PLEASE TYPE

THE UNIVERSITY OF NEW SOUTH WALES
Thesis/Project Report Sheet

Surname or Family name: Anderson

First name: Jane Other name/s: Elizabeth

Abbreviation for degree as given in the University calendar: PhD

School: Faculty: Law

Title: The Production of Indigenous Knowledge in Intellectual Property Law

Abstract 350 words maximum: (PLEASE TYPE)

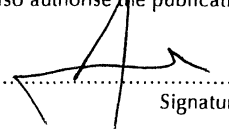
This thesis is an exploration of how indigenous knowledge has emerged as a subject within Australian intellectual property law. It uses the context of copyright to illustrate this development. The work presents an analysis of the political, social and cultural intersections that influence legal possibilities and effect practical expectations of the law in this area.

The dilemma of protecting indigenous knowledge resonates with tensions that characterise intellectual property law as a whole. The metaphysical dimensions of intellectual property have always been insecure but these difficulties come to the fore with the identification of boundaries and markers that establish property in indigenous subject matter. While intellectual property law is always managing difference, the politics of the law are more transparent when managing indigenous concerns. Rather than assume the naturalness of the category of indigenous knowledge within law, this work interrogates the politics of its construction precisely as a 'special' category. Employing a multidisciplinary methodology, engaging theories of governmental rationality that draws upon the scholarship of Michel Foucault to appreciate strategies of managing and directing knowledge, the thesis considers how the politics of law is infused by cultural, political, bureaucratic and individual factors. Key elements in Australia that have pushed the law to consider expressions of indigenous knowledge in intellectual property can be located in changing political environments, governmental intervention through strategic reports, cultural sensitivity articulated in case law and innovative instances of individual agency. The intersection of these elements reveals a dynamic that exerts influence in the shape the law takes.

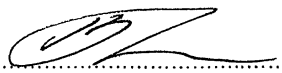
Declaration relating to disposition of project report/thesis

I am fully aware of the policy of the University relating to the retention and use of higher degree project reports and theses, namely that the University retains the copies submitted for examination and is free to allow them to be consulted or borrowed. Subject to the provisions of the Copyright Act 1968, the University may issue a project report or thesis in whole or in part, in photostat or microfilm or other copying medium.

I also authorise the publication by University Microfilms of a 350 word abstract in Dissertation Abstracts International (applicable to doctorates only).



Signature



Witness

18 September 2003

Date

The University recognises that there may be exceptional circumstances requiring restrictions on copying or conditions on use. Requests for restriction for a period of up to 2 years must be made in writing to the Registrar. Requests for a longer period of restriction may be considered in exceptional circumstances if accompanied by a letter of support from the Supervisor or Head of School. Such requests must be submitted with the thesis/project report.

FOR OFFICE USE ONLY

Date of completion of requirements for Award:

2/6/04

Registrar and Deputy Principal

THIS SHEET IS TO BE GLUED TO THE INSIDE FRONT COVER OF THE THESIS

The Production of Indigenous Knowledge in Intellectual Property Law

Jane Elizabeth Anderson

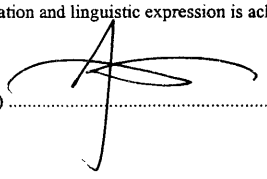
A thesis submitted in fulfilment
of the requirements for the degree of
Doctor of Philosophy

University of New South Wales
September 2003

CERTIFICATE OF ORIGINALITY

I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.



(Signed) .....

Acknowledgements

Through the years working on this thesis, my supervisor Kathy Bowrey has provided sustained support and encouragement. Her enthusiasm for my ideas and their implications has made this project pleasurable. Kathy's intelligence, wit and entertaining style have had a significant impact. I thank her for her time and for her dedication to me and this body of work.

I thank Jill McKeough for her thoughtful comments and suggestions. I am grateful to Colin Golvan, Terri Janke and Justice John von Doussa for their illuminating insights into the Aboriginal art copyright cases of the 1980s and 1990s.

I would also like to thank Luke Taylor, Lisa Strelein and fellow colleagues at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

My mother, Sue Morgan has encouraged me all my life to pursue ideas and challenge assumptions. The support she has provided has been unwavering. I am grateful for the time she spent reading this thesis, and the extended telephone conversations that followed.

To my sister, Sophie Anderson I thank for being such an inspiring and wonderful friend: someone I have learnt and continue to learn so much from.

I thank Minnie Bui Jones for deep friendship and her continual support. Bina D'Costa has travelled this road with me, albeit on a different journey with her own PhD. I am indebted to her generosity and warm friendship. To my close friends, Rich, Mel, Petie, Sarah, Annie, Courtney, Wayne, Minh and my father Ron Anderson I thank for support and the time shared discussing politics and eating fine food.

Finally, I thank Bryan Rochelle, who has shared my life and my ideas for the entirety of this thesis. I thank Bryan for his love, encouragement and intellectual engagement: three elements that I could not have done without.

In memory of

Molly Morgan

1913 - 1981

Abstract

The thesis is an exploration of how indigenous knowledge has emerged as a subject within Australian intellectual property law. It uses the context of copyright law to illustrate this development. The work presents an analysis of the political, social and cultural intersections that influence legal possibilities and effect practical expectations of the law in this area.

The dilemma of protecting indigenous knowledge resonates with tensions that characterise intellectual property as a whole. The metaphysical dimensions of intellectual property have always been insecure but these difficulties come to the fore with the identification of boundaries and markers that establish property in indigenous subject matter. While intellectual property law is always managing difference, the politics of law are more transparent when managing indigenous concerns. Rather than assume the naturalness of the category of indigenous knowledge within law, this work interrogates the politics of its construction precisely as a 'special' category. Employing a multidisciplinary methodology, engaging theories of governmental rationality that draws upon the scholarship of Michel Foucault to appreciate strategies of managing and directing knowledge, the thesis considers how the politics of law is infused by cultural, political, bureaucratic and individual factors. Key elements in Australia that have pushed the law to consider expressions of indigenous knowledge in intellectual property can be located in changing political environments, governmental intervention through strategic reports, cultural sensitivity articulated in case law and innovative instances of individual agency. The intersection of these elements reveals a dynamic that exerts influence in the shape the law takes.

Table of Contents

WARNING:

This thesis contains names of deceased people that may be sensitive to some Aboriginal people.

We decided to go and look at the site that was the subject of the painting. These were the waterhole paintings, right, and I thought that this waterhole was like, down the street, and it turned out it was in the most remote place ... the waterhole that he [John Bulun Bulun] depicts, and has depicted throughout his whole artistic career ... and others have depicted too was in fact a site he had never been to ... It had never dawned on me before that for some of the artists, the first time that they saw the waterhole that they were depicting was with me from an aeroplane when we finally found it, using maps to locate it. We never landed, couldn't land there, it was in the most remote place ... And I only realised then that what they were depicting was from their own sense of, you know, their own imagery ... they had incorporated it into their own sense of the present and the real, something that they didn't know at all ... It was amazing that aspect of the Bulun Bulun case was amazing. I only realised that day that he had not actually been to the waterhole.[1]

But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the Author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.[2]

To know the cause of a phenomenon is already a step taken in the direction of controlling it.[3]

---

[1] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

[2] Justice Yates, *Millar v Taylor* (1769) 98 ER 233.

[3] R. Guha, "The Prose of Counter Insurgency" Guha, R., and G. Spivak (eds), *Selected Subaltern Studies* Oxford University Press: New York, 1988 at 74.

Chapter One

Introduction

In 1983 Aboriginal artist Yanggarrny Wunungmurra and the Aboriginal Arts Agency commenced action for copyright infringement against a fabric designer/manufacturer and the proprietor of a retail shop.[4] The argument was that the copyright in the bark painting 'Long necked fresh water tortoises by the fish trap at Gaanan' had been infringed when reproduced onto fabric without the artist's consent. The case was settled with the first defendant, the designer, being ordered to pay damages and to supply a list of all persons to whom he had supplied fabric. The second defendant, the retailer, was ordered to deliver all the remaining material to the plaintiff. The case hardly made a ripple in the vast waters of copyright litigation. In hindsight this is a surprise considering that an emerging issue in the Australian political environment was a concern for the protection of 'expressions of folklore', namely Aboriginal art.[5]

Eleven years later, in 1994, another copyright case unfolded in the Northern Territory that generated significantly more attention.[6] *Milpurrurru & Ors v Indofurn Pty Ltd* involved the unauthorised reproduction of Aboriginal art as the designs for a series of impressive carpets intended for the art market. The significance of the case lay in the perception that it presented

---

[4] *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported. See: N. Stevenson, "Case Note: Infringement in Copyright in Aboriginal Artworks" (1983) 17 *Aboriginal Law Bulletin* 5. (It should be noted that other cases may exist that were also unreported.)

[5] We can tell the case provoked little comment for several reasons. Firstly it was not reported in the intellectual property case reports and secondly, there is very little reflection on the case in the wealth of literature dealing with Aboriginal art and copyright. Vivien Johnson makes the note that "the case was not seen as important because the focus was on folklore not copyright." V. Johnson, *Copyrites: Aboriginal art in the age of reproductive technologies* National Indigenous Arts Advocacy Association and Macquarie University: Sydney, 1996 at 15.

[6] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* [1994] 30 IPR 209, 130 ALR 659 (hereafter the *carpets case*). Also see: T. Janke, "Copyright: the carpets case" (1995) 3(72) *Aboriginal Law Bulletin/Alternative Law Journal* (Joint Issue) 36.

a clear judicial affirmation that Aboriginal art could legitimately secure copyright protection, and the collective interests of Aboriginal owners could be somehow legally secured. While some commentators in the popular media hailed the case as the '*Mabo* of copyright'[7], others argued that the case demonstrated the incommensurablity between intellectual property law and indigenous beliefs and knowledge structures.[8] Importantly the case drew attention to the profound problem of securing intellectual property protection of intangible indigenous subject matter and cultural expression.[9] The case also demonstrated how the 'uniqueness' of indigenous cultures, expressed through art, was an increasingly marketable commodity.

Notably Justice von Doussa, the presiding judge, found that a 'cultural harm' had been sustained against the Aboriginal artists and awarded additional damages accordingly. The recognition that a 'cultural harm' had taken place indicated how issues of 'culture' and cultural difference had been interpreted and translated into a legal framework. The case validated a narrative of the law as adaptable and responsive to changing political environments and the needs of new stakeholders. Thus with the finding of copyright infringement and the award of

---

[7] For instance: V. Trioli, "Record damages for illegal Aboriginal images" *The Age*, 14 December 1994. The perception of the *carpets case* as the *Mabo* of copyright was subsequently raised in academic circles. This followed literature examining how the *Mabo* decision provided possibilities for recognising 'common law native title intellectual property'. For example see: K. Puri, "Copyright Protection for Australian Aborigines in the Light of Mabo" Stephenson, M. A., and S. Ratnapala (eds), *Mabo: A Judicial Revolution* The University of Queensland Press: Brisbane, 1993; K. Puri, "Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action" (1995) *Intellectual Property Journal* 293; D. Ellinson, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17(2) *UNSW Law Journal* 327; N. Lofgren, "Common law Aboriginal knowledge" (1995) 3(77) *Aboriginal Law Bulletin* 10; M. Blakeney, "*Milpurrurru & Ors v Indofurn Pty Ltd & Ors* – Protecting Expressions of Aboriginal Folklore Under Copyright Law" (1995) *elaw: Murdoch Electronic Law Journal* at www.murdoch.edu.au/elaw/issues/v2n1/blakeney.txt; D. Bennett, "Native Title and Intellectual Property" (1996) 10 *Land, Rights, Laws: Issues of Native Title* 1; S. Gray, "Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post Mabo" (1993) 3(63) *Aboriginal Law Bulletin* 10; S. Gray, "Squatting in Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14 (2) *Law in Context* 29.

[8] See: T. Davies, "Aboriginal Cultural Property?" (1996) 14 (2) *Law in Context* 1; M. Dodson, "Indigenous peoples and intellectual property rights" *Ecopolitics IX – Conference Papers and Resolutions* Northern Land Council: Sydney, 1996; M. Davis, "Indigenous Peoples and Intellectual Property Rights" (1996-7) 20 *Parliamentary Library Research Paper*; M. Blakeney, "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" (1997) 6 *European Intellectual Property Review* 298; C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited,1997; J. McKeough and A. Stewart, "Intellectual Property and the Dreaming" Johnstone, E., M. Hinton, and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish Publishing: Sydney,1997 at 60.

[9] See the following reports in the media: "Aboriginal art copyright win" *The Advertiser*, 14 December 1994; "Aboriginal art on carpets costs importer $188,000" *Townsville Bulletin*, 15 December, 1994; M. Lang, "Artists win copyright case" *West Australian* 14 December, 1994; R. Macklin, "Court moves to stop rip-off of Aboriginal art" *The Canberra Times*, 17 December, 1994; R. Hessey, "Designs on the future" *The Sydney Morning Herald* 15 December, 1994; C. Egan, "Tickner to protect Aboriginal Artists" *The Australian* 15 December, 1994.

significant damages, the *carpets case* made legal history. Positioned within an increasingly political debate regarding cultural appropriation, possessive individualism and indigenous sovereignty, concerns about Aboriginal art and copyright engaged the interests and concerns of key agencies: legal, academic, governmental, artistic and indigenous.[10]

In legal terms, what the outcome of the case consolidated was appreciation that intellectual property law would have to find ways of incorporating the 'new' subject matter of indigenous knowledge. This meant imagining a variety of strategies, legal and governmental, where the function of intellectual property law would be required to adjust and respond to questions

---

[10] Since at least 1976, arguments had been made for copyright protection of Aboriginal art. These eventually became critiques of intellectual property law. For a selection of writings indicating this historical progression, and the increasing engagement of legal, academic, and governmental interests see: W. Marika, "Copyright on Aboriginal art" (1976) 3(1) *Aboriginal News* 7; R. Bell, "Protection of Aboriginal folklore: or do they dust reports" (1983) 17 *Aboriginal Law Bulletin* 5; J. Weiner "Protection of folklore: A political and legal challenge" (1987) 18(1) *International Review of Industrial Property and Copyright Law* 56; K. Maddock, "Copyright and Traditional Designs: An Aboriginal Dilemma" (1988) 34 *Aboriginal Law Bulletin* 8; V. Johnson, "A Whiter Shade of Paleolithic: Aboriginal Art and Appropriation" (1988) 34 *Aboriginal Law Bulletin* 8; C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 10 *European Intellectual Property Review* 346; C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 *European Intellectual Property Review* 227; B. Sherman, "From the Non-original to the Ab-original" Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford, 1994; C. Hawkins, "Stopping the rip-offs: protecting Aboriginal and Torres Strait Islander cultural expression" (1995) 20(1) *Alternative Law Bulletin* 7; C. Golvan, "Court provides strong protection for Aboriginal artwork" (1995) 8(1) *Australian Intellectual Property Law Bulletin* 6; H. Fourmile, "Protecting indigenous intellectual property rights in biodiversity" *Ecopolitics IX: Conference papers and resolutions* Northern Land Council: Sydney, 1996; D. Posey, "Indigenous peoples and traditional resource rights: A basis for equitable relationships" *Ecopolitics IX: Conference papers and resolutions* Northern Land Council: Sydney, 1996; D. Posey and G. Dutfield, *Beyond intellectual property* International Development Research Centre: Ottowa, 1996; K. Wells, "The cosmic irony of intellectual property and indigenous authenticity" (1996) 7(3) *Culture and Policy* 45; C. Golvan, "Aboriginal art and copyright infringement" Taylor, L., and J. Altman (eds), *Marketing Aboriginal Art in the 1990's* Aboriginal Studies Press: Canberra, 1996; M. Mansell, "Barricading Our Last Frontier – Aboriginal Cultural and Intellectual Property Rights" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997; M. McMahon, "The Intellectual Property Regime and the Protection of Indigenous Cultures" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997; L. Ford, "An Indigenous Perspective on Intellectual Property" (1997) 3(90) *Aboriginal Law Bulletin* 13; M. Davis, "Indigenous intellectual property protection consultations with Aboriginal and Torres Strait Islander Peoples" (1997) 3(90) *Aboriginal Law Bulletin* 22; M. Blakeney, "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" (1997) 19(6) *European Intellectual Property Review* 298; T. Davies, "Aboriginal Cultural Property?" supra n.8; S. Gray, "Vampires around the Campfire" (1997) 22(2) *Alternative Law Journal*, 60; M. McMahon, "Indigenous cultures, copyright and the digital age" (1997) 3(90) *Aboriginal Law Bulletin* 14; A. Barron, "No Other Law? Author-ity, Property and Aboriginal Art" Bently, L., and S. Maniatis (eds), *Perspectives on Intellectual Property Volume 4: Intellectual Property and Ethics* Sweet and Maxwell: London, 1998; S.W. Bunting, "Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture" (2000) 18 *Context: Journal of Music Research* 15; M. Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law" (2000) 6 *European Intellectual Property Review* 251; J. Gibson, "Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property" 2001 6(4) *Australian Indigenous Law Reporter* 1; R. Sackville, "Legal Protection of Indigenous Culture in Australia" (2003) 11 *Cardozo Journal of International and Comparative Law* 711.

directly associated with indigenous rights and culturally specific knowledge. To this end intellectual property law has been presented with an unforeseen challenge: exposing contingencies that have historically remained relatively hidden. It is the manifold possibilities and extent of this new dilemma around which this thesis spins.

Circulating rights in intellectual property

Intellectual property has become internationally recognised as a term covering a collection of intangible rights and causes of action developed by western nation states at various times to protect particular aspects of artistic and industrial output -- copyright, designs, patents, trade secrets, passing off, aspects of competition law and trade marks. A description of, purpose for and scope of intellectual property law has been defined internationally through *The Convention Establishing the World Intellectual Property Organisation 1967* (WIPO).[11] In general, intellectual property laws seek to "promote investment in, and access to, the results of creative effort, and extend to protecting the marketing of goods and services."[12] As a signatory to the Convention Australia promotes the protection of intellectual property in Australia and throughout the world through a variety of conventions and agreements. One reason for this is that intellectual property is increasingly an important mechanism of world trade.[13] Thus the regime of intellectual property law in Australia is in keeping with the definitions provided through the WIPO Convention and subsequent agreements made through this international body.[14]

---

[11] Prior to 1967, international standards for intellectual property protection were established through the *Paris Convention for the Protection of Industrial Property* (1884) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886).

[12] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition) The Lawbook Company: Pyrmont, Sydney 2002 at 3.

[13] This has been made explicit through the 1994 *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs). As McKeough, Bowrey and Griffith note "TRIPs is one of a system of agreements which make up the World Trade Organisation (WTO). TRIPs links intellectual property rights to GATT or WTO rights and obligations." J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.12 at 4. See also: M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* Sweet and Maxwell: London, 1996; P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications Ltd: London, 2002; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development* Palgrave MacMillan: Hampshire and New York, 2002; F.W. Grosheide and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

[14] In particular see the *WIPO Performances and Phonograms Treaty* (1996) and the *WIPO Copyright Treaty* (1996).

With a direct relationship between intellectual property, economics and trade becoming more explicit critical evaluation of intellectual property and its history have emerged.[15] Critical interest has been facilitated in part by concern for new and emerging technologies and related practices, such as developments with digital technology and biotechnology.[16] Much of this commentary has involved an evaluation of the role of intellectual property laws in facilitating commodification and the development of new markets.[17] As part of the developing discourse, attention has also been directed to the implicit cultural elements (and hence cultural prejudices) of intellectual property law, wherein cultural products are increasingly circulating as commodities within networks of private property relations.[18]

Accompanying a rise in the predominance of literature addressing intellectual property rights, an interest in the dynamic establishing property rights in knowledge has alerted a range of non-legal scholars to the profound complex of rights generated through intellectual property law.[19]

---

[15] See for example: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999; P. Drahos, *A Philosophy of Intellectual Property* Dartmouth Press; Sydney 1996.

[16] P. Drahos, "Capitalism, Efficiency and Self-Ownership" (2003) 28 *Australian Journal of Legal Philosophy* 215.

[17] J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* Harvard University Press: Cambridge, Massachusetts, 1996; L. Lessig, *The Future of Ideas: The fate of the commons in an interconnected world* Random House: New York 2001; D.E. Long, "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" (1998) 23 *N.C.J. Int'l L.& Com.Reg.* 229; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* Brookings Institution Press: Washington D.C., 1998; F.W. Grosheide, "General Introduction" supra n.13; S. Sell, "Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS and Post-TRIPS Strategies" (2002) 10*Cardozo Journal of International and Comparative Law* 79; C. May, *A Global Political Economy of Intellectual Property Rights: The new enclosure?* Routledge: London and New York, 2000.

[18] For example: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development* supra n.13; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Duham and London, 1998; K. Aoki, "Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) 6 *Ind. J. Global Leg. Stud.* 11; J. Gaines, *Contested Culture: The image, the voice and the law* The University of North Carolina Press: Chapel Hill, London, 1991; V. Shiva, *Protect or Plunder? Undersatnding Intellectual Property Rights* Zed Books: India, 2001; D.E. Long, "'Globalization': A Future Trend or a Satisfying Mirage" (2001) 49(1) *Journal of the Copyright Society of the USA* 313; R. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24(1) *Denv. J. Int'l L. & Pol'y* 109; P.E. Geller, "Copyright History and the Future: what's culture got to do with it?" (2000) 48(1) *Journal of the Copyright Society of the USA* 209; D.E. Long, "'Democratizing' Globalization: Practicing the Policies of Cultural Inclusion" (2002) 10 *Cardozo Journal of Interternational and Comparative Law* 217.

[19] By the term non-legal scholars, I am referring to the interest in intellectual property law in academic disciplines including anthropology, history, sociology, political science, ethnomusicology, philosophy and science. For a selection of articles positioned within these disciplines but speaking to the legal space of intellectual property law see: M. Strathern, "Potential Property: Intellectual rights and property in persons" (1996) 4(1) *Social Anthropology* 17; M. Brown, "Can Culture be Copyrighted?" (1998) 39(2) *Current Anthropology* 193; M. Sunder, "Intellectual

This is more than a contemporary Australian, or indeed 'western' fascination. It is also an area of fundamental interest in many 'developing' countries where intellectual property is considered as a mechanism providing new techniques of control, authority and knowledge management in the post-colonial era. In short, the increased circulation of intellectual property rights provides an interpretative framework that normalises the concept of private property rights existing in information.[20]

Recently Peter Drahos (with Braithwaite) observed that, "[i]ntellectual property rights are, in essence, government tools for regulating markets in information."[21] With the continuing global redefining of intellectual property standards and the animated trade bargaining pivoting around the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) a variety of publications by governments and non-government organisations (NGOs) echo concerns about the control over knowledge markets facilitated through intellectual property laws.[22] The

---

Property and Identity Politics: Playing with Fire" (2000) 4(1) *Journal of Gender, Race and Justice* 69; S. Harrison, "Ritual as Intellectual Property" (1992) 27 *Man* 225; S. Harrison, "The Politics of Resemblance: Ethnicity, Trademarks: Head-Hunting" (2002) 8 *Journal of the Royal Anthropological Institute* 211; S. Kirsch, "Environmental Disaster, 'Culture Loss' and the Law" (2001) 42(2) *Current Anthropology* 167; E. Hirsch, "Malinowski's intellectual property" (2002) 18(2) *Anthropology Today* 1; J. Christie, "Enclosing the Biodiversity Commons: bioprospecting or biopiracy" Hindmarsh, R., G. Lawrence, J. Norton (eds), *Altered Genes: Reconstructing Nature – the debate* Allen and Unwin: Sydney, 1998; F. Dawson, "The importance of property rights for biodiversity conservation in the Northern Territory" (1996) 3(2) *The Australian Journal of Natural Resources Law and Policy* 179; S. Brush, "Whose Knowledge, Whose Genes, Whose Rights?" Brush, S., and D. Stabinsky (eds), *Valuing Local Knowledge: Indigenous Peoples and Intellectual Property Rights* Island Press: Washington DC, 1996; T. Seeger, "Ethnomusicology and Music Law" Ziff, B., and P. Rao (eds), *Borrowed Power: essays on cultural appropriation* Rutgers University Press: New Jersey, 1997; B. Williams (ed), *The Politics of Culture* The Smithsonian Institute: Washington DC, 1991; W.E.A. van Beek and F. Jara, "'Granular Knowledge': Cultural Problems with Intellectual Property and Protection" Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* supra n.13. Australian newspapers are increasingly reporting on issues of intellectual property see for example: "Amazon tribes fight vine patent" *The Canberra Times* 29 May 1999; "Euphoria in South Africa as drug company drops case" *The Sydney Morning Herald* 20 April, 2000; "One rule for all is patently inequitable: intellectual title will be the next battle ground for academics and other traditional cultures" *The Australian* 18 September 2002.

[20] For example Arun Agrawal has recently noted that efforts to document and scientise indigenous knowledges can lead to inequitable power imbalances where, once the knowledge is in the public domain, "it can be refined and privatised through the existing system of intellectual property rights." A. Agrawal, "Indigenous knowledge and the politics of classification" (2002) 54(173) *International Social Science Journal* 287 at 294.

[21] P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13 at 3.

[22] For example see the Canadian NGO, Rural Advancement Foundation International (RAFI) at <http://www.rafi.org.au>. See also the Third World Network, *The Need for Greater Regulation and Control of Genetic Engineering: A Statement by Scientists Concerned about Current Trends in the New Biotechnology* Penang, Malaysia, 1995. Released articles include "Feared reviewed science: contaminated corn and tainted tortillas - Genetic Polution in Mexico's centre of maize diversity" (2002) 74 *RAFI Communique* at http://www.rafi.org/article.asp?newsid=287; "GM Fallout from Mexico to Zambia: the great containment", RAFI press release, October 25, 2002 at http://www.rafi.org/article.asp?newsid=366; "Sovereignty or Hegemony: Africa and security, Negotiating from reality" May 30 1997 at http://www.rafi.org/article.asp?newsid=192. For a discussion of implications for patents

increasing exposure of 'developing' countries to genetically modified (GM) crops and the production of low cost medicines for AIDS in Africa demonstrate that knowledge of intellectual property rights are globally circulated and utilised by a widespread range of actors and agencies. "Intellectual property rights have gone global."[23] Thus this thesis is situated at a specific point in time when the knowledge of the field of intellectual property law is undergoing transformation both in circulation and exposure.[24]

The extent to which the terms and categories of intellectual property have been absorbed into contemporary cultural language gives rise to a populist narrative about the significance of such rights.[25] For example 'users', including peer to peer (P2P) subscribers[26] presumably conceptualise intellectual property law in different ways to trademark 'owners' like Nike™ or McDonalds™. However both 'users' and 'owners' share a narrative of the law that is relatively stable and consistent – they may dispute the politics of 'owning' intellectual property and 'enforcing' rights, but in application the marriage of intellectual property law and private power is given; the primary challenge being to manage that relationship in the public interest. Attention to the primacy of private rights is however deflected by a different discourse that refers to intellectual property laws (and copyright in particular) as a balancing act – where the

---

on plants like neem and tumeric see: Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* London, 2002; E. Martin, "The Neem Tree Patent: International Conflict over the Commodification of Life" (1999) 22 *B.C. Int'l & Comp. L. Rev.* 279; V. Shiva, *Monocultures of the Mind: perspective on biodiversity and biotechnology* Zed Books: India, 1993; F.W. Grosheide, "General Introduction" Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* supra n.13 at 28.

[23] P. Drahos "Introduction" Drahos, P., and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* supra n.13 at 1. See also C. May, *A Global Political Economy of Intellectual Property Rights: The new enclosures?* Routledge: London, New York, 2000.

[24] It could be argued that knowledge of intellectual property rights is always undergoing transformation, however there is a difference in the increasing globalisation of such rights. See D.E. Long, "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" supra n.17. Also see: K. Bowrey, *Copyright and Culture: Australian Law and Controversies* (forthcoming 2003) at [4.5, 4.6].

[25] Williams notes that the deficiencies in rights discourse do not necessarily lie in the basic strategy of seeking rights but more in the narrow way that rights have been defined. See P. Williams, *The Alchemy of Race and Rights* Harvard University Press: Cambridge, Massachusetts 1991 at 159. Rosemary Coombe is best known for this study of the rise of a populist narrative of intellectual property rights. See R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* supra n.18. See also J. Gaines, *Contested culture: the image, the voice and the law* supra n.18.

[26] See: K. Bowrey and M. Rimmer, "Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law" (2002) 7(8) *First Monday*, at http://firstmonday.org/issues/issue7_8/bowrey/index.html; A. Oram (ed), *Peer to Peer: Harnessing the Benefits of a Disruptive Technology* O'Rielly: Cambridge, Massachusetts, 2001; C. Shirky, "What is P2P and What Isn't," O'Reilly Network 2000 at www.openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html.

rights and interests of 'owners' are balanced against those of 'users'.[27] This lens provides a vision away from the problems in the law and what it cannot manage, to the application of law in specific circumstances.

Popular literature helps elucidate the specific circumstances of intellectual property engagement. The story telling about intellectual property law is reflected in fiction and non-fiction. John Le Carre's *The Constant Gardener*[28], Naomi Klein's *No Logo*[29], or Stephen Gray's *The Artist is a Thief*[30], provide an accessible perspective on legal issues arising from the question of rightful ownership of knowledge. In each of these examples the story told is not really about the inherent relationships of legal power rather it is with securing the right balance in terms of the public interest and conditions of the grant of the right itself.[31] Popular texts such as these produce varying interpretations of intellectual property through differing narratives of law and its processes: for example, in *The Constant Gardener* the story is about the hegemony of pharmaceutical companies, corruption and the effect of monopoly privileges in the availability of medicines in Africa; in *No Logo* it is the story of corporate dicta and the selfish control of popular images; and in *The Artist is a Thief* the story questions concepts of legal ownership and cultural authenticity. These examples, representative of the popular narrative, remain silent in regards to defining any particular specificity or location in the failure of the law – there is no singular identification of where the law has failed. Nonetheless these separate contexts contribute to a preordained concept of 'rights' in intellectual property and broadly perceived sense of 'knowing the law' gained without active engagement in formal legal processes and/or the reading of primary sources arising from case and statute law. Such popular narratives help make intellectual property rights more comprehensible to the interested lay reader.

With the increased exposure to and awareness of rights in intellectual property, legal frameworks appear more accessible to a variety of users. For instance, indigenous people

---

[27] See for instance P.K. Yu, "Four remaining questions about copyright law after Eldred" GigaLaw.com 2003 at www.gigalaw.com/articles/2003-all/yu-2003-02-all.htm; P.E. Geller, "Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?" Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford, 1994; C. May, "Why IPRs are a Global Political Issue" supra n.17.

[28] J. Le Carre, *The Constant Gardener* Coronet Books: London, 2001.

[29] N. Klein, *No Logo: Taking Aim at the Brand Bullies*, Picador: New York, 1999.

[30] S. Gray, *The Artist is a Thief*, Allen and Unwin: Sydney, 2001.

[31] I recognise that the reading of these texts will be disputed owing to individual interpretation.

within nation states such as Australia have recognised that potentially such legal mechanisms could be manipulated and used to control and manage access and management of culturally specific knowledge. In this thesis the position of indigenous knowledge in intellectual property law is a key site of interest and exploration because of the complications and contests that its inclusion has generated. Both in Australia and in the key agency governing intellectual property standards, the World Intellectual Property Organisation (WIPO), multiple reports and initiatives have been dedicated to the subject.[32] This represents both an effort to be inclusive to indigenous needs and also to bring the subject 'indigenous knowledge' under the rubric and management of global standards of intellectual property. The variety of demands made to include indigenous knowledge as a subject of intellectual property reflect the complex motivations and interests of stakeholders. It also highlights and the positions that shape what can be known about the dimensions of indigenous knowledge, and the extent to which it can be recognised within this legal framework. This thesis seeks to unpack fundamental problems in reconciling both intellectual property law and indigenous knowledge as categories of law and subjects of governance. Significantly it seeks to highlight a remarkable irony – that efforts to include indigenous knowledge in intellectual property in effect (re)expose contingencies in intellectual property law that are constant and have remained relatively undisclosed. In positioning indigenous knowledge within an intellectual property regime, the law produces a subject that is difficult to manage.

Concepts of indigenous knowledge

Engaging in discussions about the position of indigenous knowledge (and its analogues including traditional knowledge, cultural knowledge and folklore)[33] in intellectual property law requires an appreciation of how the term indigenous knowledge is employed in this work and

---

[32] See for instance: World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* Geneva, 2001; Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore* WIPO, Fourth Session, Geneva, 2002. See also: W. Wendland, "Intellectual Property and the Protection of Cultural Expressions: The Work of the World Intellectual Property Organisation" Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* supra n.13.

[33] A. Agrawal, "Indigenous knowledge and the politics of classification" supra n.20 at 293.

how other concepts of indigenous knowledge are currently circulated from academinc and indigenous perspectives. To my mind discussing concepts of indigenous knowledge requires a certain process of demystification. By demystification I mean exposing certain conditions that have enabled indigenous knowledge to be constructed as a coherent entity and, most importantly, significantly different from 'western' knowledge. Recognising that indigenous knowledge like all knowledge is changeable and permeable is often overlooked in discussions of this subject because it disrupts a dichotomy between indigenous and western knowledge that, in turn, depends upon concepts of difference and otherness.

If we are to understand the process of positioning indigenous knowledge in intellectual property law, it is at first instance integral to appreciate how the term 'indigenous knowledge' is itself a construct that limits what can be understood within the wide range of indigenous epistemology. My interest here is not what constitutes indigenous epistemology nor its classifications but more the use of terminology – how the construct 'indigenous knowledge' circulates within intellectual property discussions. For intellectual property law produces indigenous knowledge as a coherent entity. My point is that the mystification of indigenous knowledge has led to mistaken conclusions about the dynamic intersections permeating indigenous ways of knowing. I signpost the issue now, for a reflection on the instability of the category 'indigenous knowledge' will be made implicitly and explicitly at all stages of this work as it is this instability that makes the subject difficult to manage in law.

In 1995 Arun Agrawal in his pioneering article, "Dismantling the Divide Between Indigenous and Scientific Knowledge" challenged the way indigenous knowledge was discussed in contemporary anthropological and social theory research.[34] The article begins by tracing the increased interest in indigenous knowledge from a variety of sectors, including international and national institutions, and for a variety of purposes including indigenous participation in

[34] A. Agrawal, "Dismantling the Divide Between Indigenous and Scientific Knowledge" (1995) 26 *Development and Change* 413. Another version of this article "Indigenous and scientific knowledge: some critical comments" (1995) 3(3) *Indigenous Knowledge and Development Monitor,* generated varying and considered responses. See responses in: (1996) 4(1) *Indigenous Knowledge and Development Monitor* and (1996) 4(2) *Indigenous Knowledge and Development Monitor.* For my purposes I will be referencing the initial citation above.

development strategies and scientific research.[35] The focus on indigenous knowledge within these discourses signals a profound shift in appreciating the content (and hence value) of indigenous ways of knowing. However, as Agrawal seeks to highlight, there is a tendency in such studies to construe indigenous knowledge as somehow fundamentally different to other forms of knowledge. Arguably this process of construction echoes the past romanticisation of indigenous people: an extension of the way indigenous people have been historically positioned and associated with land and nature, intrinsically and perpetually displaced from and disinterested in advancing technology and thus anything 'modern'. Agrawal questions the "validity and even the possibility of separating traditional or indigenous knowledge from western or rational/scientific knowledge."[36] His point is twofold. Firstly, it highlights the permeability and intersections of all knowledge, whatever the genesis; and secondly it invites critical reflection upon how the effects of the dichotomy generally assumed between indigenous knowledge and 'western' knowledge are produced through networks of power.

Agrawal's key position is that a classification between indigenous and western knowledge can never effectively be established. This is because such classification "seeks to separate and fix in time and space (separate as independent, and fix as stationary and unchanging) systems that can never be thus separated or so fixed."[37] Knowledge is more complicated than any form of binary allows and fundamental concerns about the intersection of relations of power in the production and circulation of knowledge are often understated or ignored. Labeling and classifying knowledge as 'types' produces categories that bare little resemblance to practical utility and the interchangeability of experience. Moreover they remain vague and ambiguous and therefore ineffective as forms of classification. Thus Agrawal advocates for critical reflection upon the usage of such categories and encourages the recognition of multiple types of knowledges "with differing logics and epistemologies."[38]

---

[35] The *Indigenous Knowledge and Development Monitor* provided a strategic place to voice Agrawal's argument, as it also functions as a journal exploring the potential articulations of indigenous knowledge within a 'development' discourse.

[36] A. Agrawal, "Dismantling the Divide Between Indigenous and Scientific Knowledge" supra n.34 at 414.

[37] Ibid. , at 422.

An Australian perspective

Recently Martin Nakata has considered the resonance of Agrawal's observations within an Australian indigenous context. The theme of Nakata's paper "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems"[39] highlights similar tensions to those identified by Agrawal – namely recent trends to describe and document indigenous knowledge. Nakata begins by explaining contentions in the current debate about the utility of indigenous knowledge: primarily that the use of the term 'indigenous knowledge' seldom engages in any contextualisation of knowledge use and tends to indicate quite particular interests.[40] As he remarks, "the Indigenous Knowledge enterprise seems to have everything and nothing to do with us."[41] Indigenous people function as the subjects from which the 'indigenous knowledge enterprise' develops. This is at the expense of continued appreciation of the changing uses of knowledge systems.[42]

Indigenous knowledge is used to denote a 'type' of knowledge derived from a variety of 'dominated' peoples. As Nakata explains:

> It has become an umbrella term, not limited to Indigenous peoples but inclusive of those in the developing countries who struggle to survive and who still rely on traditional forms of knowledge whether they be Indigenous within developed and developing nation states, formerly colonised, or distant or recent migrant groups in developing countries.[43]

The point here is that the term 'indigenous knowledge' is generalised and exists without context or politics. It applies to a range of often unrelated, and sometimes conflicting, interest groups.

---

[38] Ibid. , at 433. In Australia, the recent decision in the protracted Hindmarsh Island case arguably draws a similar conclusion and recognises the validity of this position within the law. See: *Chapman v Luminis Pty Ltd* (No.5) [2001] FCA 1106 (21 August 2001).

[39] M. Nakata, "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" (2002) 28 *International Federation of Libraries Association Journal* 281.

[40] Quoting from Warren, M., G. von Liebenstein and L. Slikkerveer, "Networking for Indigenous Knowledge" (1993) 1(1) *Indigenous Knowledge and Development Monitor,* Nakata notes that these interests include "fields of ecology, soil science, veterinary medicine, forestry, human health, aquatic resource management, botany, zoology, agronomy, agricultural economics, rural sociology, mathematics, management science, agricultural education and extension, fisheries, range management, information science, wildlife management, and water resource management." Ibid. , at 282.

[41] Ibid. , at 282.

[42] Agrawal also argues this point in "Indigenous knowledge and the politics of classification" supra n.20 at 292.

Nakata makes the observation that the increasing discussions of indigenous knowledge remake it as "a commodity, something of value, something that can be value added, something that can be exchanged, traded, appropriated, preserved, something that can be excavated and mined."[44] Becoming a term that can be used by a variety of groups to support partisan interests, it runs the risk of losing meaning and context. Following Nakata, the position of indigenous knowledge in intellectual property law is significant because it indicates quite a particular interest. Intellectual property law, like development discourse and the scientific frameworks that Agrawal and Nakata discuss, has become a key site constructing indigenous knowledge as a stable subject and further, producing it as a 'type' of distinct knowledge to be documented and managed through networks of legal power. This is at the expense of complicated contexts and contested politics.

The insistence on indigenous knowledge as 'traditional' knowledge

The subject of indigenous knowledge in intellectual property law functions through several terms that are, importantly, used interchangeably. I highlight the usage of these additional terms, in particular *folklore* and *traditional knowledge*, for two reasons. Firstly, I want to suggest that the ways by which indigenous knowledge is equated to 'traditional knowledge' is representative of the way that indigenous knowledge structures and thus indigenous people subsume a position of exteriority to contemporary cultural practice. The pervading emphasis on the 'traditional' component of indigenous knowledge facilitates a perception of incompatible differences between indigenous and western knowledge – upholding the unworkable dichotomy alluded to above by Agrawal. Secondly, the emphasis on traditional knowledge significantly affects how indigenous knowledge is understood and made intelligible before the law. This therefore underpins how realistic outcomes in intellectual property law are envisaged. Reliance upon the term 'traditional' precludes an appreciation of the dynamism of indigenous ways of knowing: fixing in time, and therefore in the past, forms of knowledge that are, through practical utility, constantly evolving. My argument, to be further elucidated

[43] M. Nakata, "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" supra n.39 at 282.
[44] Ibid. , at 283.

throughout this work, is that the term 'tradition' functions as a key trope for the identification of the metaphysical dimensions of indigenous knowledge – such an identification being crucial for an intellectual property right to be justified.[45]

The recent Report *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*[46] emanating from the intellectual property standard setting organisation WIPO, aptly demonstrates the interchangeability of the terms used in reference to indigenous knowledge. The document starts in the following way;

> Traditional knowledge is created, originated, developed and practiced by traditional knowledge holders... From WIPO's perspective, expressions of folklore are a subset of and included within the notion of traditional knowledge. Traditional knowledge is in turn, a subset of the broader concept of heritage. Indigenous knowledge being the traditional knowledge of Indigenous peoples, is also a subset of traditional knowledge. As some expressions of folklore are created by Indigenous persons there is an overlap between expressions of folklore and indigenous knowledge, both of which are forms of traditional knowledge.[47]

The struggle to describe indigenous knowledge is reflected in this quote. At one level, a symbiotic relationship between indigenous and traditional knowledge is suggested. At another level, the position of indigenous peoples as 'traditional knowledge holders' is also indicated. The Report ties indigenous knowledge and indigenous people to a distinct, if not also unitary, heritage. Indigenous people as 'traditional knowledge holders' are imagined as existing outside modernity as they "create, originate, develop and practice traditional knowledge in a traditional setting and context."[48] This invariably plays into perceptions of indigenous identity – from both indigenous and non-indigenous perspectives. The anxiety of location and position also effects how indigenous people are recognised as subjects before the law.

It appears that the problem indicated through this Report in positioning indigenous knowledge within the sphere of intellectual property reflects both uncertainty and insecurity. Law manages

---

[45] This will be discussed in Chapter Three.

[46] World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* supra n.31.

[47] Ibid. , at 26.

[48] Ibid. , at 26. For a consideration of this anxiety in the position of indigenous people between the modern and the traditional see: C. Perrin, "Approaching Anxiety: The Insistence of the Post-Colonial in the Declaration of the Rights of Indigenous Peoples" Fitzpatrick, P., and E. Darian-Smith (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999 at 161. See also: S. Gray, "Squatting in Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" supra n.7.

indigenous subjects because a cultural identity is recognised (with indigenous knowledge, an assumed difference means that the cultural identity is disclosed) yet intellectual property is generally disinterested in the cultural identity of subjects. To this end, a 'special' position is established that allows space for a connection between knowledge and identity and applied to denote unique properties and legal positioning. This specialness is identified as 'cultural' in nature.[49]

In an attempt to minimise legal insecurity about the position of indigenous subject matter and the competence of the law to adequately respond to indigenous people's needs, a dualism between 'traditional' knowledge and 'contemporary' knowledge has been established. Observations made by Ivison, Patton and Sanders are pertinent as they suggest that "when we evoke a mysterious otherness or radical difference in referring to indigenous cultures we are in danger of replaying prejudices that assume the inherent inferiority of indigenous peoples and their practices."[50] The emphasis on the 'traditional' lifestyles and 'traditional' peoples misunderstands colonial realities and the commonality of indigenous engagement with information management. The insistence on the 'traditional' as the key marker of difference obscures contemporary indigenous practice and the reality that indigenous knowledge, like all knowledge, undergoes transformation in usage and circulation. The anxiety for intellectual property law is made more acute by relying on an unreal indigenous identity that is cloaked in a sense of tradition.[51] Claims of cultural difference have to be balanced against the dynamic ways

---

[49] Shelley Wright has argued that part of the problem for the law in recognising indigenous demands can be understood by what is perceived to be the 'untrustworthy' nature of indigenous knowledge. As Wright explains, "The real problem is that indigenous peoples are not seen to as trustworthy guardians of wisdom because they are so different in European eyes...it is illustrative of the relationship between European literate cultures and the oral cultures of colonised peoples...Speech is usually seen as less trustworthy than written evidence; experience to be valuable must be recorded; history does not become 'history' until human narrative is transformed from oral mythology into written 'fact' and lived experience is transformed into detached experience that can be objectively analysed." S. Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* Routledge: London and New York, 2001at 106-107.

[50] D. Ivison, P. Patton and W. Sanders, "Introduction" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000 at 4.

[51] Peter Brosius has made the observation that the concept of 'tradition' and its emphatic equation with indigenous peoples is not exclusively the work of non-indigenous agencies and institutions. Indigenous people have also sought to use 'traditional' representations to secure particular ends. Brosius uses the example of conservation campaigns as a key site to understand how 'traditional' is re-appropriated by indigenous people. In this way, power and resistance are seen as mutually engaged. See: P. Brosius, "Anthropological engagements with environmentalism" (1999) 40(3) *Current Anthropology* 277; and, P. Brosius, "Green dots, pink hearts: Displacing politics from the Malaysian rain forest" (1999) 101(1) *American Anthropologist* 36.

in which cultures borrow and import practices and that cultural identities are constantly reforming and renegotiated.[52] Thus what is potentially destabilising for the position of indigenous knowledge in intellectual property is a reliance on notions of a 'traditional culture' that evoke particular romanticised perceptions of indigenous cultures, experience and communities.[53] This effects how indigenous knowledge is produced, positioned and managed through an intellectual property regime and how indigenous people negotiate positions in relation to these laws. It is the partial successes, moderate failures and potential dangers within intellectual property law with respect to the challenge of indigenous knowledge that forms the focus of the thesis.

The challenge of boundaries

The copyright cases involving Aboriginal art that developed through the 1980s and 1990s, generated debate and discussion within political, academic and cultural arenas. This extended arguments that addressed legal inclusivity, the rights and legitimacy of indigenous voices before the law and the recognition of the aesthetic nuances of Aboriginal cultural products. The cases signified a genuine attempt within legal liberalism to accommodate the claims of indigenous people. For the Aboriginal artists involved, the cases represented a consolidation of the view that their art could be protected through western intellectual property laws, specifically copyright and that this was interconnected with sovereign claims and land ownership.

---

[52] For influential work in this area see: J. Beckett (ed), *Past and Present: The Construction of Aboriginality* Aboriginal Studies Press: Canberra, 1988. For more recent considerations see: M. Dodson, "The end in the beginning: re(de)finding Aboriginality" (1994) 1 *Australian Aboriginal Studies* 2; M. Langton, *'Well I heard it on the radio and saw it on the television...': an essay for the Australian Film Commission on the politics and aesthetics of filmmaking by and about Aboriginal people and things* The Australian Film Commission: Sydney, 1993. See also: M. Barcham, "(De)Constructing the Politics of Indigeneity" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n.50.

[53] This has been most explicit in native title cases. In particular see the literature surrounding the emphasis on tradition in the Yorta Yorta case: *Members of the Yorta Yorta Community* v *Victoria* [1998] FCA 1606; *Members of the Yorta Yorta Community* v *State of Victoria* [2001] FCA 45 and *Members of the Yorta Yorta Community* v *State of Victoria* [2002] HCA 58. For example: V. Kerriush and C. Perrin, "Awash in Colonialism" (1999) 24(1) *Alternative Law Journal*, 3; S. Young, "The Trouble with 'Tradition': Native Title and the *Yorta Yorta* Decision" (2001) 30(1) *The University of Western Australia Law Review* 28; J. Weiner, "Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta" (2002) 2(18) *Land, Rights, Laws: Issues of Native Title* 1; L. Strelein, "Members of the Yorta Yorta Aboriginal Community v Victoria *[2002] HCA 58 – Comment*" (2003) 2(21) *Land, Rights, Laws: Issues of Native Title* 1; R. Bartlett, "The obsession with traditional laws and customs creates difficulties establishing native title claims in the South" (2003) 31(1) *The University of Western Australia Law Review* 35.

The *carpets case* was significant as it explicitly included aspects characterised as 'indigenous difference' within the fabric of the law. In the main, the previous copyright cases included indigenous issues on the same terms as the non-indigenous – however when debate relating to cultural differences arose it was positioned at the margins of the law and aroused a range of hitherto unexplored notions.[54] Thus the *carpets case* is important because it spurred debate about the terms of inclusion and questioned how indigenous concerns about protecting intangible cultural heritage were to be addressed. Explicitly the authority of the law was engaged to address indigenous subject matter, thereby exposing the power of legal discourse to produce the subject and inform how it can be successfully and adequately managed.

The immediate challenge for intellectual property law in protecting indigenous knowledge resonates with tensions that characterise intellectual property law as a whole. As 'new' subject matter, indigenous knowledge requires an identification of the boundaries or marks that established its 'property' for protection. The greatest surprise is the familiarity of the task; for the central problematic of intellectual property law is the way in which it justifies a property right in any intangible subject matter.[55] However the law generally fails to acknowledge that this is problematic in non-indigenous cases. Indigenous knowledge provides an example of how intellectual property law still grapples with determining its metaphysical dimensions.

The problem of unauthorised use of intangible indigenous subject matter involves an intersection of elements – not all of which can be remedied through the intellectual property framework. The danger in assuming intellectual property law has the capacity to provide just solutions to the appropriation of indigenous knowledge limits an understanding of the broader issues associated with the political and social impetus of naming and identifying instances of cultural appropriation. Intellectual property is evoked as the strategy for securing cultural integrity.[56] However claims for protecting cultural integrity and stopping cultural appropriation

---

[54] For instance see: *Yumbulul v Reserve Bank of Australia & Ors* (1991) 21 IPR 481; and, *Foster v Mountford* (1977) 14 ALR 71.

[55] I will be examining this problematic in Chapter Three.

[56] See: R. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" Ziff, B., and P.V. Rao (eds), *Borrowed Power: Essays on cultural appropriation* Rutgers University Press: New Brunswick, New Jersey, 1997.

are highly political. This is the difficulty of reconciling sovereign claims, minority rights and the preservation of 'culture' within the context of intellectual property law.

Responding to cultural appropriation

Calls to redress instances of 'cultural appropriation' arise from attempts to address power imbalances consequent, in part, of colonisation. As Bruce Ziff and Pratima Rao have observed, central to the concept of cultural appropriation are relationships of power.[57] However, as cultural appropriation is multidimensional, there is difficulty in adequately imagining responses because an idea of 'culture' underpins the concept.[58] Thus there are no clear limits detailing where cultural appropriation begins or ends.[59]

The recognition of the historical 'appropriation' of indigenous cultural material has not only drawn attention to colonialism and its effects but also raised awareness of how cultural identity is produced through cultural exchange.[60] Further to this has been the inevitable questioning of whether cultural identity can be considered as a unitary or stable entity in and of itself.[61] Extending these initial thoughts to claims for indigenous intellectual and cultural property protection, circles us back to concerns about the evocation of indigenous knowledge and identity as readily identifiable 'types'. This prompts reflection upon the following concerns:

- to what extent is indigenous knowledge 'uniquely' and 'originally' indigenous?

---

[57] B. Ziff and P. Rao, "Introduction to Cultural Appropriation" Ziff, B., and P.V. Rao (eds), *Borrowed Power: Essays on cultural appropriation* Rutgers University Press: New Brunswick, New Jersey, 1997at 6.

[58] Ibid. , at 5.

[59] Ibid. , at 2.

[60] Recently Stuart Kirsch has examined the connection between claims of 'culture loss' and demise of cultural identity. He suggests that these claims pose a problem for contemporary theories of culture that emphasise culture as a process of constant change. S. Kirsch, "Lost Worlds: Environmental Disaster, 'Culture Loss' and the Law" supra n.19. For critical literature considering the complex intersections of culture and identity see more generally: H. Bhabha, *The Location of Culture* Routledge: London, 1994; S. Hall and P. Du Gay (eds), *Questions of Cultural Identity* Sage Publications: London, 1996; A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* Polity Press: Cambridge, 1991; P. Gilroy, *Between Camps: Race, Identity and Nationalism at the End of the Colour Line* Allen Lane, The Penguin Press: London, 2000; P. Gilroy, *The Black Atlantic: modernity and double consciousness* Harvard University Press: Cambridge, Massachusetts 1993; G. Stokes (ed), *The Politics of Identity in Australia* Cambridge University Press: Sydney, 1997.

[61] See for instance: S. Hall, "Cultural identity and diaspora" Rutherford. J. (ed), *Identity* Lawrence and Wishart: London, 1990; S. Hall, "Cultural Identity in Question" Hall, S., D. Held and T. McGrew (eds), *Modernity and its Futures* Polity Press; London 1993; N. Dirks, G. Eley and S. Ortner, "Introduction" Dirks, N., G. Eley and S. Ortner (eds), *Culture/Power/History: A reader in contemporary social theory* Princetown University Press: New Jersey, 1994.

- does an evocation of indigenous 'culture' rely on a reading of indigeneity that is unitary, timeless and ahistorical, rather than allowing for the recognition of the plurality of influences that constitute indigenous knowledge and stem from the diversity of indigenous cultures and indigenous experience?

Significantly questions regarding cultural appropriation that spur debate for 'indigenous intellectual and cultural property rights' have their genesis in politics.[62] The current discussion about indigenous intellectual property is made possible through the positive political and legal outcomes in the 1980s that engaged past cultural violations of a tangible nature.[63] In contrast to tangible property, this next stage necessitates entering the abstract arena associated with debating ideas, information and knowledge as property.

Naming the legal challenge

The naming of the challenge of protecting indigenous knowledge in the language of intellectual property law is evident in the phrase 'indigenous intellectual property'. Within Australia this terminology circulates pervasively in policy documents and academic literature.[64] The spectrum within which aspirations for indigenous intellectual property rights are articulated exceeds the contemporary legal framework. This is because indigenous people's rights are 'mediated rights', in that rights and interests are relayed and interpreted through (at least historically) colonial legal frameworks. Therefore the recognition of indigenous interests in culturally specific

---

[62] B. Ziff and P. Rao, "Introduction to Cultural Appropriation" supra n.57 at 5.

[63] A feature of colonisation in Australia was the collection of indigenous human remains. See: M. Mansell, "The Body Snatchers" (1985) 17 *Aboriginal Law Bulletin* 8. In 2002 the Australian National Museum in Canberra returned human remains to the Larrikia community from the Northern Territory. Considerable effort is being made to return human remains still held in Australian museums but also for the repatriation of human remains still held overseas. For recent discussion regarding the repatriation of human remains see: "Top Museums unite to fight Aboriginal claims" *Sydney Morning Herald*, 11 December, 2002; "Australians happy to return" *The Age*, December 11, 2002; and, "Is it altruism or fear of losing their marbles?" *Sydney Morning Herald*, 28 December, 2002. "It is appropriate to recall those times in our not too distant past when scientists and other collectors thought it was acceptable to remove the remains of Aboriginal and Torres Strait Islander people from their resting places and send them to the other side of the world." Minister for Immigration and Multicultural and Indigenous Affairs, The Hon Phillip Ruddock MP, "Aboriginal Remains Welcomed Home from UK" Media Release, 9 April 2003. See also: D. Casey, M. Neale and F. Cubillo, "Possession, Protocol and Property: Museums collections" AIATSIS Seminar Series, *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* 19 May 2003.

[64] For instance see: Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies* 2002; Australian Broadcasting Commission, *Cultural Protocol* July 2002; Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Discussion Paper* September 1998; Australian Copyright Council, *Indigenous Arts and Copyright* August 1999.

material as political or legal inevitably transforms those interests.[65] The difficulty of crafting an effective and instrumental response to the misuse of indigenous knowledge and iconography, and the inability for the optic of the law to feasibly negotiate competing sovereign claims to own and control culturally specific material requires urgent consideration.

Consequent to the success of indigenous claims involving visual artwork, certain critical legal and philosophical analyses from the debates surrounding Aboriginal art are used as a point of departure for developing this thesis. As the Australian case law has grappled with the inclusion of Aboriginal art as legitimate subject matter, copyright forms the key focus area. However the thesis extrapolates beyond the category of copyright in order to understand how intellectual property law more generally constructs and subsequently treats intangible indigenous subject matter. To this end the thesis is occupied by the following core questions:

- what are the cultural, political and legal shifts that have produced the category of indigenous knowledge within the field of intellectual property law?
- how does legal power produce a domain specifically occupied by a concept of 'indigenous knowledge' and how does it seek to manage such a domain?

The thesis is interested in the philosophical issues that surround the process of imbuing an object with property rights, exploring how it replicates liberal possessive individualism in both indigenous and non-indigenous cases and how this functions as a means to manage indigenous difference.[66] Property relations are understood as an instance of governmental management however, in the context of indigenous intellectual property, the management and outcome is far from predictable. This is because how the law actually deals with intangible subject matter is not as consistent or stable as is generally believed.[67] Indigenous claims expose the contingency of intellectual property law generating difficulties in managing the direction and closure of the subject.

---

[65] J. Webber, "Beyond Regret: Mabo's Implications for Australian Constiutionalism" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n.50 at 66.

[66] See also: P. Drahos, *A Philosophy of Intellectual Property*, supra n.15; and, B. Bryan, "Property as Ontology: On Aboriginal English Understandings of Ownership"(2000) 13 *Can. J. L. & Juris.* 3.

[67] See the earlier discussion on fiction and the popular narratives of intellectual property law.

Theoretical influences

This thesis makes clear the interaction and interdependency of factors – cultural, political, legal and governmental that shape and direct how legal frameworks are employed in an attempt to accommodate indigenous people's knowledge systems. The point is that these attempts transform the interests and subsequently the possibilities for action. In Australia, the debate is still strikingly new, dating back a mere thirty-five years.[68] In line with the equally important and recent advent of overturning the myth of *terra nullius*[69] this area presents an obligation for further interdisciplinary efforts to readdress issues including power imbalance, control of knowledge dissemination and an awareness of how the inclusion of indigenous subject matter disrupts the narrative of intellectual property law as stable and consistent. Like indigenous claims to land, claims to knowledge challenge the congruency of liberal strategies of governance.

A background in critical cultural and political theory influences how particular observations in this area can be made.[70] In Australia, the work of Duncan Ivison, Paul Patton and Will

---

[68] Consider that the referendum put to the Australian public to decide whether indigenous people could become citizens of Australia occurred in 1967. The Gove Land Claim, *Milpirrum v Nabalco* (1971) 17 FLR 141 and *Coe v Commonwealth* (1979) ALRJ 403 challenged the legitimacy of the doctrine of *terra nullius*. Importantly such efforts led to the passage of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). The first case involving common law confidential information was *Foster v Mountford* (1977) 14 ALR 71 and the first case involving Aboriginal art, *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported.

[69] See *Mabo* v *Queensland* [No1](1988) 166 CLR 186; and, *Mabo* [No.2] (1992) 175 CLR 1. For the effects of the Mabo case see: M. Stephenson, and S. Ratnapala (eds), *Mabo: A Judicial Revolution* University of Queensland Press: Brisbane, 1993; F. Brennan, "Mabo and its Ramifications for the Future of Indigenous Australians" Johnston, E., M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish Publishing: Sydney, 1997; C. Cuneen and T. Libesman, *Indigenous People and the Law in Australia* Butterworths: Australia, 1995; T. Rowse, *After Mabo: interpreting Indigenous traditions* Melbourne University Press: Carlton, 1993. Whilst *terra nullius* was overturned in the Mabo case, essential principles still remain, namely that Aboriginal land law and sovereignty was ceded to the colonisers system of law. Valerie Kerruish succinctly observes, "I do not see how legally and politically, we can be said to be done with *terra nullius* until there is a recognition of [Aboriginal] laws." V. Kerruish "Reconciliation, Property and Rights" Christodoulidis, E., and S. Veitch (eds), *Lethe's Law: Justice, Law and Ethics in Reconciliation* Hart Publishing: Oxford, 2001 at 198.

[70] While this influence draws particularly from Foucault's work on discourse and knowledge (see *The Archaeology of Knowledge* Tavistock Publishing: London, 1972), other theorists, critics and philosophers, before and after Foucault have been pivotal in informing and consolidating my theoretical positions. For a selection of these influences to be utilised throughout this body of work see: E. Said, *Orientalism* Vintage Books: New York, 1979; G. Burchell, C. Gordon, P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991; B. Cohen, *Colonialism and its Forms of Knowledge: The British in India* Princetown University Press: New Jersey, 1996; L. Grossberg, C. Nelson and P. Trechlier (eds), *Cultural Studies* Routledge: New York, 1992; R. Guha and G. Spivak (eds), *Selected Subaltern Studies* Oxford University Press: New York, 1988; B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* Versco Publishing: London, 1983; J. Clifford, *The Predicament of*

Sanders[71], suggests a lively engagement with political theory and indigenous rights where questions of identity, sovereignty and democratic theory are engaged. From this work engaging a political theory on the rights of indigenous people, the concept of 'rights' itself is understood as,

> powers or instruments to secure or promote individual and group interests, operate and come to be grasped within practical and interpretative frameworks that are partly held in place by historically patterned beliefs and structures.[72]

Informed by critical theory that considers the emergence and production of discursive fields of knowledge, my position locates a moment of curiosity: how it is increasingly assumed that the protection of indigenous knowledge will be secured within a legal field of intellectual property law. This location has not been exposed to extended critique, nor has the analysis moved beyond a debate that has accepted the authority of the legal framework – an authority that appears consolidated in each new governmental and legal initiative. The subject of 'indigenous intellectual property' has been readily assumed to be lawyers 'turf', with very little engagement with indigenous people, except as the subjects of the law.[73] The resonance of Nakata's concern about the 'indigenous knowledge enterprise' which has everything and nothing to do with indigenous people, remains at the forefront of this thesis: a primary concern being how indigenous claims have been positioned within the authoritative discourse of the law and how these claims have been understood, interpreted and consequently managed.

Culture: Twentieth Century Ethnography, Literature and Art Harvard University Press: Massachusetts, 1986; J. Donzelot, *The Policing of Families* Pantheon: New York, 1979; B. Hindess, *Discourses of Power: From Hobbes to Foucault* Blackwell Publishers: Oxford, 1996.

[71] D. Ivison, P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, supra n.50. See also D. Ivison, *Postcolonial Liberalism* Cambridge University Press: Cambridge, 2002.

[72] D. Ivison, P. Patton and W. Sanders, "Introduction" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n.50 at 17.

[73] Or as indigenous legal practitioners, see for instance the work of Terri Janke: "Don't give away your valuable cultural assets" (1998) 4(11) *Indigenous Law Bulletin* 8; *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* (produced for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and the Aboriginal and Torres Strait Islander Commission [ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, 1998; "Museums and Indigenous cultural and intellectual property rights (1998) 7(1) *Museum National* 13; "Intellectual property and indigenous dance issues" paper for the Arts Law Seminar 14 May 1999; "Berne, baby, Berne: the Berne Convention, moral rights and Indigenous peoples cultural rights" (2001) 5(6) *Indigenous Law Bulletin* 14; "Indigenous cultural and intellectual property rights: a visual arts perspective" (2002) 151 *Art Monthly Australia* 26; *Writing cultures: protocols for producing Indigenous literature* The Australia Council: Sydney 2002; *New Media Cultures: protocols for producing Indigenous Australian new media* The Australia Council: Sydney 2002; *Visual Cultures: protocols for producing Indigenous Australian visual arts and crafts* The Australia Council: Sydney

Increasingly indigenous knowledge is, for the purposes of governmental intervention, being generated and identified as a 'type' existing within a legal domain, produced through case law, governmental reports, academic interest and international concern. In reality, indigenous knowledge is not ahistorical and uniformly coherent. The objective of this thesis is to consider how this field of knowledge has been produced, including how other disciplines and forms of analysis have become subordinate to the legal questions that the intersection of indigenous knowledge and intellectual property generate.[74]

The broader focus of this thesis is not concerned with developing a set of guidelines for the protection of indigenous knowledge (although the pioneering work of Terri Janke will be discussed). Instead the purpose is to question the way in which 'truths'[75] about indigenous knowledge are produced and how these relate more broadly to systems of 'governance' in the sense first formulated by Foucault in his work 'On Governmentality'[76] and subsequently extended by his interlocutors.[77] For future progress in both indigenous rights and intellectual property the nature and interactivity of other agents incorporating social, political and economic domains must be enjoined. I concur with Ivison, Patton and Sanders when they emphasise that "New ways of thinking are required with regard to certain crucial conceptual and normative assumptions informing indigenous claims."[78] Only through the process of acknowledging the concomitant elements at play, and providing indigenous individuals and

---

2002. See also: T. Janke, "Future Legal Directions" AIATSIS Seminar Series, *Intellectual Property and Indigenous Knowledge: Access and ownership of Indigenous cultural material* 26 May 2003.

[74] For instance, the focus on the requirements of originality and questions of authorship have pre-occupied many writers in this area.

[75] Here I am referring to what Foucault termed 'regimes of truth'. As Foucault explains, "Each society has its regime of truth, its 'general politics' of truth: that is the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true." M. Foucault, "Truth and Power" Gordon, C. (ed), *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* Pantheon: New York, 1980 at 131.

[76] Foucault first presented his work 'On Governmentality' as a lecture at the Collège de France in February 1978. The printed version was reproduced, first in *Ideology and Consciousness* (I&C) in 1979 and later in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991 at 87-104.

[77] While Foucault's interlocutors are many, I restrict myself here to those who have been fundamental in setting possible trajectories for work on issues of governmental rationality. These include Colin Gordon, Nikolas Rose, Peter Millar, Barry Hindess, Mitchell Dean, Pasqualle Pasquino, Francois Ewald, Jacques Donzelot, Ian Hunter and Pat O'Malley.

[78] D. Ivison, P. Patton and W. Sanders, "Introduction" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n.50 at 11.

communities with the authority to promote interests on their own behalf, can the law as it is practiced, provide realistic outcomes for indigenous people.

In line with contemporary thinking informed by Foucault's work on governance, this thesis critiques the mechanisms of the state that allow the albeit complicated forms of indigenous knowledges to be more readily understood and therefore more manageable. The inter-dependency between the law and programmes of governmental management effectively produce relations of power and distinctive styles of governance. Within these systems, the management and 'protection' of indigenous knowledge systems establishes new areas for regulatory techniques of government to operate through the medium of indigenous rights, justice and accommodating difference. This work will open up the field of intellectual property to analyses that promote further questions about the production of knowledge and to expose the relations of power that function between law and government to produce subjects in intellectual property law. The site is considered as one that necessarily engages with critiques of liberalism, thus generating new and diverse ways of perceiving the relationship between communities and individuals, knowledge and property.

In some circles the work of Michel Foucault has become unfashionable because of its neo-marxist associations and its presumed reductionist approach to individual subjects.[79] In other spheres, Foucault's influence remains vigorous, with academics continuing to apply his theoretical observations in fields of interest, reflective of concerns extant within contemporary society. The lecture 'On Governmentality' is fundamental to the questions explored within this thesis, however it is not constitutive of this work as a whole. The application of Foucault's work provides a technique for the recasting of questions about the legal construction of knowledge and the way in which indigenous rights to knowledge are managed. [80]

---

[79] Three strident critiques of Foucault come from Charles Taylor, Jurgen Habermas and Nancy Fraser. In particular see: C. Taylor, "Foucault on Freedom and Truth" Hoy, D. (ed), *Foucault: a critical reader* Basil Blackwell: New York and Oxford, 1986; J. Habermas, "Modernity v Postmodernity" (transl. Benhabib, S.) (1981) 22 *NGC*; and, N. Fraser, "Foucault on Modern Power: Empirical Insights and Normative Confusions" (1981) 1*Praxis International* 272. For an argument about the difficulty of ascertaining a consistent set of claims by Foucault see: N. Fraser, "Michel Foucault: A 'Young Conservative'" (1985) 96 *Ethics* 165.

Indigenous knowledge is not presumed to be a pre-existing natural property of indigenous people that the law responds to. It is taken up as an artificial construct through which indigenous communities and their interface with the western body of legal knowledge and jurisprudence is managed in relation to intellectual property. To achieve this understanding I will look at the agencies and processes reflected in the Australian documentation that produce the record of indigenous knowledge as a challenging category for the law. Therefore the thesis will consider a number of reports: *Report of the Working Party on the Protection of Aboriginal Folklore*[81]; *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander People*[82]; *Our Culture, Our Future: Report on Australian Indigenous Intellectual and Cultural Property Rights*[83]; and two particular instances of case law: *Milpurrurru & Ors v Indofurn Pty Ltd* (1994)[84]; and *Bulun Bulun & Ors v R&T Textiles Pty Ltd* (1998).[85]

Given what has been said about the unstable meaning of indigenous knowledge and the challenges of speaking for that subject, this project will analyse the abovementioned legal and governmental documents as part of a methodological and theoretical construct. It points to the pragmatics associated with drawing from the complex layers that arise in the process of 'reconciling' indigenous claims within 'western' frameworks.[86] Recognition of the value of indigenous ways of knowing and reconciling these within interpretative frameworks is not a challenge to the law alone. Other disciplines, critics and communities have justifiable cause to be part of the debate on the nature, power and significance of law and legal discourse in relation to knowledge, property and sovereignty. For the process of "cultural accommodation should be seen more as matters to do with institutional innovation rather than the

---

[80] M. Foucault, "Interview with Michel Foucault" Faubion, D. (ed), *Essential Works of Michel Foucault: 1954 – 1984 (Vol 3)* Penguin Books: London, 2000 at 288.

[81] Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* Canberra, December 1981.

[82] The Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Indigenous arts and cultural expression* Canberra, 1994.

[83] T. Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property,* supra n.73.

[84] *Milpurrurru & Ors v Indofurn Pty Ltd* (1994) 30 IPR 209.

[85] *Bulun Bulun v R & T Textiles Pty Ltd,* (1998) 41 IPR 513.

[86] Consider the articulation of indigenous interests in the legal domains such as native title [per the *Native Title Act* 1993 (Cth), and the *Native Title Amendment Act* 1998 (Cth)], juvenile justice, criminal law. These spaces seek to integrate and reconcile indigenous concerns, whilst simultaneously professing sameness and equality before the law.

jurisprudence of rights."[87] My intention is to explicate the inevitable intersections that influence law, policy and governmental direction in this field and the tensions between cultural difference and liberal values affecting a unique form of governance.

Structure of the thesis

As already noted, the framework of intellectual property law is under increased scrutiny nationally and internationally both in its purpose and future possibilities of inclusion. The ambiguity of describing indigenous knowledge has magnified the difficulty for intellectual property law to respond to such subject matter. In an increasingly globalised and postcolonial world, where the value of knowledge within indigenous cultures also resonates in varying markets, what is the purpose of employing laws of intellectual property? Is there room for differences in value systems and intellectual traditions within intellectual property law? How are different value systems within and between cultures to be reconciled? To what extent are strategies of governing directed towards the production of the subject in the law?

The next chapter begins with an examination of the intersections between culture, law and power. Attention to calls to protect manifestations of indigenous knowledge through intellectual property laws have been framed as a response to the broader problem of cultural appropriation. Cultural appropriation then provides a useful vantage point to consider the complexity of 'culture' and the dilemma of responses that evoke cultures as bounded and distinct entities. The chapter then moves to consider the influence of 'culture' in legal thinking, with particular attention to critiques of law that have revealed how law is deeply imbued with processes of cultural production. The recognition that law functions and is influenced by a social nexus provides possibility for it to adapt and modify to particular needs, in this instance with respect to indigenous people.

Chapter Three examines the emergence of intellectual property law within modern liberal states. The point is to illustrate that intellectual property law is not a timeless and ahistorical

---

[87] D. Ivison, P. Patton and W. Sanders, "Introduction" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n.50 at 17.

category of law. Instead it emerged from a distinct project of negotiating private property rights for intangible subject matter. The examination of the struggle between intangible property rights and the modern abstraction of intellectual property law provides an alternative account of the long process of formation for intellectual property law. The pre-modern focus on literary property generated concern regarding the inability of the law to determine the necessary dimensions of intangible property. The historical shift came in the abstraction of language to define and structure the boundaries of how intellectual property law was to be understood. Subsequently in the modern period roughly defined as post 1850s, intellectual property, because of the level of abstraction, was imagined as ahistorical.[88] Thus the categories were assumed and perpetuated as naturally and narrowly legal in formation.

In destabilising the narrative of intellectual property, the chapter will consider the creation of copyright as a subject of intellectual property. What characterises copyright is its reliance upon notions of authorship and originality. These categories function to identify the subject matter of copyright and thus the property. Postmodern critiques have prompted recognition of the singularity of copyright and its abstraction as a legal category. These observations have also revealed the inevitable influence of cultural and political factors on what is brought into the intellectual property network. The inclusion of indigenous knowledge in intellectual property law is in response to the characteristics of intellectual property that include its complex history, its categories of measurement and the inevitable influence of politics. Overall the chapter identifies the multiple influences that have lead intellectual property to produce indigenous knowledge as a 'special' category known to the law.

Chapter Four begins by considering how law establishes governable spaces and thus how indigenous knowledge is consolidated as a distinct entity within the law. As governable spaces direct attention to a particular area of concern, they are integral to the way in which indigenous knowledge has been positioned as a 'special' legal problem. Looking at two governmental reports – *Report of the Working Party on the Protection of Aboriginal Folklore*; and, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander People* – as instances of a

[88] See: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: the British experience, 1760-1911* supra n.15.

bureaucratic agenda, it is possible to gauge the levels of intervention producing indigenous knowledge as a legal problem. The chapter argues there is an anxiety in purpose that characterises the disparity between intellectual property law and indigenous people who want their knowledge protected. The governmental reports concerning indigenous knowledge can be said to be functioning as specific techniques of governance, circulating language and power, ultimately directing how the intangibility of indigenous knowledge can be positioned and consequently managed through legal networks of power.

Chapter Five considers two examples of case law involving Aboriginal art: *Milpurrurru v Indofurn* (1994) and *Bulun Bulun v R & T Textiles* (1998). Legal judgments provide a symbolic and a practical reckoning of the issues, yet they offer an account of how the 'practice' of intellectual property law differs to governmental reports which 'articulate' the law. Case law provides examples of function: connecting the problematic with an instance – what actually happens with the problem. In turn, handling the problem tests and pushes the limits of the law. The case law highlights the ways in which indigenous people and cultures are constructed in relation to contemporary society and the law. The way in which the law grapples with cultural difference, presented through the tensions between protecting indigenous knowledge and cultural identity noticeably relies upon limiting perceptions of diversity, effectively compartmentalising Aboriginal cultures. Significantly this produces new effects whereby the abstraction of indigenous knowledge becomes hidden, and the naturalness of property existing in indigenous knowledge assumed. The boundaries are shifted, and the law is seen as responsive, but not responsive enough to fully accommodate full 'property rights' in indigenous knowledge.

Chapter Six considers how the position of Aboriginal art within the global art market helps establish markers of value that identify both the tangible and intangible subject of property protection. Following from how the abstract value of Aboriginal art is dealt with by the judiciary, particular interest for this chapter is:

- how and at what point, are intellectual property rights in Aboriginal art engaged?

- to what extent is intention bound to Aboriginal art entering an economic realm of value?[89]

The questions allow for an examination of the politics of the law exposed through the case law of the previous chapter. It will indicate how the value of Aboriginal art in a marketplace is central to its recognition as a cultural product worth protecting through intellectual property law.

Chapter Seven extends attention to individual responses to indigenous intellectual property and how these inadvertently consolidate and perpetuate 'indigenous knowledge' as a legal category and a fixed 'type' of knowledge. I will utilise two interviews with eminent workers in this field, Mr Colin Golvan and Ms Terri Janke. Mr Golvan acted as the leading Barrister on the intellectual property cases examined in Chapter Five. Ms Janke is the author of *Our Culture: Our Future*, the dominant Report examining the key problems of applying intellectual property frameworks to various forms of indigenous knowledge. I will also consider an interview conducted by Cathy Eatock and Kim Mordaunt with Banduk Marika,[90] an artist whose work was reproduced on carpets and who was a respondent in the case discussed above, *Milpurrurru v Indofurn* (1994).

My point is to show that far from it just being governmental reports and case law, individuals also function to produce and enhance the management of the legal category indigenous intellectual property. This extends my position that individual agency plays a significant role in maintaining and distributing forms of governance – a factor that is often overshadowed in much work utilising the lens of governmentality. The interviews provide an opportunity to highlight the instrumentality of individual actors and that rationalities of governance are made practicable – complete with shortfalls – by individual agents.

---

[89] *Foster v Mountford* (1977) 14 ALR 71 is arguably an example where the law is engaged without a primary economic cause – but confidential information and equitable rights sit at the fringe of attention in intellectual property circles, where more predominant attention is focused on the law expressed in the intellectual property statutes.

[90] C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.

Chapter Eight will consider the global politics of intellectual property rights and the extended attention to the problem of protecting indigenous knowledge internationally. The chapter considers the national/international movement and interest in both intellectual property regulation and the subject of indigenous knowledge. That the problem of indigenous knowledge is on the international agenda means that there is a direct correlate between how the national approach to protecting indigenous knowledge authorises and influences international initiatives in this area. However, this is mediated through differing national and international governing strategies.

This work rethinks existing boundaries concerning property protection and the control of knowledge. It opens a new space where the power relations inherent in intellectual property law can be critiqued; where governmental influence can be detailed and where a discourse on indigenous rights is engaged. Teasing out the variety of factors; governmental, legal and individual action, inter-woven into the fabric of the debate around indigenous knowledge and intellectual property law will highlight the limitations currently extant in what may be heard, phrased, understood. Forging new directions requires critical examination of the categories utilised in the present and how these are historically informed and internationally circulated.

Chapter Two

Intersections of Influence: Culture, Law and Governance

Indigenous intellectual property as a site of examination, exhibits profound complexities, both in construction and legitimation. This chapter seeks to tease out some of these complexities, not so the subject can be securely captured, rather that the internal machinations of its construction are exposed demonstrating the functionality of systems of governance. Rather than assume the naturalness of the category indigenous intellectual property, my work questions the politics of its construction. In recasting questions regarding the production of the legal category 'indigenous intellectual property' this chapter will highlight the broader philosophical concerns that inform my approach to this area.

The challenge for the law in reconciling intellectual property and indigenous knowledge has been generated, in part, by debates arising from issues of 'cultural appropriation'. By this I mean that the project of addressing allegations of cultural appropriation has increasingly turned to the law, particularly intellectual property, for remedy. However, the issue of cultural appropriation involves intersections of power, culture and resistance and is not solely a legal challenge. Positioning the unauthorised use of cultural knowledge as a legal issue, evident for example in the term 'indigenous intellectual property', directs attention to how the law functions to manage difficult concerns, both in relation to the circulation of knowledge and the government of indigenous people. Assuming legal positioning prompts consideration of the ways indigenous people within Australia have been subject to colonial techniques of management. This then leads to the following question: is indigenous intellectual property another manifestation of managing indigenous subjects? Does the category of indigenous intellectual property highlight the subtleties resulting from the interplay between law and

governance in regulating social and cultural fields? Does this adequately explain the everyday politics that push the category of indigenous intellectual property to new levels of articulation, which expose limitations of the law?

This chapter is divided into three sections. These sections will examine: the intersections of culture, power and the law; the contingency of law in its political and social context; and, the means by which governmentality accounts for the interplay of complex elements. To begin, a consideration of the intersection between culture, power and law necessarily outlines how complexities of 'culture' are to be understood throughout the thesis. As cultural appropriation foregrounds the concept of indigenous intellectual property, it provides a good vantage point to ponder the fluidity of cultures and the dilemma of responses to cultural appropriation that evoke cultures as bounded distinct entities.

The second section will draw attention to the contingency of law, where rather than a unitary phenomenon, law and legal institutions are deeply imbued within networks of political and social influence. Thinking through law in relation to society and individuals focuses attention on how law is informed and constituted by cultural production, where law is simultaneously an object and subject of culture. This section will map out characteristics that reframe how law responds to the assertion of indigenous rights to control intangible indigenous subject matter.

The final element of the chapter will extrapolate the utility of the framework of governmentality to interpret diverse political, social and cultural indices. In particular I develop an appreciation of how law, property, knowledge and indigenous interests intersect at the category of indigenous intellectual property. My point is to reveal the biopolitical dimension that informs this category and manages its production. Crucial to understanding these complexities is the recognition that indigenous intellectual property is not just a legal category 'imposed' upon indigenous people but also a category adopted and actively shaped by indigenous people themselves in response to political and governmental objectives.

Governmental rationality is *ad hoc* and inconsistent. It is precisely this recognition that denies the existence of monolithic governmental power and provides the productive conditions for

possibilities of governance. While there may be bureaucratic aims in positioning indigenous knowledge within a legal realm, this does not mean outcomes are predictable. Rather there are a variety of responses; governmental, cultural and individual that push and produce the category of indigenous intellectual property as it resides simultaneously within the law and outside it.

Culture/Power/Law

As considered in Chapter One, a reading of the term 'indigenous intellectual property' could assume a distinct cultural derivation. Yet conceptualising relations between and through cultures has, at least in the latter part of the Twentieth Century, become more attenuated to the fluidity and dynamism of culture that often defies description in theory or in practice.[1] As an outcome of this growing understanding certain disciplines, namely anthropology, cultural studies and sociology, have responded by articulating the many ways in which the location of culture is disparate and moveable, being nowhere and everywhere.[2] As James Clifford notes, in the twentieth century "culture is a deeply compromised idea."[3]

Raymond Williams has done much to foster understanding of the complexities and fluidities of the concept of 'culture', especially in tracing the trajectories of the term.[4] Utilised as a plural in the Eighteenth Century, the term 'culture' came to relate to the "specific and variable cultures of different nations and periods, but also the specific and variable cultures of social and economic groups within a nation."[5] The transition of the term also speaks to the change in conceptualising 'culture', where the term came to refer to intellectual and artistic expression in

---

[1] See for example: R. Williams, *The Long Revolution* Harmondsworth, Penguin Books: London, 1965; R. Williams, *Keywords: A Vocabulary of Culture and Society* Fontana/Croom Helm: London, 1976; E. Said, *Orientalism* Penguin Books: London, 1985; T. Bennett, *Culture: A Reformer's Science* Allen and Unwin: Sydney, 1998; N. Dirks, G. Eley and S. Ortner (eds), *Culture/Power/History: a reader in contemporary social theory* Princetown University Press: Princetown, New Jersey, 1994.

[2] See: H. Bhabha, *The Location of Culture* Routledge London and New York, 1994.

[3] J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* Harvard University Press: Cambridge and Massachusetts, 1988 at 10.

[4] See: R. Williams key works: *Culture and Society 1780- 1950* Harmondsworth, Penguin Books: London, 1963; *The Long Revolution* Harmondsworth, Penguin Books: London, 1965; *Politics and Letters* New Left Books, London, 1979; *The Politics of Modernism: Against the New Conformists* Verso: London, 1989.

[5] R. Williams, *Keywords: A Vocabulary of Culture and Society* supra n.1 at 87.

the Nineteenth Century.[6] Notably, this perception of culture as defined by Arnold has shifted but has not totally disappeared from contemporary ways of appreciating 'other' cultures. Arnold's conception still permeates late modernity. I would suggest that it returns in a modified way in reference to Aboriginal art, where in particular, the intellectual and artistic expression of Aboriginal and Torres Strait Islander people signifies and confirms the sense that indigenous 'culture' has survived colonisation. A further complexity has emerged however, because this notion has come to be treated as if it were unified, bounded and singular both in law, politics and popular culture.[7]

Williams has sketched the social definition of culture, where:

> culture is a description of a particular way of life, which expresses certain meanings and values, not only in art and learning, but also in institutions and ordinary behaviour. The analysis of culture, from such a definition, is the clarification of the meaning and values implicit and explicit in a particular way of life, a particular culture.[8]

This description has had a significant impact on a range of disciplines and influenced how many theorists conceptualise relations of culture in theory and practice as being a 'whole way of life'.[9] Critiques of Williams, particularly for what Ian Hunter refers to as his evocation of Romantic aesthetics,[10] have generated other ways of talking about culture that include consideration of how culture is not just the 'whole way of life' of any given group, but also the way in which experience is shaped, mapped and interpreted.

The rethinking of categories of class, gender, race and ethnicity as being constitutive of culture has produced a shift in the way distinctive groups are studied and understood. This shift has destabilised the assumption that the notion of culture is 'shared' by all members of a given society. Instead there is recognition that cultures are elusive and complex and defy simple definitions. Further, the differences within cultures and the multiple actors that structure and position themselves between and through different cultural spaces necessitates recognition of

---

[6] See in M. Arnold, *Culture and Anarchy: An Essay in Social and Political Criticism* Bobbs-Merrill: Indianapolis and New York, 1971. See also E. Gellner, *Culture, Identity and Politics* Cambridge University Press: Cambridge, 1987.
[7] This will be extrapolated later in Chapter Six.
[8] R. Williams, *The Long Revolution* supra n.1 at 41.
[9] In particular see the influence in sociology, anthropology and cultural studies.
[10] I. Hunter, "Aesthetics and Cultural Studies" Grossberg, L., C. Nelson, P. Treichler (eds), *Cultural Studies* Routledge: New York and London, 1992.

the fluidity and permeability of cultural exchange. The reality of the translocation of culture sits uncomfortably with definitions of cultures that emphasise the wholeness of groups. Cultures are imagined, in similar ways to how Benedict Anderson conceptualised nations as imagined communities.[11]

As powerful factors – both political and social – produce images of culture as a heterogeneous unit, it is advantageous to think of culture as a theory, rather than a given category that describes the spatial parameters of social relations.[12] Indeed it could be argued that culture is a political project of interpretation and reinterpretation, where no one meaning can fully maintain a grasp on the proliferation of the term.[13] 'Culture' as theory provides a lens through which the use of the term can signify the engagement of relations of power – for example, where distinct groups effectively emphasise their own cultural uniqueness. Such evocations invariably function in response to various fluctuations within society at any given period and are inextricably tied to relations of power.

Cultural appropriation

The point at which the consideration of 'culture' informs this work, derives from a tension. This tension is between the fluidity and the fixed concepts of 'culture'. While theories of culture and cultural production (that pay attention to the fluidity and dynamism of culture) circulate and proliferate, these are countered by an increasing number of social groups demanding recognition of their cultural distinctiveness that is bounded by a distinctive and unitary 'culture' and inseparable from a unique cultural identity. As Michael Brown observes,

---

[11] B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* Versco Publishing: London, 1983. With critical attention to the term 'culture', more recently 'community' has come to circulate similar characteristics previously associated with 'culture': that is 'community' has come to represent homogenous spatial structures. Recently Arun Agrawal and Clark Gibson have drawn attention to the growing body of work that emphasises the 'wholeness' of communities. Agrawal and Gibson argue that it is essential for initiatives involving communities to recognise the multiple interests and actors within communities and how "these actors influence decision making and the internal and external institutions that shape the decision making process." A. Agrawal and C.C. Gibson, "The Role of Community in Natural Resource Conservation" Gibson, C., M. McKean, E. Ostrom (eds), *People and Forests: communities, institutions and governance* Massachusetts Institute of Technology: Massachusetts 2000 at 2.

[12] I thank Dr Richard Davis, Visiting Research Fellow at AIATSIS for his discussions with me on this point.

[13] As Ziff and Rao have suggested, "the term culture is as indeterminate as any within the social sciences. It therefore cannot be relied upon to set clear limits." B. Ziff and P. Rao, "Introduction to Cultural Appropriation"

"the ongoing struggle for political and cultural sovereignty often leads indigenous activists to talk about culture as if it were a fixed and corporeal thing."[14]

The concept of cultural appropriation deftly illustrates the tension. Some have argued that cultural appropriation is no more than an exercise of cultural hybridity.[15] The counter argument is that cultural appropriation presumes an act of 'theft' whereby the dominant 'culture' adopts something 'belonging' to the 'minority' culture.[16] The conditions that lead observers to name cultural appropriation derive from multiple histories of colonisation, domination and subjugation.[17] However, it is dangerous to assert that the process of cultural appropriation is as clear as the 'taking' by one culture of what is 'owned' by another.[18] Binaries between cultures can never be neat, and such a perception of cultural appropriation insists on a

---

Ziff, B., and P.V. Rao (eds), *Borrowed Power: Essays on cultural appropriation* Rutgers University Press: New Jersey, 1997 at 2.

[14] M. Brown, "Can Culture be Copyrighted?" (1998) 39(2) *Current Anthropology* 193 at 197.

[15] In Australia, three cases illustrate the difficulty in determining what is and what is not cultural appropriation. These also hint at the complexity of regulating representations of Aboriginality in fiction and art. See for instance: MarloMorgan's book (*Mutant Message Down Under* Harper Collins: New York, 1995) where she records a meeting with the last (and lost) Aboriginal tribe and is initiated into the tribe revealing tribal 'secrets' of the Dreamtime in the (fiction) book; Elizabeth Durack painting as an Aboriginal man named Eddie Burrup and winning the prestigious Telstra Indigenous Art Award, ("Male Aboriginal artist turns out to be woman with Irish decent" *Australian Associated Press*, 7 March 1997); and Satchi Amyettere arguing Arrente cultural identity and painting a church in Aboriginal styles and adopting an Aboriginal name. These instances provoked public outrage, and were widely reported in the Australian media. Stephen Gray considers these three cases in more detail in his article, "Black, White or Beyond the Pale: The Authenticity Debate and Protection for Aboriginal Culture" (2001) 15 *The Australian Feminist Law Journal* 105. See also: Fred Myers *Painting Culture: The Making of an Aboriginal High Art* Duke University Press: Durham and New York 2003 at 330-336. More recently the debate over Prince Harry painting in Aboriginal 'styles' and exhibiting these works has re-ignited debates about cultural appropriation and colonialism. It appears that part of the problem is also in the 'authentic' representation of Harry's art in that it has been shown in London along side 'traditional' burial poles from Arnhem Land. See: "Cultural pretensions to the native thrown" *The Australian* 17 June 2003. I will be exploring these issues of authenticity in Aboriginal art in Chapter Six.

[16] See a consideration in: L. Lippard, *Mixed Blessings: New Art in Multicultural America* Pantheon Books, New York, 1990; C. Nicholls, *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art Exhibition Catalogue* March 2000. See also: H. Fourmile, "Some background to issues concerning the appropriation of Aboriginal imagery" Cramer, S. (ed), *Postmodernism: a consideration of the appropriation of Aboriginal imagery: forum papers,* Institute of Modern Art, Brisbane, 1989; H. Fourmile, "The Aboriginal art market and the repatriation of Aboriginal cultural property" (1989) 8(1) *Social Alternatives* 19; H. Fourmile, "Cultural survival v cultural prostitution" Paper presented at the Cultural Tourism Awareness Workshop, Cairns, Queensland 1993; L. Behrendt, "In your dreams: cultural appropriation, popular culture and colonialism" (1998) 4(1) *Law, Text, Culture* 256.

[17] See generally: S. Cramer (ed), *Postmodernism: a consideration of the appropriation of Aboriginal imagery: forum papers Institute of Modern Art*, Brisbane, 1989.

[18] For another discussions of the tensions between cultural appropriation and law see: S.E. Merry, "Tenth Anniversary Symposium: New Direction: Law Culture and Cultural Appropriation" (1998) 10 *Yale Journal of Law and the Humanities* 575.

process of hegemony and subjugation that leaves little room for resistance and agency. Nothing is achieved in pitting colonisers against colonised; as Ann Stoler notes the perpetuation of such binaries speaks more to "political agendas than to ambiguous colonial realities."[19]

Cultural appropriation can also occur within cultures as there exist considerable differences between (sub)cultures within the same recognisable community. For cultural appropriation is not solely a characteristic of a 'dominant' culture: it is a more complex process. The danger is in reducing the issue to the tension between two distinct groups, vying for control of what is seen as uniquely owned by another one 'whole' culture. For in missing the fluidity between and through cultures, phantoms of 'tradition' and ahistoricity are constructed, whereby cultural practices function in a timeless vacuum, impervious to historical, cultural, political and individual adaptation and influence. The effects of such imaginings include the relegation of particular groups of people to positions 'outside' modern and contemporary practice. Attention to calls to stop cultural appropriation must be mindful of these dangers and the layering of influences that makes legal solutions difficult to determine because the reality of cultural exchange is infinitely polyvalent.

In an illuminating anecdote regarding the above difficulty, Rosemary Coombe explains how in Canada her reaction to the definitions of cultural appropriation sat uncomfortably, for the "term was 'officially defined' by the Advisory Committee for Racial Equality in the Arts ... to mean 'the depiction of minorities or cultures other than one's own, either in fiction or nonfiction.'"[20] Prior to this, Coombe had been working on a book named *Cultural Appropriations* that in contrast to this definition, was to explore "the ways in which subaltern groups use mass media texts, celebrity images, trademarks and other legally protected commodity/signs to forge identities and communities ... focused on the subcultural appropriation of authorial forms to construct alternative gender identities, challenge the

---

[19] A. Stoler, *Race and the Education of Desire: Foucault's* History of Sexuality *and the Colonial Order of Things* Duke University Press: Durham and London, 1995 at 199.
[20] R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Duham and London, 1998, at 209.

parameters of nations and citizenship, express aspiration and claim recognition."[21] Coombe had developed an interpretation of cultural appropriation that was "shorthand for cultural agency and subaltern struggle within media saturated consumer societies."[22]

Power is fundamentally engaged within claims of cultural appropriation – both as it attempts to address historical imbalances, such as past histories of dispossession and colonisation, and also as it renegotiates a contemporary position within societies and nations for differing cultural and social groupings. Coombe's anecdote aptly points to the variety of ways in which culture can be and is considered. Indeed there is no 'right' way of looking at culture, but rather a variety of ways that develop responses. This lends strength to an appreciation of culture as a theory that indicates quite specific interests and projects of interpretation, including how relations of power are intrinsically imbued within evocations of cultural dominance. Arguments regarding cultural appropriation can be understood as particular (and strategic) responses to historical and cultural factors. The naming of the process of cultural appropriation, similar to the one that confounded Coombe, reveals a struggle between relations of power. The contestation provides new and divergent ways of considering the differences between and within cultures.

In a similar way to Coombe, Meaghan Morris recognises that the term has been positioned within a framework that denotes a 'marauding' element of all forms of cultural exchange.[23] In this sense Morris has articulated 'appropriation' as a "lexical mini-myth of power."[24] By this she means that appropriation is a term that can be strategically used to evoke relations of dominance and that these disrupt familiar relations of property. However, the extent to which appropriation is, or could be, post-colonial resistance falls sharply from view when cultural appropriation is only seen through the lens of exploitation.

The language and framework of intellectual property law has been employed by indigenous people to counter the notion of cultural appropriation and as a response to perceptions of loss

---

[21] Ibid. , at 208.
[22] Ibid. , at 209.
[23] M. Morris, "Tooth and Claw: Tales of Survival, and *Crocodile Dundee*" (1987) 25 *Art and Text* 267.
[24] Ibid. , at 267.

of control over intangible cultural property. This context utilises a language of 'theft' and 'ownership', and extends the underlying assumptions to a broader evocation of culture as 'property'.[25] Enhancing the point that the positioning of a problem such as cultural appropriation within a legal framework is of profound importance, Pat O'Malley has observed that:

> The identification of a social problem as a legal need rather than some other sort of problem altogether is dependent on the place that the law occupies in the society concerned, and especially the extent to which legalism permeates social consciousness. To identify a problem as a legal need is to make a particular judgment about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution.[26]

Whilst the complexity of issues are not only legal in nature, the law provides a space where political and ethical judgements echoing an assumption that a wrong is being committed, contribute to the shape of the solution remaining within the domain of the law.

As a response to the cultural appropriation of intangible subject matter, intellectual property law has become the point for possible solutions. The law is set a tough challenge: it must mediate discrete indigenous differences whilst also countenancing for the commonality of indigenous needs and interests, for example in an engagement with the market.[27] Inevitably this has led to revelations of incommensurability between indigenous and legal value systems.[28] Yet the ambiguity of cultural appropriation effects how political influences can realistically engage in workable legal strategies that manage such a problem. As a result of an ill-defined context,

---

[25] See for example: T. Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and Aboriginal and Torres Strait Islander Commission [ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, Sydney, 1998.

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

[27] In a recent article Richard Davis examines the way in which the Aboriginal experience of pastoralism has been assumed to be "anti-accumulative or subsistence orientated, while Australian pastoralism in general is understood to be surplus orientated, or geared towards maximising profit returns." Davis argues that these assumptions are untenable in an examination of Aboriginal pastoralism and the increasing possession of pastoral leases in the Kimberley. R. Davis, "Society, ecology and pastoralism: aspects of Aboriginal cattle ownership in the Kimberley" (forthcoming 2003).

[28] See: J. McKeough and A. Stewart, "Intellectual Property and the Dreaming" Johnstone, E., M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish: Sydney, 1996; M. Blakeney, "Protecting the cultural expressions of Indigenous peoples under intellectual property law – the Australian experience" Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002; T. Davies, "Aboriginal Cultural Property?" (1996) 14(2) *Law in Context* 1; K. Bowrey, "The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture" (2001) 12 *Law and Critique* 75.

the argument for intellectual property protection frustrates itself because it fails to clarify the purpose of employing intellectual property law. This creates a conflict for intellectual property law that arises for two reasons: firstly there is a mixed narrative of what realistically intellectual property is for and can achieve; and, secondly there is an expectation that it should be modified to accommodate the different interests of indigenous actors.[29] Thus intellectual property is imagined as a necessary mechanism that has the scope to respond to historical power imbalances in colonial relations. This disrupts intellectual property law's *raison d'être* which extends only to protecting the economic potential that indigenous cultural material, or any other intangible subject matter, contains.[30]

The dilemmas of cultural appropriation, like the recognition of indigenous people as subjects of the law, are relatively recent.[31] This makes for challenging cultural and legal positions. But within these positions relations of power are intrinsically engaged. This is highlighted in the way that indigenous articulations within the intellectual property discourse have actually produced recognition that indigenous people may have differing views of cultural information exchange. As power also functions as a productive element, it forces the law and by implication broader society, to confront and acknowledge issues of cultural difference.

Power and indigenous sovereignty

Power then, provides a fulcrum between law and culture.

Power enables the necessary conditions of existence for law to reflect upon complexities and disparities of cultural production. This is due to the ways in which relationships of power allow for the possibility of opening spaces where struggles develop.[32] In the context of indigenous

---

[29] There is a further assumption that Indigenous people require a 'different' structure of the law. This misunderstands the divergent histories and experiences of Indigenous peoples within Australia.
[30] Moral rights are a late addition to this framework. See *Copyright Amendment (Moral Rights) Bill 1999* (Cth).
[31] The rise of the term in intellectual property law dates from concerns with postmodernism. See for instance: M. Woodmansee and P. Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* Duke University Press: Durham, London, 1994; M. Rose, *Authors and Owners: The Invention of Copyright* Harvard University Press: Cambridge, Massachusetts, London, 1993; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Durham, London, 1998.
[32] See: M. Foucault, "The Subject and Power" Dreyfus, H. and P. Rabinow (eds), *Michel Foucault: Between Structuralism and Hermenuetics* Harvester Press: Brighton, 1982.

calls for better intellectual property laws to protect culturally specific knowledge and information, power is the point at which such claims can be made within the law and used to generate indigenous sovereignty through seeking to control and direct the use and management of cultural knowledge. This presents new and differing levels of complexity. Indigenous people want to be able to 'own' and 'control' their knowledge *as* property, including its dissemination and transmission.[33] This represents a form of indigenous self-determination where the law is used as the vehicle to secure a position where indigenous people can govern decisions about the ways in which specific manifestations of knowledge will be regulated. However, the possibility of Australian law granting forms of sovereignty to indigenous people evokes political and legal questions of legitimacy, including for example, through whose terms such frameworks are developed.[34] For example, the paradigm of property and exclusive possession remains the dominant framework in which indigenous strategies to maintain control of knowledge can be realised.

Irene Watson has explained how the position of indigenous people in Australia is unchanged in regards to sovereignty, yet its significance remains undiminished.

> The human rights of Nunga peoples, including the inherent right to self-determination, are denied in the 1990s as they were denied to our ancestors at the time of the colonial invasion of Australia. The right to self-determination in international law includes the right to freely determine political status, and the right to economic, cultural and social independence. Self-determination has been characterised as a

---

[33] See for instance: M. Dodson, "Indigenous Peoples and Intellectual Property Rights" *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney 1996; L. Ford, "An Indigenous Perspective on Intellectual Property" (1997) 3(90) *Aboriginal Law Bulletin* 13; S. Smallacombe, "On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press: Cambridge, 2000. Also consider: J. Neparrnga Gumbula, "Indigenous Knowledge Centres: Returning and Disseminating Knowledge – The Galiwin'ku Virtual Knowledge Centre" *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* AIATSIS Seminar Series, 14 April 2003; N. Rothwell, "Technology preserves ancient traditions" *The Australian* 10 June 2003; A. Hodge "Cultural Revolution in making" *The Australian* 28 July 2003; L. Harris, "Back to Culture" *Koori Mail* 1 August 2003. See also: E. Daes, "Striving for self-determination for Indigenous peoples" Kly, Y., and D. Kly (eds) *In pursuit of the right to self-determination*, Clarity Press: Geneva, 2000. Also see United Nations *Draft Declaration on the Rights of Indigenous Peoples* (1994).

[34] Larissa Behrendt has argued that there are two forms of Aboriginal sovereignty that are discussed in contemporary Australian politics. The first one is discussed in relation to international law and international conventions and the second form of sovereignty is that argued by indigenous people. In regards to the latter, Behrendt explains that indigenous self-determination and sovereignty are not mutually exclusive categories, but merge together. For a detailed explication of the differences between the two conceptions of sovereignty see: L. Behrendt, *Achieving Social Justice: Indigenous rights and Australia's future* Federation Press: Sydney, 2003. See also: R. Barsh, "Indigenous peoples and the right to self-determination in international law" Hocking, B. (ed) *International Law and Aboriginal Human Rights* The Law Book Company: Sydney, 1988.

> continuing right, in full freedom, to determine, when and as they wish, their internal and external political status without external interference.[35]

Michael Dodson, in his role of Aboriginal and Torres Strait Islander Social Justice Commissioner further elucidates the comments of Watson on the importance of self-determination;

> Correctly understood, every issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self-determination. The reason for this lies on the fact that self-determination is a process. The right of self-determination is the right to make decisions. These decisions affect the enjoyment and exercise of the full range of fundamental freedoms and human rights of Indigenous peoples.[36]

In the face of these problems with securing sovereignty, indigenous people within Australia have directed their attention to the courts in efforts to secure certain forms of self-determination.[37] For instance, arguments for land rights and native title are efforts aimed at effecting forms of sovereignty. As Lisa Strelein has argued, there is a clear link between land and other cultural and social rights.[38] Indeed questions of social justice underpin indigenous people's self-determination claims. But the engagement with legal institutions to affect such claims, demonstrated most aptly in the cases of *Mabo*[39] and *Wik*[40], still requires the translation of self-determination claims into these legal and cultural frameworks. Despite these difficulties, indigenous people continue to advocate for the recognition of cultural rights within political and legal arenas as they remain the key forums to challenge the legitimacy of the colonial state apparatus. This in itself is result of changed and changing political power. As Larissa Behrendt explains,

> The recognition of Indigenous sovereignty is not a threat to the sovereignty of the Australian state but it does question the legitimacy of that authority, accuses it of historically excluding Indigenous people and of continuing that exclusion today. It

---

[35] I. Watson, "Nungas in the Nineties" Bird, G., Martin and J. Neilson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996 at 1.

[36] Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report* Australian Government Publishing Service: Canberra, 1994 at 41. See also: M. Dodson, "Towards the exercise of Indigenous rights: policy, power and self-determination" (1994) 35(4) *Race and Class* 65.

[37] See: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* J. S. McMillan Printing Group, Sydney, 2002; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000* Superfine Printing, Sydney 2000. See also: C. Fletcher (ed), *Aboriginal Self-Determination in Australia Aboriginal Studies* Press: Canberra, 1994.

[38] L. Strelein, *Indigenous Self-Determination Claims and the Common Law in Australia* PhD Dissertation, Australian National University, 1998 (unpublished).

[39] *Mabo v Queensland* [No.2] (1992) 175 CLR 1.

[40] *Wik* v *Queensland* (1996) 187 CLR 1.

> seeks a fundamentally different relationship, one that will change through a range of initiatives that in totality can be described as self-determination.[41]

Power is a fundamental lever in elevating indigenous concerns for cultural knowledge management into a legal framework. While there is no underlying consensus defining the notion of power, nor its effects, transmissions and displacements, Michel Foucault has contributed significantly to furthering the conception of power beyond that of a concept representing a monolithic entity dominating society from above.[42] Foucault considers power in terms of a 'structure of actions'[43]; in that power permeates the social field and thus has the capacity to structure the ways in which individuals act and respond to particular instances of political influence. Barry Hindess posits accordingly that, "power relationships will often be unstable and reversible."[44] This allows for an appreciation that as power is dependent on resistance, wherever there is a relation of power it is possible to modify its hold.[45]

Reflecting upon Foucault's observations that to "recognise a discontinuity is never anything more than to register a problem that needs to be solved,"[46] it follows that a function of power is to draw out through contestation the possibility of a new way of understanding a particular problem that has been previously unmanageable. The discontinuity in this case is the expectation that legal mechanisms can be employed to inform indigenous self-determination claims in the form of owning and controlling knowledge use and dissemination. The problem is reconciling the competing values of indigenous sovereign claims and historical legal mediums of managing knowledge through styles of ownership and forms of property. Contested property values and colonial anxiety regarding the positioning of indigenous people

---

[41] L. Behrendt, *Achieving Social Justice: Indigenous rights and Australia's future* supra n.34 at 103.

[42] See: Michel Foucault's writing on power. In particular, "The Subject and Power" Dreyfus, H., and P. Rabinow (eds), *Michel Foucault: Between Structuralism and Hermeneutics* supra n.32; and more generally, *Discipline and Punish: The Birth of the Prison* (transl. Sheridan, A.) Allen Lane: London, 1977; *Language Counter-Memory and Practice: Selected Essays and Interviews* (transl. Bouchard, D.F and S. Simon) Cornell University Press: Ithica New York, 1977; *History of Sexuality, vol 1* (transl. Hurley, M.) Pantheon: New York, 1978; *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* Gordon. C. (ed), Pantheon: New York 1980; and, *Essential works of Michel Foucault 1954 – 1984: Power (vol 3)* Faubian, J. (ed), Penguin Books: London, 2000.

[43] M. Foucault, *Power/Knowledge*, ibid. , at 220.

[44] B. Hindess, *Discourses of Power: From Hobbes to Foucault* Blackwell Publishers: Cambridge, Massachusetts, 1996 at 97.

[45] M. Foucault, "The Subject and Power" supra n.42.

[46] M. Foucault, "Questions of Method" Burchell, G., C. Gordon, P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991 at 76.

within the Australian legal framework produces new ways of seeing that the problems being confronted here are elements in a continuum: both of legal engagement of 'new' knowledges within intellectual property law; and, indigenous demands to have cultural differences recognised within the colonial legal system. Power is a productive conduit in bringing these struggles to the fore. As Foucault states in *Discipline and Punish*;

> We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces; it produces reality; it produces domains of objects and rituals of truth.[47]

Hindess observes that primarily Foucault's interest in power is to "understand the means whereby the effects of such power are produced."[48] While Foucault's treatment of power shifted from that considered in *Discipline and Punish* to a broader conception of power in terms of biopolitics,[49] this allowed for Foucault's increasing attention to regimes of governing. With the treatment of government as a specific modality of the exercise of power, the interest becomes one of how relations of power produce "strategic games between liberties".[50] Thus biopower concerns an appreciation of the intersection of power, government, liberalism, and individual freedom and action, where all these elements contribute to how a particular problem manifests itself, and how strategies for managing the issue are contingent upon individual and governmental initiatives. In the present context, the biopolitical dimension of the challenge of indigenous intellectual property oscillates around the concept of justice.

The expectation of justice

Justice, within western political thinking, has a variant range of theoretical positions.[51] These positions engage differing conceptualisations of how justice functions within society and under

---

[47] M. Foucault, *Discipline and Punish*, supra n.42 at 194.

[48] B. Hindess, *Discourses of Power*, supra n.44 at 98.

[49] According to Foucault, biopolitics refers to the "endeavor begun in the eighteenth century, to rationalise the problems presented to governmental practice by the phenomena characteristic of a group of living human beings constituted as a population: health sanitation, birthrate, longevity, race ... In a system anxious to have the respect of legal subjects and to ensure the free enterprise of individuals, how can the population phenomenon with its specific effects and problems, be taken into account? On behalf of what, and according to what rules can it be managed?" M. Foucault,"The Birth of Biopolitics" Rabinow, P. (ed), *The Essential Works 1 Ethics: Subjectivity and Truth* Penguin Books: London, 1994 at 73. Consider also Hardt and Negri's interpretation of biopolitics in: M. Hardt and A. Negri, *Empire* Harvard University Press: Massachusetts and London, 2000.

[50] B. Hindess, supra n.44 at 99.

what circumstances it is employed. Will Kymlicka observes that while justice "mediates conflicts, it also tends to create conflicts."[52] Thus, the seemingly contradictory function and purpose of justice can both increase conflicts and enhance integral elements of a particular struggle, depending on the varying interpretations of justice and the scope of possibility in achieving it. In short, justice, as an ever-present ideal around which political and individual struggles are articulated, functions as a medium to understand the limitations of contemporary political practice, by which new strategies of intervention and application are imagined and enacted.

Austin Sarat and Thomas Kearns point to the way in which the concept of justice is woven through legal jurisprudence. Their point is to alleviate the abstraction of justice within elusive practices of law, and situate justice within an examination of law's everyday practice, spinning together the threads of political and social influence.[53] Through such an approach it is possible to realise that justice is relational to particular sites and as manifestations of "particular moments in time."[54] Thus political and social conditions underpin justice claims made by indigenous people. Contextualising the intersection of factors reveals the potential that makes justice possible, and the contradictions of practice that makes injustice inevitable. Intrinsically concepts of justice rely upon judgement, at which point it is possible to see variable influences: "for a justice system to be unjust, it doesn't need to convict the wrong individual; it only needs to judge in the wrong way."[55]

Whilst the concept of justice is embedded within a legal nexus, it is influenced by political factors and individual needs. As Sarat and Kearns observe, "like liberty and equality, justice is yet another notion at the very centre of Western political, social and legal thought whose

---

[51] Traditional political philosophies of justice entertain a range of positions including utilitarianism, liberal equality and libertarianism. Critiques of these positions include Marxism, communitarianism and feminism.

[52] W. Kymlicka, "Introduction" Kymlicka, W. (ed), *Justice in Political Philosophy (Vol II)* Edward Elgar Publishing: England, 1992 at xi. See also: J. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice: A Review of Research* 1.

[53] See: A. Sarat and T. Kearns (eds), *Justice and Injustice in Legal Theory* The University of Michigan Press: Michigan, 1996.

[54] Ibid. , at 1.

[55] M. Foucault, "The Proper Use of Criminals" Faubian, J.D. (ed), *The Essential Works of Foucault: Power (vol 3)* Penguin Books: London, 2001 at 429.

boundaries are notoriously indistinct, ill defined and incessantly contested."[56] Inevitably certain issues that come before the law arise as a struggle between competing sets of value and evoke concepts of justice and rights.[57] Indigenous demands for intellectual property protection are no different. In seeking to secure the protection of cultural material, questions of justice are raised, both in regards to atoning for past injustices of colonisation, and in recognising indigenous subjects as legal actors. Historical injustice however raises the concern for how deeply encoded the injustices that characterised the past are, and whether it is possible to transcend such historically informing limitations.[58] The political impetus for 'just' recognition of the differing interests articulated by indigenous people pushes legal frameworks to develop alternative avenues for achieving the possibility of justice. However, recognition of indigenous rights to cultural autonomy and the 'right' to control culturally specific knowledge that form a foundation to securing indigenous sovereignty and self-determination, inevitably depend upon their recognition within the Australian legal system. To what extent does the translation of justice into the context of intellectual property and indigenous knowledge allow for differing cultural positions and engagement? Is it possible for law and legal institutions to move beyond the limits of encoded injustice?

The turn to 'culture'

Austin Sarat and Jonothan Simon have suggested that the decline of ideology as an organising force in national and international relations has generated a turn to the 'cultural'.[59] Utilising the example of Samuel Huntington's "Clash of Civilisations"[60] they argue that 'culture' has come to "provide another vantage point from which to understand new polarities."[61] By this they

---

[56] A. Sarat and T. Kearns, *Justice and Injustice in Political Theory* supra n.53 at 2.

[57] In certain cases what is justice for one person is unjust for another. The debates on pornography and abortion have the capacity to engage strong justice claims on each (opposing) side. For a well developed examination of the issues of justice claims in pornography and abortion see: J. Cohen, "Freedom, Equality and Pornography" and F. Michelman, "Judicial Supremacy, the Concept of Law and the Sanctity of Life" (both in) Sarat, A., and T. Kearns (eds), *Justice and Injustice in Legal Theory* supra n.53.

[58] It is perhaps this jurisprudential concern that drove legal academic interest in the subject of 'indigenous knowledge' and cultural expression from the outset.

[59] A. Sarat and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship" (2001) 13(35) *Yale Journal of Law and the Humanities* 1 at 2.

[60] S. Huntington, "The Clash of Civilisations" (1993) 72 *Foreign Affairs* 22.

[61] A. Sarat and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship" supra n.59 at 3.

mean that through schisms in how difference is understood within society, culture has becomes constitutive of 'otherness'. New binaries are established that generate social divisions down cultural lines, regardless of the inescapably intercultural nature of human interaction in the twenty-first century. Moreover, 'culture' becomes a tool for identifying disparity and disjuncture within social groups; it becomes a means of justifying the identification of (often negative) social engagement.

Extending Sarat and Simon's observations to Australia, an element of this turn to the cultural is evident through governmental and policy directions that emphasise, for example, the *culture* of violence.[62] Further, this focus on the cultural as an explanation for individual and community behaviour can be demonstrated through the way that indigenous people, typified (and stereotyped) as living in 'remote' communities, are framed. One instance is in the increasing popularity in governmental reports and directives of talking about problems within Aboriginal communities to attribute these to the *culture* of alcohol and the *culture* of violence.[63] Aboriginal 'culture', as a cohesive unit, is used as an imaginary: to justify the intervention of the state in areas directly affecting the lives of Aboriginal people. This creates new polarities, the effects of which are twofold. Firstly Aboriginal 'culture' is reaffirmed as a bounded and distinct entity defined by a particular instance or problematic (for example alcoholism), denying the fluidity and hybridity of Aboriginal cultures. This simultaneously leads to the second effect wherein Aboriginal people are (re)positioned as dually responsible for the 'culture' of violence but, significantly, unable to act - 'victims of their own culture'. Thus problems are constructed as uniquely and identifiably 'Aboriginal' which therefore justifies the diverse actions of the state to act 'on behalf' of Aboriginal people.[64] The new polarity positions

---

[62] Note the history of viewing Aboriginality through the prism of criminality, where it was understood in terms of biology/pathology. In contemporary Australian society, it is now defined through the social and economic relations thus moving towards an emphasis on culture.

[63] See the Queensland Government Report *Meeting Challenges: Making Choices* April 2002. The Report identifies a range of reforms to address alcohol and violence in indigenous communities in Queensland. For recent consideration of the complexities of alcohol use in Aboriginal communities see in particular M. Brady, "The feasibility and acceptability of introducing brief intervention for alcohol misuses in urban Aboriginal medical service" (2002) 21 *Drug and Alcohol Review* 375; M. Brady, "Aborigines and Alcohol" (2002) 61(2) *Meanjin* 147; D. McKnight, *From Hunting to Drinking: the devastating effects of alcohol on an Australian Aboriginal community* Routledge: London, 2002.

[64] A significant recommendation coming out of the above report *Meeting Challenges: Making Choices* is closing community (alcohol) canteens. Here the underlying premise is that such intervention will ultimately be for the communities own good, that intervention is necessary by the state because of the inability of the community to

indigenous culture (in the singular) as forever 'other' despite histories and current realities of intercultural engagement.

This illustrates what Sarat and Simon describe as increasingly functioning within a liberal society, where the 'cultural' has become more than a "delivery vehicle."[65] That is, the turn to the cultural provides new ways of identifying and enacting strategies that discretely manage differing cultural groups and sets the problems as 'distinct'. Arguably the concept of cultural difference becomes a mechanism that can be deployed in particular circumstances: whether to hint at incommensurable relationships such as that between the state and indigenous people, thus justifying legislative inaction or to enhance the levels of state intervention in a particular context, for example the way in which ndigenous people lives are recorded, monitored and scrutinised. In this sense the "cultural has become a stand-in for interpretative grids that can no longer be utilised effectively."[66] The emphasis on 'culture' in turn produces a cyclical dependence on culture to explain difference.

Power provides the point at which culture and law are imbricated with each other, as law functions as a signifying practice that is always already implicated in processes of cultural production. Culture is deployed in law as both an explanatory tool, where cultural differences pose 'special' challenges to legal inclusivity, and a problematic, where law is challenged to accommodate difference – how law treats difference becomes of primary interest.[67]

---

make such a decision. As Noel Pearson, Team Leader of Cape York Partnerships and Geoff Clarke, Chairperson of ATSIC (until August 2003) have publicly stated, alcohol is a serious and extreme problem for indigenous people and communities. The governmental approach however raises complex issues and fosters disparity for the recommendation is posited as a solution to the indigenous 'culture' of alcohol. This constructs indigenous communities as a 'whole' and marginalises the reality that the same problems with alcohol exist in the other 'whole' non-indigenous communities, however these are perhaps not as open to the same forms of scrutiny and analysis. A governmental attempt at closing a non-indigenous 'canteen' would be very difficult to justify. This highlights the different ways that Aboriginal and Torres Strait Islander communities are imagined in relation to other non-indigenous communities and the historical functions of governmental intervention in Aboriginal and Torres Strait Islander affairs. Of course, there are many indigenous communities that are 'dry' through the governance (self-governance) of the community. One example is Yirrkala in northern Arnhem Land. See also: C. Charles, "Call for Government to consult with Aboriginal communities on alcohol policies" (2003) 6(1) *ALRM Focus* 2.

[65] A. Sarat and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship" supra n.59 at 3.

[66] Ibid. , at 3

[67] I will elaborate on how this proceeds in the following section "Law and Critique".

As Sarat and Simon acknowledge, "legal meaning is found and invented in the variety of locations and practices that comprise culture, and that those locations and practices are themselves encapsulated, though always incompletely, in legal forms, regulations and symbols."[68] The dynamism of law is a direct result of incomplete strategies for achieving justice. It is precisely the inability of law to function in an isolated cultural vacuity that reveals the possibility of the law to respond to new problems as they arise. The fluidity of legal frameworks is dependent upon tensions generated through intersections of culture and power. It is through these tensions and contests that new possibilities are generated.

The intersection of intellectual property and indigenous knowledge demonstrates the capacity of law is respond to change. However this is contingent upon law's own categories of identification and application and limits how new challenges like 'indigenous intellectual property' are understood.[69] Through critical legal theory, alternative ways of understanding the utility of law in multiple locales have emerged. It is to the history of this way of thinking about law that I now turn.

Law and Critique

The rethinking of law in regards to society and individuals has emerged at a steady pace over the latter part of the Twentieth Century.[70] As the Brazilian jurist Roberto Unger has written, the critical legal studies movement provided at its inception, new and productive ways of envisaging the connections between law and modern society as mutually informing. With

---

[68] A. Sarat and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship" supra n.60 at 21.

[69] Chapter Three will consider how intellectual property law has constructed indigenous knowledge as a legal category.

[70] See the following as a selection of texts that have engaged in the rethinking of law. For instance: A. Hunt, *The Sociological Movement in Law* Temple University Press: Philadelphia, 1978; A. Hunt, "The Critique of Law: What is 'Critical' about Critical Legal Studies" (1987) 14 *Journal of Law and Society* 5; D. Cornell, *The Philosophy of the Limit* Routledge: New York, 1991; A. Hunt and P. Fitzpatrick (eds), *Critical Legal Studies* Basil Blackwell: Oxford, 1987; R. Cotterrell, *The Politics of Jurisprudence* Butterworths, London, 1989; M. Sandel, *Liberalism and the Limits of Justice* Cambridge University Press: Cambridge, 1982; M. Kelman, *A Guide to Critical Legal Studies* Harvard University Press: Harvard, 1987; G. Frug, "A Critical Theory of Law" (1989) 1 *Legal Education Review* 43; N. Purvis, "Critical Legal Studies in Public International Law" (1991) 32 *Harvard International Law Journal* 98; M. Davies, *Delimiting the Law: Postmodernism and the Politics of Law* Pluto Press: London and Chicago, 1996; M. Davies, *Asking the Law Question* The Law Book Company: Sydney, 1994; M. Thornton, "Portia lost in the grove of academe wondering

influence from social theory and political philosophy, legal scholars considered afresh the interactive nature of law.[71]

Critical attention to law and legal institutions grew from the dissatisfaction with understanding law as a regime of abstract rules.[72] Mark Tushnet describes critical legal studies as occupying a political location more than being an intellectual movement.[73] In this regard it is attention to the relations between law and politics that initially provided the frame for an analysis of the indeterminacy of legal thought and legal outcomes. Critical legal thinking has been instrumental in exploring how law, in all its functions, is deeply imbued in a social nexus, and that it is this nexus that provides the law with fluidity and changeability.

Critical legal theory

In *The Critical Legal Studies Movement*, Unger explains that a fundamental critique of law was directed against legal formalism and objectivism.[74] Critical reflection upon differences between 'law making and law application' exposed the extent of thought where formalism and objectivism were assumed in each process. Following Unger, formalism can be understood as a "commitment to, and therefore a belief in the possibility of, a method of legal justification that contrasts with open ended disputes about the basic terms of social life ... [t]his formalism holds impersonal purposes, policies and principles to be indispensable components of legal reasoning."[75] In other words, it is only through a rational, undemonstrative and apolitical framework of analysis that legal dogma is possible. Objectivism insists on the authority of legal material – cases, statutes and accepted legal rationale – as they display "always imperfectly, an

---

what to do about legal education" Inaugural Lecture: La Trobe University Legal Studies, 3 June 1991; J. Raz *The Authority of Law* Clarendon Press: Oxford, 1979.

[71] R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* The Free Press, McMillan Publishers: London and New York, 1976, at 49.

[72] See for instance J. Austin, *The Province of Jurisprudence Determined* and *Lectures on Jurisprudence* (3 vols) John Murray: London, 1861-3; H.L.A. Hart, *The Concept of Law* Clarendon Press: Oxford, 1961; R. Dworkin, *Law's Empire* Fontana Press: London, 1986.

[73] M. Tushnet, "Critical Legal Studies: A political history" (1991) 100 *The Yale Law Journal* 1515.

[74] R. Unger, *The Critical Legal Studies Movement* Harvard University Press: Cambridge, Massachusetts, 1986. As Bottomly and Parker have noted, "Formalism in the law has been debated at least since the American Realist Movement of the 1920's" Bottomley S., and S. Parker (eds) *Law in Context* (second edition) The Federation Press: Sydney, 1997 at 53.

[75] R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* supra n.71 at 1.

intelligible moral order."[76] Both legal formalism and objectivism circulate in a space beyond politics in an abstract and rationally self-contained prism.

These characteristics of law came under increased scrutiny in the Twentieth Century, particularly for their inability to provide an accurate account of legal process and function. The fuzzy boundaries between law, individuals and practice, heightened the necessity for reflection that made links between legal processes and society that was not above or beyond politics. Both the 'law-in-context movement' and critical legal jurisprudence challenged the belief in the naturalness, efficiency and fairness of the structure of the legal profession. It revealed the hidden characteristics and political life of legal reasoning. Hilary Charlesworth has noted that these observations were essential to critical legal thinking because the reasoning "assumes first, that the law on a particular issue is clear and pre-existing, and can be identified through an objective process; second, that the facts relevant to the determination of the legal dispute can be settled by objective means ...; and third that a proper result in a particular case is achieved through the routine application of the objectively determined law to the equally objective facts."[77]

As well as arguing against the contingency of the law and highlighting the impossibility of objectivism, critical legal theory also questioned how it was then, that the legitimating and constitutive operation of law, on all levels of social and individual engagement, could be seen to be natural.[78] The progression of this line of inquiry revealed that underlying particular legal doctrines rested categories of legal analysis that distributed particular and subtle effects. This led to observations that the law, positioned within a political location, was partial, contingent and specific. Law responded to politics and politics enhanced the position of law, particularly in situated and localised centres of conflict. Critical legal theory unmasked the 'universalism' of traditional legal jurisprudence, rejecting the premise that law exists in a political and social

---

[76] Ibid. , at 2. See also the debate about the relationship between law and morals, in particular, M. Sandel (ed), *Liberalism and its Critics* New York University Press: New York, 1984. Also see: A. Young and A. Sarat (eds), (1994) 3(3) *Beyond Criticism: Law Power and Ethics, Social and Legal Studies* 1.

[77] H. Charlesworth, "Critical Legal Education" (1989) 5 *Australian Journal of Law and Society* 27 at 30.

[78] M. Tushnet, "Critical Legal Studies: A Political History" supra n.73 at 1526. Also see: J. Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 *Cardozo Law Review* 919.

vacuum. Sir Anthony Mason, Chief Justice of Australia, confirmed this view at an inauguration for the Faculty of Law at The University of Wollongong where he stated:

> [To] treat the law as a discrete set of principles in a vacuum and without a context is to misconceive its dynamic and ubiquitous nature and, more importantly, to undervalue or even to overlook the manner in which it contributes to the fundamental fabric of modern society.[79]

In the 1980s and 1990s legal thinking developed a critique of law that was difficult for mainstream jurisprudence and legal teaching to absorb.[80] Nonetheless, sympathetic to the broader general critique of law, dedicated readings of feminism and law,[81] race and law,[82] and law and discourse[83] endured, drawing upon political theories of feminism, critical race theory and postmodernism.[84] This new interdisciplinary scholarship has revealed contingencies and limits within the law that were previously undisclosed and hidden. Rethinking the construction of categories of law with regard to differing subjectivities has produced new and diverse ways of thinking about law, legal process and legal power that reflect upon the complexity of legal engagement. Through this thinking indigenous claims to self-determination and human rights have taken on a new resonance, displacing the mythology of modern law as autonomous, distinct, unified and internally coherent.[85] Understanding relations between law and power have become pressing, necessitating an appreciation of the ways in which law shapes and influences how people think and act.

---

[79] Sir Anthony Mason, Chief Justice of Australia, 19 February 1991. Quoted in Bottomley, S., and S. Parker (eds), *Law in Context* supra n.74 at 2.

[80] The antagonism against critical legal scholars highlights the threat that such ideas posed to the establishment. In Australia, the controversy was contextualised at the Law Faculty of Macquarie University. See *Report of the Committee to Review Australian Law Schools, A Discipline Assessment.* Commonwealth Tertiary Education Commission: Australian Government Publishing Service, 1987. In America, critical legal theorists were sacked and denied tenure. For an account of this see M. Tushnet, "Critical Legal Studies." supra n.73 at 1530-1534.

[81] For several feminist critiques challenging traditional jurisprudence see: C. Smart, *Feminism and the Power of Law* Routledge: London, 1989; C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* Harvard University Press: America, 1987; T. S. Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* Oxford University Press: Oxford, 1987; M. Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford University Press: London and Sydney, 1990.

[82] For race and law see: P. Williams, *The Alchemy of Race and Rights.* Harvard University Press: Cambridge and Massachusetts, 1991; C. Cunneen and T. Libesman, *Indigenous People and the Law in Australia.* Butterworths: Sydney, 1995; P. Fitzpatrick, "Racism and the Innocence of Law" Fitzpatrick, P., and A. Hunt (eds), *Critical Legal Studies* Basil Blackwell: Oxford, 1991.

[83] For law and discourse: R. Cotterrall, *Law's Community: Legal Theory in Sociological Perspective*, Clarendon Press: Oxford, 1995; H. Stacey, "Legal Discourse and the Feminist Political Economy: Moving Beyond Sameness/Difference" (1996) 6 *The Australian Feminist Law Journal* 115.

[84] See for example: P. Fitzpatrick, *The Mythology of Modern Law* Routledge: London and New York, 1992.

[85] Ibid., from 10.

Law and indigenous subjects

I argued earlier that one of the difficulties in reconciling indigenous interests in intellectual property is overcoming encoded (legal) practices of injustice directed against indigenous people. Critical attention to the subject positions that indigenous people occupy within the law (and within society) has been crucial in locating and identifying modes of historical injustice and attempts at engaging with the amalgam ways through which law treats difference.[86]

Chris Cuneen has argued that it is impossible to consider indigenous people as subjects of western law without also recognising the historical circumstances of colonisation to which indigenous people have been subjected. This includes the way in which legal precedent has established Anglo-Australian jurisdiction over indigenous people.[87] While arguments by indigenous people fundamentally question the legitimacy of the jurisdiction of Australian courts, inevitably leading to opposing sovereignty claims, the continuing over-representation of indigenous people in the criminal justice system reflects the power of legal apparatus to exert its effects upon indigenous subjects.[88]

The 1967 referendum where full citizenship rights were established for Aboriginal and Torres Strait Islander people implied the "application of the principle of equality before the law."[89] This included dismantling the discriminatory legislation and policies directed towards

---

[86] For critical readings that examine the position of indigenous people within the law see generally: C. Cuneen, "Judicial Racism" (1992) 2(58) *Aboriginal Law Bulletin* 9; P. Dodson, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of the Inquiry into Underlying Issues in Western Australia* Australian Government Printing Service: Canberra, 1991; P. Hanks and B. Keon-Cohen, *Aborigines and the Law* George Allen and Unwin: North Sydney, 1984; G. Bird, G. Martin and J. Nielson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996; R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 *The American Journal of International Law* 369; I. Watson, "Indigenous Peoples' Law-Ways: Survival against the Colonial State" (1997) 8 *Australian Feminist Law Journal* 39; E. Johnson, M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish Publishing: Sydney, 1997; C. Cuneen and T. Libesman, *Indigenous People and the Law in Australia* Butterworths: Australia, 1995.

[87] C. Cuneen, *Conflicts, Politics and Crime* Allen and Unwin: Sydney, 2001 at 5.

[88] In Australia most indigenous people are in custody for minor offences. See: J. Walker and D. McDonald, *The Over Representation of Indigenous Peoples in Custody in Australia* Australian Institute of Criminology – Issues Paper 47, August 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner *Fifth Report* HREOC, 1997; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* J.S. McMillan Publishing Sydney 2001; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* J.S. McMillan Publishing Sydney 2002.

[89] C. Cuneen , supra n.87 at 7.

indigenous people during the prolonged period of colonisation. However, as Cuneen and others have argued, the colonial optic for viewing and managing indigenous people through the legal system has not changed.[90] The significant *Royal Commission into Aboriginal Deaths in Custody*[91] highlighted the severe failings of the Australian legal system to respond to cultural differences and recognise the effects of colonial power structures on colonised people.[92] As Irene Watson has explained;

> The over representation of Nungas within the criminal justice system and Nunga deaths in custody is the Australian 'indigenous experience' of colonialism. The story was told during the 1980s for the first time to international audiences...The Australian government established the inquiry in an attempt to clear its image of being a racist nation that still practiced genocide at the end of the twentieth century. However the final report addressed Indigenous issues within the confines of internal colonialism, and fundamental issues of international law and self-determination remain unresolved. And at the conclusion of the inquiry Indigenous people were still dying in custody – as they are today.[93]

The way in which indigenous people have been constructed and produced before the Anglo-Australian legal system is a product of social and political influence in which the law is integrally engaged.[94] The utility in recognising such a construction is to draw attention to the extent that politics is embedded within the law: that it does not function in an isolated sphere. The recent push to recognise the 'special' circumstances under which indigenous subjects enter the legal discourse has prompted consideration of the extent to which law can accommodate difference. Here indigenous culture is deployed in the law as a problematic – there is a real question about the accommodation of difference in law, for instance that indigenous subjects can make for differing legal subjectivities. This is quite a particular appreciation that must also

---

[90] Cuneen has identified this as neo-colonialism, supra n.87 at 10. See also: G. Bird, *'The Civilising Mission': Race and the Construction of Crime* Contemporary Legal Issues No.4, Monash University, 1987; J. Purdy, "British Common Law and Colonised Peoples: Studies in Trinidad and Western Australia" Bird, G., G. Martin and J. Nielson (eds), *Majah: Indigenous Peoples and the Law* supra n.86 ; J. Purdy, "Postcolonialism: The Emperor's New Clothes?" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* The University of Michigan Press: Michigan, 1999.

[91] *Royal Commission into Aboriginal Deaths in Custody – National Report* AGPS: Canberra, 1991. Also see: *Royal Commission into Aboriginal Deaths in Custody – Interim Report* AGPS: Canberra, 1988.

[92] See: P. Dodson, *The Wentworth Lecture 2000 – Beyond the Mourning Gate: Dealing with Unfinished Business* AIATSIS: Canberra, 2000; M. Langton, *Too much sorry business: the report of the Aboriginal Issues Unit of the Northern Territory* AGPS: Canberra, 1991; H. Wootten, "Deaths in Custody" Paper delivered at the Coronial Inquest Seminar, Sydney University Law School, 1992; T. Rowse, "The Royal Commission, ATSIC and self-determination: A review of the Royal Commission into Aboriginal Deaths in Custody" (1992) 27(3) *Australian Journal of Social Issues* 153; M. Langton, "Dumb politics wins the day" (2000) *Land Rights Queensland* 11.

[93] I. Watson, "Nungas in the Nineties" supra n.35 at 3.

be mindful of the ways that indigenous people can also make for similar legal subjects owing to inter-cultural experience and relations. With the overturning of the myth of *terra nullius* through the *Mabo* decision in 1992, new dilemmas in accommodating indigenous difference have arisen, specifically in terms of recognising indigenous proprietary rights to land. As the High Court found that such rights continued to exist after colonisation and British sovereignty,[95] questions of land ownership and native title have formed the frontier for illustrating how law treats difference presented through indigenous legal subjects.

At this point in my analysis it is illuminating to turn to an examination of property which is used by individual subjects to challenge (once revered) legal frameworks. It demonstrates the tension between legal regimes and individual subjects. Property provides a vantage point to consider a number of intersecting elements including the traditions of western philosophy of property and rights in property; legal frameworks through which social relations between people are engaged; and, how different indigenous perceptions of property disrupt traditional western jurisprudence. The consideration of how such difference is treated in 'real' property terms is crucial to developing an appreciation of the implications in intellectual property. It is worth remembering that the ways in which 'real' property justifies a right in property differs considerably to that in intellectual property.[96] However property remains a principle of social organisation. The real value in understanding the concept of property is not only to demonstrate how law accommodates differing indigenous conceptualisations of property rights, but also extends and enhances its own categories and boundaries of identification and classification.

The implications of property in intellectual property

> Property is nothing but a basis of expectation: the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. There is no image, no painting, no visible trait, which

---

[94] See for example: J. Clarke, "Law and Race: The position of Indigenous people" Bottomley, S., and S. Parker (eds), *Law and Context* (second edition) supra n.74.

[95] *Mabo v Queensland* [No.2] (1992) 175 CLR 1.

[96] The way in which intellectual property law justifies a right in property will be examined in the following chapter.

> can express the relation that constitutes property. It is not material, it is metaphysical, it is a mere conception of the mind.[97]

The language of property underpins the way that indigenous knowledge and expression has come to be positioned within the law. This is not only in regard to 'intellectual' property but also material cultural products.[98] Discussions that pinpoint notions of cultural 'ownership' and 'theft' denote exclusive relations of private property. O'Malley's earlier observation regarding the significant moment when social issues are positioned for remedy through legal means, raises questions about the influence of the law in managing particular sites of discontinuity, for instance indigenous property rights and makes for challenging legal positions.

It could be argued that western law is preoccupied with property rights and their protection.[99] Importantly in Australia, *Mabo* (1992) addressed in part the injustice of colonisation (expropriating property) and the historical legal denial of indigenous customary rights. It is significant that this watershed was achieved through a case specifically centred on property. For the indigenous claimants, western property law, or 'real' property, provided a vehicle to argue for a set of rights, one of which could be understood through this legal jurisdiction – ownership of land.[100] Together, the politics of law and the justice claims of the law, expressed in terms of expectation following Bentham, create a tension in dealing with indigenous property. For indigenous property is not confined to a claim restricted by real property law but incorporates other categories of law such as intellectual property.[101]

---

[97] J. Bentham, 'Chapter VIII – Of Property" reprinted in Macpherson, C.B (ed), *Property: Mainstream and Critical Positions* University of Toronto Press: Toronto, 1978 at 51.

[98] Debate about material cultural objects has informed intellectual property discussions in Australia.

[99] See: K. Bowrey "The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture" supra n. 28; P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications Ltd: London, 2002.

[100] See: N. Loos and K. Mabo, *Edward Koiki Mabo: his life and struggle for land rights* Queensland University Press: St Lucia, 1996

[101] Recent writing in Australia has focused on the relationship between cultural knowledge, intellectual property and native title. See: K. Howden, "Indigenous Traditional Knowledge and Native Title" (2001) 24(1) *UNSW Law Journal* 60; M. Davis, "Law, Anthropology and the Recognition of Indigenous Cultural Systems" (2001) 11 *Law and Anthropology* 298; J. Anderson, "The difficulties of recognising cultural knowledge in native title following the *Miriuwung Gajerrong* decision" Conference Paper, *The Native Title Conference 2003: Native Title on the Ground* 4 June 2003.

Both modern 'real' property law and modern intellectual property law took significant form in the Eighteenth and Nineteenth Centuries.[102] Both experienced profound difficulties in securing agreement on foundations and principles, despite various statutory reforms. Challenged in terms of addressing their own cultural specificity and history, it is unsurprising that both fields of law are stretched by indigenous 'real property' and 'intellectual property' claims. In both spheres, western notions of property have come under increased scrutiny. As Bryan explains property is "an expression of social relationships because it organises people with respect to each other and their material environment."[103] The power of property is that it resides simultaneously within the law and outside it. Where indigenous people have adopted the property discourse to challenge precepts of *terra nullius*, property demarcates competing political interests: in the instance of *Mabo* between the Murray Islanders and the Commonwealth Government. It also points to the ways in which, inescapably, property mediates the world in which people interact and the possible relationships between individuals, legal and governmental institutions. Property is an essential organising principle around which liberal ideals of ownership and possession are circulated and authorised.

The concept of property has clearly evolved over time. However the modern political conception of property owes a considerable debt to John Locke and it is therefore important to briefly sketch his approach to property.[104] Locke's thinking on property was instrumental in shaping how successors such as Blackstone,[105] Bentham,[106] Hohfeld[107] and Reich[108]

---

[102] See: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999; D. Leiberman, *The Province of Legislature Determined: Legal Theory in Eighteenth Century Britain* Cambridge University Press: Cambridge, 2002; P. Drahos, *A Philosophy of Intellectual Property* Dartmouth Press; Sydney 1996; J. Litman, "The Public Domain" (1990) 39(4) *Emory Law Journal* 965 at 970-972. Also see: K. Bowrey, *Copyright and Culture: Australian Law and Controversies* (forthcoming 2003) at [4.4].

[103] B. Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13 *Can. J. L. & Juris.* 3.

[104] For more detailed approaches see: R. Ashcraft, *John Locke: Critical Assessments* Routledge: London, 1991; C. Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth Century Britain* University of California Press: Berkeley, 1988; J. Dunn, *The Political Thought of John Locke* Cambridge University Press: Cambridge, 1969.

[105] W. Blackstone, *Commentaries on the Laws of England* Facsimile of the First Edition (1765-1769) Chicago University Press: Chicago, 1979.

[106] J. Bentham, *The Theory of Legislation* Ogden, C. K (ed), Keagan Paul Publishers: London, 1931. This text draws from Bentham's *Principles of the Civil Code* which was first published in French in 1802 and in English in 1830.

[107] W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Juridical Reasoning" (1913) 23 *Yale Law Journal* 16. See also: J.E. Penner, "The Bundle of Rights Picture of Property" (1996) 43 *UCLA Law Review* 711.

[108] C. Reich, "The New Property" (1964) 73 *Yale Law Journal* 733. Reich's work focused on the function of property and the changing social relations effecting the construction of property.

reinterpreted and reinscribed concepts that have become central tenets in modern liberal states.

John Locke's labour theory justified private property in a unique and somewhat oblique way which explains the subsequent contrary interpretations of his theory of natural rights.[109] Locke's concern with property is identified as existing in *Two Treatises of Government.*[110] The explanatory passage in 'Of Property' commonly cited to clearly locate this position is;

> Though the Earth, and all inferior Creatures be Common to all Men, yet every Man has a *Property* of his own *Person.* This nobody has any right to but himself. The *Labour* of his body and the *Work* of his hands, we may say are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own and thereby makes it his *Property.*[111]

Locke's justification of private property rests upon three key principles that can be elicited from this passage. Firstly, that "every Man has a *Property* of his *Person*", and that "*Labour* of his body and *Work* of his hands" are therefore part of this property of the person. Secondly, mixing individual labour with the state of nature, produces something new which will be a person's property. Thirdly, it is labour that adds the value to land (the common state of nature), making it worth something, rather than nothing; as Locke asserts "for it is labour indeed that puts the difference of value on everything".[112] The key factor in this argument is that man's labour is an exertion of action exercised upon on object or thing previously inactive, for example while fruit grows it has to be picked and therefore labour exerted to become the property of the picker. Labour must be used to cultivate, extract and to make value out of something that would otherwise be worthless. Locke's natural rights theory assumes action of human endeavour in the contexts of the inactive state of nature: 'commons' provided by God for the use of 'Man'. Further, as property is thus imbued with the qualities of

---

[109] I will consider this shortly, however for interests sake compare J. Tully, *A Discourse on Property: John Locke and his adversaries* Cambridge University: Cambridge, 1980, and C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* Clarendon Press: Oxford, 1962. Also see: P. Drahos, *A Philosophy of Intellectual Property* supra n.102 for a discussion of these dissenting views.

[110] *Two Treatises of Government* was first published in 1689. J. Locke, *Two Treatises of Government* (reprint) J.M. Dent & Sons Ltd: London, 1990.

[111] Ibid. , at 136.

[112] Ibid. , at 136.

a natural right, it does not emanate from social relations but exists "prior to the social order."[113]

Notably, Locke's conception of natural rights requires specific interpretation of 'labour' and the definition of the labourer entitled to property. There is an implicit hierarchy within Locke's natural rights theory – not only relating to who is a legitimate 'person' but also what the act of labour and cultivation entails. The presumption is that cultivation is closely tied to notions of civilisation, and that labour 'improves' the land and enables progress to be sustained. This is demonstrated most aptly later in his account where Locke he makes the distinction between labour and cultivation and the wastelands of America untilled (in the European sense) by the Indians: the logic extends via the implication that there is no property held by the Indians in America because there has been no labour exerted to cultivate and improve the land, especially given that: "Nature [has] furnished as liberally as any other peoples with the material of plenty".[114]

It can be misleading to only consider this brief part of Locke's work to understand his natural rights theory of property.[115] For Locke's theory of property was also positioned within a larger discourse about government – in the justification of the English Revolution of 1688 and to invalidate the doctrine of absolute monarchy presented by Robert Filmer in *Patriarcha: or The Natural Order of Kings* (1680).[116] That selective readings from Locke's work have been so influential is curious – even more so if we then consider how Locke's natural rights theory has been used to authorise property in intellectual property, a connection that Locke himself never made as he did not support a perpetual right of authors in a work.[117]

---

[113] M. Rose, *Authors and Owners: The Invention of Copyright* Harvard University Press: Cambridge, Massachusetts, 1993 at 6.

[114] J. Locke, *Two Treatises of Government*, supra n.110 at 136.

[115] K. Bowrey, *Don't Fence Me In: The Many Histories of Copyright*, Doctor of Juridical Studies, University of Sydney, 1994 (unpublished). Peter Drahos also notes that it is too simple a view of the natural law tradition in which Locke worked to depict Locke as a "labour theorist of property." P. Drahos, *A Philosophy of Intellectual Property* supra n.102 at 48. James Tully argues that Locke's philosophy is deeply embedded within a religious context that is impossible to ignore in understanding Locke's conception of nature, law and the commons. See J. Tully, *A Discourse on Property: John Locke and his adversaries* Cambridge University: Cambridge, 1980.

[116] W. S. Carpenter, "Introduction" *Two Treatises of Government* supra n.110.

[117] K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.102 at [2.2].

Locke's labour theory has been taken to authorise the natural right of ownership in a person's intellectual labour, as though this is a pre-existing right. Indeed for the purposes of our current context, various arguments for indigenous intellectual property also echo a natural rights thesis. The key here is that such arguments presume that property is naturally occurring, without exploration of the notion as a social, political and governmental principle of organisation, and thus a construct growing from western liberal thought and traditions. This is also extended by way of example, to international arenas that refer to indigenous intellectual property as a human right and thus a 'natural right'.[118]

Whilst Lockean labour theory is discussed in some accounts of intellectual property law,[119] other prominent histories trace no such derivations.[120] This is interesting considering that a justification for modern intellectual property law, argued initially in the context of the literary property debates of the Eighteenth Century, is that all labouring authors have a natural pre-existing private property right to the text. Drahos notes, that those who "use Locke's theory tend to concentrate on labour and the mixing metaphor."[121] The position of 'labour' to justify property in abstract objects is significant but raises the question of boundaries, as Drahos asks: "Labour creates the property right, but what identifies the object of that property right?"[122]

William Blackstone, an English common law theorist in the Eighteenth Century, adapted and modified Locke's position on rights and labour in the particular context of the literary property debates of the Eighteenth Century. To this end, Blackstone adopted a natural rights approach to ideas and knowledge, arguing the common law right to literary property arose through the

---

[118] E.I. Daes, *Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous People*, presented by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and President of the Working Group on Indigenous Populations, Geneva, 45th Session, E/CN.4/Sub.2/1993/28.

[119] See for instance: P. Drahos, *A Philosophy of Intellectual Property* supra n.102; J. Hughes, "The Philosophy of Intellectual Property, (1988) 77 *The Georgetown Law Journal* 287; M. Rose, *Authors and Owners* supra n.115; D. Saunders, *Authorship and Copyright* Routledge: London, 1992; B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.102; E. Hettinger, "Justifying Intellectual Property" (1989) 18(1) *Philosophy and Public Affairs* 31.

[120] See for instance: B. Kaplan, *An Unhurried View of Copyright* Columbia University Press: New York, 1967; R. Patterson, Copyright in Historical Perspective Vandebilt University Press: Nashville, 1968; V. Bonham-Carter, *Authors By Profession, Volume One and Two* The Society of Authors: London, 1978; J. Feather, *The Provincial Book Trade in Eighteenth Century England* Cambridge University Press: Cambridge, 1985.

[121] P. Drahos, *A Philosophy of Intellectual Property* supra n.102 at 48.

[122] Ibid. , at 51.

natural labour exerted in the production of the expression. Whilst Locke did not support a perpetual common law right in an expression because of the unlikely "essential representation of an identity in a work"[123] nevertheless, in intellectual property circles Blackstone's interpretation has become synonymous with Locke's position and emphasises the rationality imbued in the identification of property relationships.[124]

By the end of the Nineteenth Century Blackstone's conception of property originally equating to absolute dominion over things, was replaced by a newly defined form of property. The features that characterised this new form of property were that it had been de-physicalised, consisting not of rights over things but of any valuable right.[125] Value thus became the key to identifications of property, serving both the tangible realm of property and intangible property. Value, although relying on arbitrary judgement, linked formulations of property and secured judicial autonomy. Importantly measuring value was increasingly tied to the market and this meant that new forms of property could be constituted and protected.[126]

Whilst Blackstone embraced and reinterpreted Locke's account of natural rights theory and its justification for property, intermingling it with common law theories of entitlements,[127] Jeremy Bentham, as Blackstone's predecessor, rejected natural law and natural rights. Subsequently Bentham's influence in dismissing any claim to 'naturally' occurring rights in law, resonate in considerations of the relationship, generated by property, as being between persons, rather than between a person and a thing. However, scorning natural rights and claiming to have replaced them with utility (or the greatest happiness of the greatest number), Bentham still rested the property right on labour. Bentham presents a case that relations of property are constitutive of social relations. Property then is not a pre-existing concept of law, rather it is a

---

[123] K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.102 at [2].
[124] M. Rose, *Authors and Owners* supra n.31 at 5.
[125] K. Vandervelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 *Buffalo Law Review* 325.
[126] I will consider value as a marker of intellectual property in the following chapter.
[127] K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.102 at [2].

socially constructed concept embodying questions of power and social relations. Thus property is not objectively definable or identifiable.[128]

The law provides the boundaries whereby the expectation of property is constructed and disseminated. So while it may appear as though property is a medium for social organisation, it is regulated through the legal parameters that govern expectation. Bentham's position that 'property is nothing but an expectation' is significant because expectation is fundamentally developed through human relations. It is not a pre-existing concept. What is integral to expectation is the extent to which such anticipation has been generated. The grounds for expectation need to be first established so that there is a sense of probability. This makes claims of entitlement possible. The expectation arises because of other concerns such as value and rights. But expectation is also positioned within a field where it is legitimate to have expectation to begin with, that there is some form of precedent for such expectation. If property is nothing more than expectation, then this is contingent upon the legal avenues that uphold and produce this 'expectation'. Expectation then can be shaped and moulded so that what is expected is not beyond delivery.

Bentham's shift makes possible a different linkage between real property and intangible property to that assumed by Blackstone. Rather than treat the literary property expression as a kind of pre-occupied land, Bentham's approach obliterates the physicality of property altogether, relocating the gaze to the classificatory distinctions and boundaries produced by law itself. Law produces the legal subject/object. This is later understood by Charles Reich to also involve ceding an authority of the marketplace, to the extent that the law itself does practically engage 'expectation'.[129]

The economic transformation of property is an equally important element of contemporary social relations and new forms of expectation. Thus property relations become imbued with an intent to generate revenue, where governmental influences readily demarcate political domains

---

[128] See: C. Reich "The New Property" (1964) 73*Yale Law Journal* 733. Reich's argument focuses on the function of property and the changing social relations effecting the construction of property.

[129] Thus overcoming the dead hand of legal 'tradition'. (This was understood as Bentham's critique of Blackstone.) See: K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.102 at [1-2].

of interaction. The economic utility of property generates new forms of expectation that the law regulates. Questions of value inform property relations and influence how law identifies a distinction between exclusive possession and economic value. Kevin Gray has argued that seeing property as generating a power relationship significantly increases the range of interests wherein property can be claimed.[130] As the limits on property are not fixed, judicial process through the courts have the power to "create property."[131] The direct implication for intellectual property is that if there are no natural limits, and the politics of determining the boundaries of property are acknowledged, how can indigenous claims be denied?

At this point it is useful to return to the articulation by indigenous people of *rights* to ownership of cultural material. At the very least, there is an expectation being played out in the context of indigenous intellectual property, drawing upon the contemporary context of property rights and value. Indigenous claims within the framework of law are made because an expectation has been developed that the law can respond to indigenous people's claims to property, both tangible and intangible. Indigenous rights to cultural property evoke an expectation, not only in recognising a proprietary right, but also on a more abstract level of expecting justice.

Noel Pearson, Team Leader of Cape York Partnerships, has recognised the utility and possibility for action wherein legal frameworks can be adopted for purposeful strategies of recognition. [132] As he states, indigenous people "need to be realistic about the following: first about the content and the nature of the tools which are available to us; second about what these tools can positively achieve. They are limited tools and to optimise results we must use them wisely and skilfully."[133] What Pearson indicates here is the possibility of utilising law as a strategic vehicle, through which indigenous interests might be advanced. Certainly then re-imagining a concept of property so that it can be adapted to differing conceptions of

---

[130] K. Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 307. See also: M. Radin, *Reinterpreting property* University of Chicago Press: Chicago, 1993; C. Harris, "Whiteness as Property" (1993) 106(8) *Harvard Law Review* 1709 at 1730.

[131] K. Gray, "Property in Thin Air" Ibid. , at 307.

[132] See also: C. O'Faircheallaigh, *Negotiating Major Agreements: The 'Cape York Model'* Discussion Research Paper No. 11, AIATSIS: Canberra, 2000.

[133] N. Pearson, "Aboriginal law and colonial law since Mabo" Fletcher, C. (ed), *Aboriginal Self-determination in Australia* Aboriginal Studies Press: Canberra, 1994, at 158.

ownership, and relations between people, is a necessary element in voicing an expectation of law. In this context, to guarantee justice through recognising the legitimate rights and interests indigenous people have in controlling cultural material. This strategy contests the language of the law and the power of property within it. Legal claims for property rights become a powerful vehicle in advancing indigenous self-determination claims. Claims for property ownership in intangible material raise an agenda and present an expectation for legal action.

There is a legitimate point to critical work that reveals how such phrasing necessarily reduces indigenous concepts of ownership and property to a western framework thus limiting an understanding of historical and contemporary pressures and contexts. For example Michael Dodson argues that;

> Certainly neither the Copyright Act, nor any other acts are able to provide for the complexities and subtleties of the ownership of indigenous art. The roles and obligations of our artists, the relationships between the artist as an individual and as a member of the society in which he or she works finds little accommodation within the existing legal framework.[134]

In a similar way Michael Blakeney has argued that;

> Indeed a major problem, which has been identified in analysing traditional knowledge and cultural expression in conventional intellectual property terms is the observation that 'indigenous people do not view their heritage in terms of property at all...but in terms of community and individual responsibility.'[135]

Both Dodson and Blakeney emphasise how the existing legislative framework fails to take account of the diversity of positions held by indigenous people in relation to expressions of intangible cultural material. Both suggest that a property discourse reduces indigenous concepts and community values. In reflecting upon these difficulties, Valerie Kerruish has observed that;

> Private property within a historical and cultural context that transforms such property, at the level of normative discourse into rights of persons (moral subjects, citizens) is a mode of social organisation which has exhausted its emancipatory potential.[136]

---

[134] M. Dodson, "Indigenous peoples and intellectual property rights" *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney, 1995 at 31.

[135] M. Blakeney, "Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous People: An Australian Perspective" (1997) 6 *European Intellectual Property Review* 298 at 300.

[136] V. Kerruish, "Reconciliation, Property and Rights" Christodoulidis, E., and S. Veitch (eds), *Lethe's Law: Justice Law and Ethics in Reconciliation* Hart Publishing: Oxford, 2001 at 195.

Kerruish's point is that it is capital that protects its power as property at all costs, therefore there can be no emancipatory power for the poor. But the conflict in the context of indigenous intellectual property is of a different nature. There is not a direct confrontation with capital versus labour. In fact it is the potential of indigenous cultural expressions as capital that encourages the law to engage with the subject. This links back precisely to Pearson's point that there is emancipatory potential within the law, because there is nowhere else to go: the law can provide realistic expectations of what is possible, and not in a disciplinary arena of pre-ordained values imposed on indigenous people. The opportunity to expose the limits of the law comes from within the dominant system. When indigenous people make the claim that intellectual property laws should protect their cultural integrity, the challenge has been set for the law in a familiar framework, for the law moderates difference when presented through the guise of its own categories and frameworks. Other pressures, such as political influence, also force changes in recognition and hence the scope of the law. To change the terms of the debate necessitates initially beginning on these terms. The assumption that indigenous people are unable or unwilling to employ such strategic engagement misunderstands the ways by which multiple resistances to circulations of power can be or are imagined and enacted by individuals as well as providing political impetus.

The primacy of law and legal frameworks in mediating struggles is of fundamental interest here. In the context of property, law functions as a location where challenging positions are circulated. This is not only in regard to competing sovereignty claims but also contested value systems and intellectual traditions regarding knowledge management and circulation. It seems at least in intellectual property, incommensurable differences in knowledge production, ownership and protection are the familiar arguments that constitute the circularity of contemporary debate. However, if we keep in mind the relationship of dependency between knowledge and power, what is revealed is how the subject of indigenous intellectual property produces its own frameworks of understanding and regimes of truth. Further, these are not only the apparatus of the coloniser, but also the tool adopted and modified by indigenous people and consequently a feature of indigenous governance. For whilst 'property' and 'ownership might not fully encompass indigenous aspirations and perceptions, they provide a terminology to elevate indigenous interests in this area. This is the (optimistic) spirit within

which this work interprets the emerging discourse on indigenous intellectual property – where law is a site of action and of contestation – mindful of the limits of what may be possible.

Governance and Law

Systems of governing, articulated through Foucault's notion of governmentality, are applicable to this context. What follows is not an overview of this work.[137] Instead, by explaining fundamental elements that establish governing subjects and regimes of truth, my intention is to develop an appreciation of how rationalities of governing are imbued within the production of the category of indigenous intellectual property. Through law, spaces and enclosures are established where governmental objectives can be established, met and invented. Contrary to Foucault's assertion that "within the perspective of government, law is not what is important"[138] the argument is that it is – for law functions as a technology of government, directing what is possible, and determining with what level of expectation. Law is one mechanism involved in making complex social and political issues intelligible and amenable to intervention.

The following paragraph illuminates the 'art of governing' that is pertinent to this work.

> Government is defined as a right manner of disposing of things so as to lead not to the form of common good, as the jurists' texts would have said, but an end which is 'convenient' for each of the things that are to be governed ... There are a whole series of specific finalities, then, which become the objective of government as such. In order to achieve these various finalities, things must be disposed – and this term dispose is important because with sovereignty the instrument that allowed it to achieve its aim – that is to say obedience to the laws – was the law itself; law and sovereignty were absolutely inseparable. On the contrary with government it is a question not of imposing law on men, but disposing of things: that is to say of employing tactics rather

---

[137] There are a number of texts that provide comprehensive explanations of Foucault's work on governmentality. See in particular: C. Gordon "Governmental rationality: an introduction" Burchell, G., C. Gordon and P. Miller (eds) *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991; M. Dean, *Governmentality: Power and Rule in Modern Society* Sage Publications: London, 1999; N. Rose and P. Miller, "Political power beyond the state: problematics of government" (1992) 43(2) *British Journal of Sociology* 172; N. Rose, *Powers of Freedom: Reframing Political Thought* Cambridge University Press: Cambridge, 1999; B. Hindess *Discourses of Power* supra n.45; B. Hindess and M. Dean, "Introduction" Hindess, B., and M. Dean (eds), *Governing in Australia: Studies in Contemporary Rationalities of Government* Cambridge University Press: Cambridge, 1998.

[138] M. Foucault, "Governmentality" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991at 95.

> than laws, and even using laws themselves as tactics – to arrange things in such a way that, through a certain number of means, such and such an ends may be achieved.[139]

Strategies of governing are always haphazard and incomplete because governing subjects, as individuals, transform problems into new and diverse manifestations and deny the possibility of an entrenched and over-determined disciplinary state. But without varying strategies of legal intervention and legal bureaucracy, the disposition of things, for instance managing the cultural expression of indigenous people, would remain beyond the capacity of governmental rationality. The fact that indigenous people have legal expectations, in terms of justice and legal security, mean that law is intrinsically engaged in both mediating rights and managing how those rights are interpreted and produced governmentally.

Situating government rationality

Over twenty years have passed since Michel Foucault gave his lectures at the Collège de France on the theme of government[140] thus initiating a new mode of inquiry into the complex relations of governing, from the state to the individual. Foucault's influence has changed the way in which governing can be conceptualised, as his mode of inquiry moved away from conventional studies of political philosophy and political sociology. Instead Foucault focused on how specific and diverse passages of power that traverse the state, not fixed in one particular locale, impact upon an individual's way of acting. In this sense the problems of governance refer to the many ways in which government attempts to direct and shape the activities and conduct of individuals.[141] To govern is to act upon the actions of others.[142]

Thus the study of governmentality is not the study of the actual operation of systems of rule. Contemporary analytics of governmentality do not seek to definitively define rule. Instead such studies find their loci in what Foucault referred to as 'the conduct of conduct' or as Gordon has explained the form of activity aiming to shape, guide or direct the conduct of some person

---

[139] Ibid. , at 95.

[140] Foucault gave the lecture on 'governmentality' in February 1978. For an account of the social events surrounding this new theme and the attention to liberalism within the series of 1978 lectures see: J. Miller, *The Passion of Michel Foucault* Harper Collins Publishers: London, 1994 from 310.

[141] For an illuminating examination of this process see: J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* Yale University Press: New Haven, 1998.

[142] N. Rose, *Powers of Freedom: Reframing Political Thought* supra n.137 at 4.

or persons.[143] Key questions include how particular regimes of truth emerge and how such regimes are authorised and effect subsequent relations of power. Foucault was specifically concerned with the ensemble of mechanisms that enable the exercise of a very complex and specific form of power. Such mechanisms are controlled through institutions, procedures and analyses; certain calculations that work together to allow the exercise of biopolitical power. Foucault notes that the intersections of problems of governmentality and techniques of government constitute the only real space for struggle and contestation of the political.[144] He concludes his lecture on government by stating:

> ... since it is the tactics of government which make possible the continual definition and redefinition of what is within the competency of the State and what is not ...; thus the State can only be understood in its survival and its limits on the basis of the general tactics of governmentality.[145]

The analytics of governing open up a space for critical thought.[146] In conceptualising the function of government in respect to the varying rationalities of governing, the different schemas produced highlight the multiple and varying activities of government. In this way government cannot be seen as a monolithic unit, rather it is a complex that utilises varying techniques, strategies and programmes in order to enhance rule. Mitchell Dean explains that government is understood as a term not only directed at systems of authority and how these

---

[143] C. Gordon, "Governmental rationality: an introduction" supra n. 137 at 4.

[144] N. Rose, *Powers of Freedom: Reframing Political Thought* supra n.137 from 19.

[145] M. Foucault, "Governmentality" supra n.138 at 104.

[146] This is evident in the range of studies employing Foucault's thesis that have emerged in the last twenty years. For a selection of these see for example: P. Miller and N. Rose, "Governing economic life" (1990) 19(1) *Economy and Society* 1; G. Procacci, "Social economy and the government of poverty" Burchell, G., C. Gordon, and P. Miller, (eds) *The Foucault Effect: Studies in Governmentality* supra n. 138; P. Pasquino, "Political theory of war and peace: Foucault and the history modern political theory" (1992) 22(1) *Economy and Society* 77; K. Stenson, "Community policing as a governmental technology" (1993) 22(3) *Economy and Society* 373; N. Rose, "Government, authority and expertise in advanced liberalism" (1993) 22(3) *Economy and Society* 283; D. Scott, "Colonial Governmentality" (1995) 43 *Social Text* 191; A. Hunt, "Governing the city: liberalism and early modes of governance" Barry, A., T. Osborne and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of governance* University of Chicago Press: Chicago, 1996; F. Pearce and S. Tombs, "Hegemony, risk and governance: 'social regulation' and the American chemical industry" (1996) 25(3) *Economy and Society* 428; P. O'Malley, "Risk and responsibility" Barry, A., T. Osborne and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of governance* op cit; D. Chakrabarty, "Modernity and Ethnicity in India" Bennett, D. (ed), *Multicultural States: Rethinking Difference and Identity* Routledge, London, 1998; D. Otto, "Subalterity and International Law: The Problems of Global Community and the Incommensurability of Difference" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* The University of Michigan Press: Michigan, 1999; P. O'Malley, "Uncertain subjects: risks, liberalism and contract" (2000) 29(4) *Economy and Society* 460; C. Novas and N. Rose, "Genetic risk and the birth of the somatic individual" (2000) 29(4) *Economy and Society* 485; U. Kalpagam, "Colonial governmentality and the 'economy'" (2000) 29(3) *Economy and Society* 418; A. Agrawal, "The Regulatory

govern "abstract entities such as states and populations"[147] but most importantly "how we govern ourselves."[148] The key to such thinking is the connection between the ways in which abstract structures, for example prisons or economies are managed, directly or indirectly impinge on the ways in which individuals engage and interact with such structures and in turn each other. "To analyse government is to analyse those practices that try to shape, sculpt, mobilize and work through the choices, desires, aspirations, needs, wants, lifestyles of individuals and groups."[149] In the context of indigenous knowledge and intellectual property, it is the concomitant levels of engagement, from legal and bureaucratic structures, to diverse histories and effects of colonisation, to practical and postcolonial indigenous engagement with the law, that invites this form of governmental analysis. This is in order to appreciate the interconnected levels through which the subject of indigenous intellectual property is produced. Governmentality provides a theoretical framework that links legal authority, politics and individual agency to questions of governance.

For the purposes of this body of work it is useful to appreciate one specific element of governmental rationality: programmes of government. Programmes function as the link between theoretical concerns or thinking and practical intentions and applications. As Dean explains, programmes "are explicit, planned attempts to transform regimes of practices by reorienting them to specific ends or investing them with particular purposes."[150] For instance if 'indigenous intellectual property' is not a naturally occurring category in law, certain questions regarding its production immediately arise and through the lens of programmes of government particular linkages that were otherwise obscured from view are revealed.[151] Peter Miller and Nikolas Rose explain that contemporary government is characterised by its programmatic form.

> Governmentality is programmatic not so much in the proliferation of more or less explicit programmes for informing reality –governmental reports, white papers ...[i]t is also programmatic in that it is characterised by an eternal optimism that a domain or

---

Community: Decentralisation and the Environment in the Van Panchayats (Forest Councils) of Kumaon, India" (2001) 21(3) *Mountain Research and Development* 208.

[147] M. Dean, *Governmentality: Power and Rule in Modern Society* supra n.137 at 12.

[148] Ibid. , at 4.

[149] Ibid. , at 4.

[150] Ibid. , at 211.

[151] I will expand upon this in Chapter Four.

> society could be administered better or more effectively, that reality is, in some way or other programmable.[152]

For Miller and Rose programmes are understood as strategic ways of making reality thinkable and practicable. In this sense they provide a means for governmental action: they help render a field open to inquiry and intervention. Importantly they "lay claim to a particular knowledge of the sphere or problem to be addressed."[153] Programmes exercise a calculated form of power over an attempt to legitimate a specific area of focus, for example concepts of indigenous knowledge in intellectual property law. In this sense they provide "intellectual machinery"[154] for government by subjecting the reality to processes of disciplined thought. Foucault describes programmes in the following way.

> The rational schemas of the prison, the hospital or the asylum...are explicit programmes; we are dealing with sets of calculated, reasoned prescriptions in terms of which institutions are meant to be re-organised, spaces arranged, behaviours regulated. If they have an ideality, it is that of a programming left in an abeyance, not that of a general but hidden meaning.[155]

Programmes are attempts to make the objects of government thinkable in such a way that their problems appear open to diagnosis, prescription and cure by calculating and normalising intervention.[156] Thus, the temporary suspension of programmes of government, such as those that Foucault refers to, enables the objects of the programmatic attention to be subject to surveillance and examination. Programmes are "idealized schema for the ordering of social and economic life."[157]

> Programmes constitute a space within which the objectives of government are elaborated, and where plans to implement them are dreamed up. But the technologies which seek to operate on activities and processes produce their own difficulties, fail to function as intended.[158]

In identifying an area or problem to be scrutinised, programmes lend themselves to a fluid dynamic; that is, they respond to their own failure. As the intellectual machinery of government programmes help identify a field of concern and develop strategies for

---

[152] P. Miller and N. Rose, "Governing economic life" supra n.146 at 4.
[153] C. Gordon, "Governmental rationality: an introduction" supra n.137 at 18.
[154] N. Rose and P. Miller, "Political Power Beyond the State: problematics of government" supra n.137 at 181.
[155] M. Foucault, "Questions of Method" supra n.46 at 80.
[156] P. Miller and N. Rose, 'Governing economic life" supra n.146 at 13.
[157] Ibid. , at 14.
[158] Ibid. , at 14.

approaching the problem.[159] But in constructing solutions to the problem, and rendering reality open to intervention, programmes always miss important elements of reality that shift and transform the problem, namely individuals and political factors. The failure of programmes of government is perpetual: just as a problem is named it moves location or changes form through innovative individual action or political impetus. Thus the cycle of failure allows the programme to change with the problem through reinvention. The paradox is that the failure alerts the programme to new ways of imagining success.

The term 'failure' however does not adequately capture the dynamism of programmes. The inapplicability of programmes is a direct consequence of resistance to rule.[160] For the "real always insists on a form of resistance to programming".[161] As resistance to rule underpins the possibilities of governing, individual agency is a significant factor in how programmes are directed and resisted. Further, programmes are not univocal nor overly coherent or systematic.[162] They are instead messy and inconsistent where the solutions for one programme tend to be the problems for another.[163]

O'Malley, Weir and Shearing point out that there is a tendency in governmentality literature to see "programmes as if they are written by the one hand, rather than multi-vocal, internally contested and thus in a sense always in change and often internally contradictory."[164] This makes it difficult for government to identify the intersection of elements that construct and produce the problem and hence limits the way a particular concern is treated.

If we apply these thoughts regarding programmes of government to the problem of indigenous intellectual property, the phrase in itself represents an attempt to solve the problem. Moreover it also directs attention to the way in which broader concerns for indigenous rights are positioned within a legal discourse. The response of government, through

---

[159] Language is integral to this process – I will be exploring the importance of language in making a field intelligible and amenable to governing practices and programmes in Chapter Four.
[160] P. O'Malley, "Indigenous governance" Hindess, B., and M. Dean (eds) *Governing Australia* supra n.137 at 157.
[161] P. Miller and N. Rose, "Governing Economic Life" supra n.146 at 14.
[162] P. O'Malley, L. Weir and C. Shearing, "Governmentality, criticism, politics" (1997) 26(4) *Economy and Society* 501.
[163] P. Miller and N. Rose, "Governing Economic Life" supra n.146 at 19.

various reports, has been to identify how theoretical concerns for the protection of indigenous knowledge could be practically solved though legal structures or at least be open to legal remedy. The legal solution however does not speak to the complexity of the issue and indeed attempts to provide legal solutions in effect generate further problems because a legal solution cannot mediate the extent of issues of power imbued within this subject.[165] Thus we find the fluidity of programmes of government functioning in a constant state as an attempt to securely capture the subject of indigenous knowledge and intellectual property. However, as I have already discussed, securely capturing a subject is cyclical, for individuals will change the dynamism of the problem, thus modifying how outcomes can be applied. In this context, the colonial anxiety regarding relations between indigenous and non-indigenous subjects also disrupts traditional programmatic forms and regimes of government.

Colonial forms of governing

In governmentality literature there has been a tendency to focus on liberal, neo-liberal and advanced liberal rationalities of governance, at the expense of an appreciation of the manifold ways in which colonial forms of administration have produced unique articulations within these rationalities.[166] This is in respect to differing practices of rule expressed and impressed upon colonial and colonised subjects.[167] This directly engages various levels of politics, which

---

[164] P. O'Malley, L. Weir and C. Shearing, "Governmentality, criticism, politics" supra n.162 at 513.

[165] This is also demonstrated in the issues of cultural appropriation that I discussed at this beginning of this Chapter.

[166] For several works that focus upon forms of liberalism see: B. Hindess, "Liberalism, socialism and democracy: variations on a governmental theme" (1993) 22(3) *Economy and Society* 300; N. Rose, "Governing 'advanced' liberal democracies" Barry, A., T. Osborne, and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of government* University of Chicago Press: Chicago, 1996; G. Burchell, "Liberal government and techniques of the self" Barry, A., T. Osborne, and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of government* op cit; T. Osborne, "Liberalism, neo-liberalism and the liberal profession of medicine" (1993) 22(3) *Economy and Society* 345. The presumption made in the focus on liberalism and neo-liberal societies is that individuals exercise choice through their freedom. The problem here is the varying degrees of freedom that colonial and colonised subjects had and have. There can be no general assumption about the freedom of subjects within liberal states.

[167] For thoughtful considerations of this complexity see: A. Stoler, *Race and the Education of Desire: Foucault's* History of Sexuality *and the Colonial Order of Things* Duke University Press: Durham and London, 1995; and more recently, A. Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* University of California Press: Berkeley and London, 2002. Rose explains "As important perhaps, for the new arts of government were the ways in which colonial government problematised those who would rule, and invented strategies for the ethical formation of the coloniser; these would shape the very nature of expert administration and the moral formation of civil servants and experts at the centres of empire themselves. Given the geographical distance between the colonies and the metropolitan European centres, government was inescapably 'at a distance' in a rather literal

also remain distanced from contemporary governmentality studies as politics always produces unpredictable relays of power

In *Governing Australia: Studies in Contemporary Rationalities of Government*[168] Barry Hindess and Mitchell Dean focus on the diverse ways in which "attempts to regulate the conduct of the Australian population" are attempted through "the collectivities, groups and organisations which it incorporates."[169] Government modifies its way of acting to affect the individual depending on a variety of particularities produced through the governing context. This makes for irregularities in agenda, strategy and direction. Irregularities in governing can come in the form of subject, context or mechanisms. Each irregularity requires the exercise of new and productive strategies for managing subjects within any given context.

The Australian governing context differs to that of Europe owing to its distinct history as a colonial country.[170] The population of Australia was made up of subjects occupying variant positions ranging from colonial subjects (with varying states of freedom) to colonised subjects, with distinct strategies of governing enacted upon these positions.[171] In contrast to liberal and neoliberal accounts of governmentality, in colonial states colonised subjects were not 'free' in the sense that the power to rule was conceded. This observation destabilises the emphasis in liberal political theories on individual freedom and rational action.[172] In Australia, it is

---

sense. That is to say that to govern the colonies it was necessary to shape and regulate the practices of self-government of those who would govern: the colonial administrators and the colonists themselves." N. Rose, *Powers of Freedom: Reframing political thought* supra n.137 at 111. In a recent article, R. Hogg and K. Carrington point out that until the controversies of the High Court native title cases of *Mabo* and *Wik*, "many aspects of the legal and governmental regulation of the Australian interior had been a neglected aspect of governance and socio-legal politics." R. Hogg and K. Carrington, "Governing Rural Australia: Land Space and Race" Wickham, G., and G. Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* Hart Publishing: Oxford, 2001 at 43.

[168] B. Hindess, and M. Dean, *Governing Australia: Studies in Contemporary Rationalities of Government* supra n.137.

[169] Ibid. , at 12.

[170] Considerable literature has been dedicated to the relations produced through colonialism. See for instance F. Fanon, *The Wretched of the Earth* Penguin Books: Middlesex, 1961/1967; F. Fanon, *Black Skin, White Masks* (transl. C.L. Markmann) MacGibbon and Kee: London, 1968; A. Memmi, *The Coloniser and the Colonised* Beacon Press: Boston, 1965; G.C. Spivak, "Can the Subaltern Speak?" Nelson, C., and L. Grossberg (eds), *Marxism and the Interpretation of Culture* Macmillan Education: Bassingstoke, 1988; E. Said, *Orientalism* Penguin Books, 1978.

[171] More recently this has come to include the governing of refugees who are curiously presented in law as non-subjects as are their Australian borne children.

[172] Arguably, in the context of intellectual property, individual agency fitted with the expectations and social production of subjects at the time of the *Berne Convention on the Protection of Literary and Artistic Works* (1886) but not the contemporary political/legal landscape following the Second World War. See generally: D. Ivison, *Postcolonial Liberalism* Cambridge University Press: Cambridge, 2002.

important to recognise the differing ways in which indigenous people have been governed and the discrete postcolonial politics this has generated as a direct consequence of colonial forms of administration.

I have already suggested how the differing position of indigenous people in Australia is demonstrated through continued claims for self-determination. These claims have found particular resonance in a post-colonial era, where the explicit hegemony of colonial states lies in abeyance. Following the Second World War, an international order repositioned the rights and interests of indigenous people.[173] The extent to which the international interests in the rights of indigenous people informs the national context remains fluid.[174] For instance, an interest in protecting indigenous ('traditional') knowledge is firmly on international agenda.[175] This parallels the globalisation of intellectual property rights themselves, considered briefly in Chapter One, where 'traditional' knowledge is included in global attempts to rationalise and regulate markets in information.[176] Decolonisation has given international initiatives, such as those by WIPO, broader legitimacy.[177] Such postcolonial politics within the international arena means that indigenous rights and interests are engaged within these fora.[178] Indigenous concerns provide an external critique of law and also function within the legal categories,

---

[173] See as an instance of indigenous concerns reaching international fora, International Labour Organisation Convention 107 *Protection and Integration of Indigenous and of Tribal and other semi-Tribal populations in Independent Countries* 1957. See also: D. Otto, "Subalterity and International Law: The Problems of Global Community and the Incommenurability of Difference" supra n.146.

[174] I will be considering the globalisation of indigenous rights in intellectual property in Chapter Eight.

[175] See the interest in 'traditional knowledge' by the World Intellectual Property Organisation *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* Geneva, 2001; World Intellectual Property Organisation Secretariat, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Preliminary Systematic Analysis of National Experiences with the Legal Protection and Expressions of Folklore*, Fourth Session, Geneva, 2002. The interest in 'traditional knowledge is also evidenced by UNESCO *Convention on Biological Diversity* 1992.

[176] For a consideration of the globalisation of intellectual property see: M. Ryan, "WIPO and the International Organisation of Intellectual Property" *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* Brookings Institute: Washington, D.C., 1998; P. Gerhardt, "Why Law Making for Global Intellectual Property is Unbalanced" (2000) 22(7) *European Intellectual Property Review* 309; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* Palgrave McMillan: Hampshire 2002; S. Fitzpatrick, "Prospect of Further Copyright Harmonisation" (2003) 25(5) *European Intellectual Property Review* 215; C. May, *A Global Political Economy of Intellectual Property Rights* Routledge: London and New York, 2000.

[177] K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.102 at [4.5].

[178] See: D.E. Long, "Democratising Globalisation: Practicing the Policies of Cultural Inclusion" (2002) 10 *Cardozo J. Int'l and Comp. L.* 217.

influencing the redefinition of rationales of intellectual property protection.[179] The elevation of indigenous rights and concerns within these international contexts highlights the changing position of indigenous subjects both nationally and internationally.

The meanings of postcolonialism remain contested[180] and certainly whether Australia ever attained a position that could be described as postcolonial is debatable.[181] Thus the international and national attention to indigenous concerns belies a colonial/postcolonial tension.[182] In a country where the past history in relation to indigenous people is, and remains, relatively unresolved through a constant state of forgetting (and dispute),[183] attention to the forms of colonial governing that position indigenous people as colonised subjects rather than colonial subjects, makes for the appreciation of the different approaches and placements of indigenous people within national/state frameworks.

Understanding the effects of colonial governmentality requires the recognition of the different relations extant between the population and the state in a colonial context. In an article discussing the distinct form of colonial governing enacted in India, Kalpagam explains that;

---

[179] F.W. Grosheide, "General Introduction" Grosheide, F.W., and J.J. Brinkoff (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

[180] See: G.C. Spivak, *The Post-Colonial Critic: Interviews, strategies, dialogues* Harasym, S. (ed), Routledge: London, 1990; V. Mishra and B. Hodge, "What is Post(-)colonialism" (1991) 5(3) *Textual Practice* 399; A. McClintock, "The Angel of Progress: Pitfalls of the Term 'Post-colonialism'" (1992) *Social Text* 1; S. Hall, "When was the postcolonial? Thinking at the Limit" Chambers, I., and L. Curti (eds), *The Post-Colonial Question: Common Skies, Divided Horizons* Routledge: London, 1996.

[181] There is a curious limit in literature from Australian indigenous academics focusing on postcolonial subject positions. It is more usually a position that is generated from outside Australia, with the popularity of postcolonial studies remaining relatively off shore. In addition, those who label Australia as postcolonial are usually based in Europe. The question remains as to what extent could it be argued that Australia is a postcolonial nation? See also: D. Ivison, *Postcolonial Liberalism*, supra n.172.

[182] See also: J. Purdy, "Postcolonialism: The Emperor's New Clothes?" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* The University of Michigan: Michigan, 1999; C. Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples" Darian-Smith, E., and Fitzpatrick, P. (eds), *Laws of the Postcolonial* The University of Michigan: Michigan, 1999.

[183] See the recent furore over the publication of K. Windschuttle *The Fabrication of Australian History* Macleay Press: Sydney 2002. See for example: "Landscapes in Blood" *Sydney Morning Herald* 14 December, 2002; "Historians in bitter plagarism dispute" *The Age*, 16 December, 2002; R. Mann "In Denial" (2002) 1 *The Quarterly Essay* 1; B. Attwood and S.G Foster (eds), *Frontier Conflict: The Australian Experience* National Museum of Australia, Canberra, 2003. Also consider the current parliamentary review of the Australian National Museum, where the interpretation of Australia's colonial history, in particular frontier conflict, has been at the forefront of concern, "Look back in anger" *Sydney Morning Herald* January 4, 2003.

> Colonial governmentality was not merely governance from a distance, but was fundamentally one in which governance by the modern State sought to supplant earlier forms of pre-modern rule through the autonomous rationality of the government. In doing so the colonial state not only had to contend with extant cognitive frameworks and the associated practices of rendering the terrain of governance intelligible and readable in a manner suited to the political rationalities of earlier forms of pre-modern rule, but also encountered the difficulties of introducing an universalistic framework of knowledge into a colonial order of difference.[184]

Thus, looking at the production of indigenous knowledge within an intellectual property framework must be mindful of the distinct differences of subjectivity, and the way in which colonial rule was secured through the documentation and classifications of knowledge.[185] Indeed this is never far from my mind in considerations of how the production of indigenous intellectual property generates particular narratives of indigenous knowledge. Intellectual property effectively functions as a means of managing and normalising indigenous forms of knowledge expression. However, whilst the colonial project may be a continual one, I am also aware of the manifold ways in which indigenous people disrupt this hegemony, in particular through the assertion of rights to the law, and expectations of justice. Partly the changing global (and postcolonial) environment makes this disruption possible. Nevertheless, I am still interested in the ways that the production of indigenous knowledge in intellectual property law produces certain regimes of truth, and how these circulate to inform what is possible within this field and what intervention is required. The comments of Kapalagam again have resonance;

> The colonial rulers likewise saw themselves as superior to the colonized subjects. This in turn meant that the modern colonial State sought to introduce new, albeit superior forms of knowledge regimes as part of its governance. It was assumed that such knowledge regimes that were constitutive of the technologies of governance were universally applicable. The colonial order of difference was thus fitted into universalistic frameworks of knowledge through a process of normalizing the colonial terrain.[186]

The question remains to what extent are contemporary laws of intellectual property an attempt to normalise indigenous cultural expression, thereby making more knowable and hence more

---

[184] U. Kalpagam, "Colonial governmentality and the economy" supra n.146 at 419.

[185] This has been examined in the context of India. See: B. Cohen, *Colonialism and its forms of knowledge* Princetown University Press: New Jersey, 1996; R. Guha, *Dominance without Hegemony: History and Power in Colonial India* Harvard University Press: Cambridge, 1997; D. Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* Princeton University Press: New Jersey, 2000. See also: A. Agrawal, "Indigenous knowledge and the politics of classification" (2002) 54(3) *International Social Science Journal* 283.

[186] U. Kalpagam, "Colonial governmentality and the economy" supra n.146 at 420.

manageable indigenous subjects? Further, to what extent is contemporary international interest in indigenous subjects an extension of colonial governmentality, justified by our new 'postcolonial' global intellectual property system?

Foucault and law

Directly applying Foucault's theories to legal positions is problematic not least because law was never a central focus of his work. In many instances where Foucault discussed law he had a propensity to ignore tensions between legal institutions and governments and within legal institutions (for example higher and lower courts). In other words, Foucault's treatment of law narrows the dimensions and complexities under which law operates.[187] As I have already discussed, in a general sense law resists definition and processes that seek to accurately explain its purpose and mechanisms of function, for law does not exist in the singular but rather in multiple networks of legal influence, that are often hidden yet integral elements of social relations. This is what makes law a key element for successful regimes of governing.

Dean argues that the relationship between liberalism and law is the most revealing element of liberalism.[188] By this Dean means that liberalism transforms the purpose of law, so that its function as an "instrument of the exercise of sovereignty becomes linked to a complex set of disciplinary and governmental apparatuses."[189] Following Dean's argument, studying law through regimes of governing does not mean questioning the general meaning of law, its purpose or role, but instead examining the role of law within practices concerned with ways of directing and managing issues directly effecting the population. This means considering questions about the "role [law] is assigned within specific programmes of government, the technology it is part of, and the forms of subject it proposes to work through and upon."[190]

---

[187] For an extended account of the problems of Foucault's understanding of law and legal processes see generally A. Hunt and G. Wickham, *Foucault and Law. Towards a sociology of law as governance* Pluto Press: London and Colorado, 1994.

[188] M. Dean, *Governmentality: Power and Rule in Modern Society* supra n.137 at 118.

[189] Ibid. , at 118.

[190] Ibid. , at 118.

This perspective of law moves beyond Foucault's dominant thesis of law that equates law with discipline.[191] Foucault linked law with negative conceptions of power as he used a view of law that conventionally imagines law as rules and sanctions.[192] Whilst trying to destabilise this perception of law, Foucault failed to engage in a sophisticated appreciation of the dynamic of law and how it manages to be pervasive throughout society without relying upon explicit punitive disciplinary models. Law is illustrative for Foucault, and not of central concern. This has meant however, that there has been a tendency for theorists to mistake the (productive) power of law, like the dynamism of power I considered earlier in this chapter, which generates struggle and contestation which in turn, creates possibilities of action.

At one point Foucault makes note of the potential implications of law within governing practices. He states;

> Law is neither the truth of power, nor its alibi. It is an instrument of power which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other non-juridical mechanisms.[193]

It is important to recognise that while law is all encompassing within a modern liberal democracy, it distributes its effects without necessarily being seen to do so. It functions within a network of regulatory mechanisms, but its purpose is not to subjugate in totality.[194] Law is dispersed through a variety of mechanisms and functions, through complicated techniques of power and governance. What law establishes are governable spaces. These spaces, utilising a whole array of techniques, impress upon the individual preferred ways of acting, and are reinforced through providing access to legal remedies and sanctions. This is not to say that resistances are not encountered, rather these resistances become embodied in the way that the legal solutions are imagined, fostering interconnection between relations of law, individuals and governance.

---

[191] This view of Foucault's thesis can be found in particular in *Discipline and Punish: The Birth of the Prison* Penguin Books: London, 1991; *The History of Sexuality: Volume 1* Penguin Books: London, 1990; and, "Two Lectures" *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* (transl. Gordon, C.) Pantheon: New York 1980.

[192] For two specific examples see *The History of Sexuality* ibid., at 90-91; and, "Two Lectures" ibid. , at 102.

[193] M. Foucault, "Powers and strategies" *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* (transl. Gordon, C.) Pantheon: New York 1980 at 141.

[194] For a consideration of regulatory mechanisms see: J. Donzelot, *The Policing of Families* Pantheon Books: New York, 1979; and, J. Donzelot, "The mobilisation of society" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Law can establish governable spaces by laying claim to a particular problem. For example the field of indigenous intellectual property is informed by law and legal processes but this does not mean that law alone directs the solution or outcome. For while the complexity of the problem is mediated through the law, other discourses and discussants are intricately engaged. For instance, as Miller and Rose observe;

> The enactment of legislation is a powerful resource in the creation of centres, to the extent that law translates aspects of a governmental programme into mechanisms that establish, constrain or empower certain agents or entities and set some of the key terms of their deliberations.[195]

Law, in establishing and directing a space, need not govern it directly.[196] Management can be left to other influences that paradoxically add further layers of complexity. Teasing these layers apart reveals that the problem of indigenous intellectual property is not only managed as a legal concern. Rather, the point of interest here is how precisely it has been produced as a legal issue and how this sets key expressions that structure the given terms of the debate. Law can identify and locate the problem at inception, or indeed others can identify the problem as 'legal' in nature. However, other strategies including the intersection of politics and social influence, usually come into play.[197]

Duncan Ivison has recently observed that the deep challenge confronting indigenous people in liberal democracies is how indigenous rights are "particularly vulnerable to co-option or ... 'domestication' under the guise of legitimate recognition."[198] This means that indigenous claims fall somewhere between "exclusion and assimilation."[199] Ivison questions the translation of indigenous rights and claims into the legal framework, where he locates the significant problem faced by liberalism, that of acknowledging and accommodating indigenous differences. Similarily Christine Helliwell and Barry Hindess have recently critiqued an assumption made by

---

[195] P. Miller and N. Rose, "Political power beyond the State: problematics of government" supra n.137 at 189.

[196] Criminal law provides an instance where a discrete space is directly managed and monitored through legal governance.

[197] In Chapter Four will expand upon how law establishes governable spaces with particular reference to two governmental reports. I will focus initially on the problem of how to protect indigenous 'folklore' and, consequently, the remaking this problem as how intellectual property law facilitates protection for indigenous cultural expression.

[198] D. Ivison, *Postcolonial Liberalism* supra n.172 at 136.

[199] Ibid. , at 136.

James Tully that liberal constitutionalism inevitably results in an 'empire of uniformity'.[200] That is, "a regime in which a uniform set of laws and conventions for their interpretation is thought to apply to all members of the population in question."[201] Instead Helliwell and Hindess counter that liberal strategies of governing have always "been willing to acknowledge cultural difference" but the point is how "liberal constitutionalism *treats* such difference."[202] In other words, the main struggle for liberal democracies, born through colonial styles of governing, is how to deal with the differences presented to it by colonised subjects, indigenous people. For while strategies promoting individual liberty and democratic structures are translated into indigenous frameworks, indigenous people still retain the autonomy to adopt and utilise these frameworks for themselves and in doing so modify the purpose and aims of governing.[203]

However, despite this there still exists within the superstructures of liberal democracy, elitist assumptions regarding the populations to be governed.[204] This affects how cultural difference is treated, and how it is accommodated. Further there is a presumption, from a colonial standpoint, of what form of government is best for a people.[205] This reveals a tension that characterises both how indigenous people utilise legal frameworks and how indigenous people are made subjects of the law.

---

[200] C. Helliwell and B. Hindess, "The 'Empire of Uniformity' and the Government of Subject Peoples" (2002) 6 (1&2) *Cultural Values* 139.

[201] Ibid. , 140.

[202] Ibid. , 140 [emphasis in text].

[203] For example ATSIC, the body charged with facilitating forms of self-determination for indigenous people is based on a democratic model replete with elections for Council members though with conduct overseen and reviewed by the Minster for Aboriginal and Torres Strait Islander Affairs.

[204] C. Helliwell and B. Hindess, "The 'Empire of Uniformity' and the Government of Subject Peoples" supra n.200 at 146.

[205] The question is at what point can liberal ideals accommodate Indigenous interests? This makes Indigenous rights mediated rights, where the full legitimacy of Indigenous peoples is entertained, but only adopted within the given structures. Will Kymlicka would argue that it is possible within a liberal tradition to make a special provision for 'minority rights'. See W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* Clarendon Press: Oxford, 1995. However J. Tully would argue that this in itself is discriminatory, given that these 'minority rights' are only ever effected within the framework of liberalism. See: J. Tully, *Strange multiplicity: Constitutionalism in an age of diversity* Cambridge University Press: Cambridge, 1995; J. Tully, "The Struggles of Indigenous Peoples for Freedom" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000.

The utility of governmentality

Recently attention has been directed to the potential limits and difficulties extant within theories of governmentality.[206] In one instance this has been identified as the way that much governmentality literature "disdains politics."[207] That is, avoids sustained engagement with political processes that configure and re-imagine how governing can be and is effected. As Hogg and Brown suggest, politics has been seen as "wholly arbitrary in its effects ... or ... as a secondary phenomenon of changing mentalities of rule."[208] Implications of this 'turn away from the political' for understanding governmentalities include impartial and limited perspectives of the multitude of factors including politics that are intricately woven within the modern fabric of governing.[209] The disdain for politics takes a step back from contestation, from the struggles that so mark how rationalities of governing are configured, debated and discussed.

Mindful of the above critiques this thesis employs theories of governmentality as a particular way of recasting questions about the production of the category of indigenous knowledge in intellectual property law. By this I mean to posit that there is more happening socially, politically and culturally to produce the legal category of indigenous knowledge than has been elucidated to date. Moreover, the circularity of discussions that have permeated the area of debate reveal little that was not already known, for example that legal categories of intellectual property protection leave little room for indigenous conceptions of property and ownership.[210] By recasting the questions, different positions are exposed and these give us pause to consider how to approach and develop new strategies of inclusion and recognition of indigenous interests. To this end notions regarding the functionality of governing are adapted as a strategic way of pulling apart relations of association between legal institutions, governing agencies and

---

[206] See in particular: P. O'Malley, L. Weir and C. Shearing, "Governmentality, Criticism, Politics" supra n.162; P. O'Malley, "Genealogy, Systematisation and Resistance in 'Advanced Liberalism" Wickham, G., and G. Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* supra n.167; G. Pavlich, "The Art of Critique or How Not to be Governed Thus" Wickham, G. and G. Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* supra n.167.

[207] D. Brown, "Governmentality and Law and Order" Wickham, G., and G. Pavlich (eds), *Rethinking Law Society and Governance: Foucault's Bequest*, supra n.167 at 109.

[208] R. Hogg and D. Brown, *Rethinking Law and Order* Pluto Press: Sydney, 1998 at 229.

[209] In a similar way Christopher May has critiqued the distance between politics and understandings of intellectual property law. C. May, "Why IPRs are a Global Political Issue" (2003) 1 *European Intellectual Property Review* 1.

individuals that reveal messy, *ad hoc* and inconsistent attempts to mange disparate problems; in this instance I refer to knowledge circulation and cross-cultural exchange.

In exploring the rationalities of governance this thesis is mindful of the particularities involved. For instance in the contested political agendas both in indigenous demands for inclusion with intellectual property regimes, and political unwillingness to modify current regimes in any substantial way. The thesis transcends the abstract by situating its analysis within accessible governmental reports and case law that highlight the influence of political and economic discourse. It also utilises sociological approaches in the form of interviews to highlight the importance of individuals in modifying and shaping the way problems are articulated for future governmental responses. Governmentality forms a theoretical nexus, but the subject under consideration demands a more refined approach owing to the intersection of elements and its general complexity.

Conclusion

The intersection of indigenous people with western law provides a vantage point where resistance to rule is re-imagined. Certainly there is an enduring legacy of colonial power relations in the ways through which indigenous people have been positioned within western law. However as I discussed above, indigenous people can and do utilise the legal framework and in doing so moderate colonial power relations and reveal the possibilities generated through resistance. Colonial forms of governing have effected and continue to effect indigenous people in a variety of ways. However, indigenous people actively utilise the law (whilst also recognising its limitations) and forms of legal agency.

Indigenous agency adapts and utilises legal locations to challenge the legal limits of current frameworks for the protection of culturally specific material, and in doing so draw attention to the failure of governmental rationality in successfully accounting for the interests and rights of indigenous people. In addition, adopting the language of rights, property and justice positions indigenous intellectual property within a wider network of indigenous sovereignty claims. In

---

[210] M. Dodson, "Indigenous Peoples and Intellectual Property Rights" supra n.33.

response, legal and governmental efforts are strategically employed in an attempt to underplay the 'specialness' (in the form of cultural distinction) of the situation. But the deployment of 'culture' disrupts this strategy. Keeping the problem in legally defined stasis minimises the effects of sovereignty claims and sustains the recognition that the key issue for indigenous people is control over access, and thus involving relations of property. How the law maintains a grasp of the problem is through discrete programmes of government directed at managing and directing responses through regimes of truth.

To this end, questions regarding what forms of governance are engaged when an indigenous claim to property is made form the fundamental fabric of this thesis. When an indigenous artist claims a property right what are the levels and mechanisms of governance that swing into play? For instance how does the bureaucracy (targeting the indigenous subject) respond? How does the academe sponsor and mirror the bureaucratic response? To what extent can law reform and the legal profession adopt strategies developed through the courts and influenced by bureaucratic attempts to manage the problem? What is it that the property demand generates in governmental terms and produces in governance terms?

To begin an appreciation of what is happening when an indigenous claim to intellectual property is made in governance terms, it is first essential to know what elements are engaged when a general claim to a right in intellectual property is made. This is far from a simple process. Therefore before moving into a textual analysis of the bureaucratic and legal initiatives in the area of indigenous intellectual property, it is important to detail how rights in intangible property are justified. What will become apparent in the next chapter is the insecurity of intellectual property and that difficulties in the metaphysical dimensions of justifying a right in property undermine the function and operation of this category of law. These difficulties come to the fore when identifying indigenous subject matter, and this makes the tensions within the law all the more transparent.

Chapter Three

Intellectual property law and the production of knowledge

In the previous chapter I suggested that for indigenous claims within intellectual property law to be possible, an opportunity for that possibility must first exist within the category of intellectual property law. Whilst the theoretical development of notions of 'property' is one factor, historically 'real' property and intellectual property are distinct and separate areas of law. It is with regard to analyses of intellectual property law that indigenous knowledge has emerged as a noticeable category in its own right, both in the critical analysis of its exclusion from the mainstream of intellectual property law and the legal attempts internationally and nationally to secure its inclusion. Attempts at inclusion are evidenced, for example, by the 2001 General Agreement on Trade and Tariffs (GATT) round of discussions, where the consideration of intellectual property extended to protection for 'indigenous knowledge and folklore', which was positioned alongside other areas seeking inclusion such as geographical indications for wines and the compulsory licensing of pharmaceuticals.[1] The recent report by WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999),* has also confirmed the increased attention and intention to include indigenous knowledge internationally, and at a national level, as new subject matter and therefore part of an intellectual property regime.[2]

---

[1] General Agreement on Trade and Tariffs (GATT) meeting 2001 held at Doha, Qatar (Doha Round).

[2] World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* Geneva, Switzerland, 2001.

Alongside the development of critical histories of intellectual property and in particular copyright, indigenous knowledge has become a site of examination and conceptualisation in legal discourse. In this way, it could be argued that intellectual property law has become sufficiently self-conscious about its cultural underpinnings to consider indigenous knowledge as a special case. However this is mediated through the categories and classifications of intellectual property law as they currently exist. The point where indigenous knowledge is understood in relation to an established intellectual property discourse marks a distinct rupture where new forms of considering intellectual property and ways of describing indigenous knowledge are produced. This shift is evidenced in part by the new phraseology 'indigenous intellectual and cultural property'.[3] This new terminology also highlights the implicit position of 'culture' which functions as a means for understanding difference, in this case, indigenous subject matter.[4]

Recognition of the exclusion of indigenous knowledge from intellectual property law have arisen as part of the critical consideration of the author-function in copyright, through which developed a concern for questioning cultural ownership.[5] Much of this analysis was preoccupied with exploring the cultural and legal significance of postmodern authorship and analysed copyright against the western preoccupation with individual ownership. Along with this then, questions of collective cultural ownership and issues of indigenous ownership came to the fore. In an Australian context, legal actions by Aboriginal artists as legal owners further contributed to an examination of problems and limitations deriving from the largely western origins of the law.[6] It is at the point of identification, as a subset presenting difficult cultural

---

[3] For usage of this term see generally: T. Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and Aboriginal and Torres Strait Islander Commission [ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, Sydney, 1998.

[4] I will expand upon the importance of a reliance on 'culture' later in this chapter.

[5] See for example: M. Foucault, "What is an Author?" Rabinow, P. (ed), *The Foucault Reader: an introduction to Foucault's thought* Penguin Books: London, 1984; M. Rose, *Authors and Owners: The Invention of Copyright* Harvard University Press: Cambridge and Massachusetts, 1993; D. Saunders, *Authorship and Copyright* Routledge: London and New York, 1992; M. Woodmansee and P. Janszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* Duke University Press: London, 1994.

[6] *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported; *Bulun Bulun v Nejlam Pty Ltd* (1989) Federal Court, unreported; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* [1994] 30 IPR 209; *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513; *Bulurru Australia v Oliver* [2000]NSWSC 58 (28 June 2000).

and legal problems, that indigenous knowledge has become a category of attention in intellectual property law.

This chapter will be divided into four sections. The first will consider the making of modern intellectual property law. In this section I will consider the disparate and inconsistent history of intellectual property, highlighting that what we now recognise as a distinct field of law, is actually a relatively recent phenomenon. Destablising the narrative of intellectual property as a cohesive unit will provide the context for the second section that examines the creation of copyright as a subject of intellectual property law. As a subject of intellectual property, copyright is characterised by its influence from early Enlightenment and Romantic notions of possessive individualism. Indeed this influence underpins the categories that identify copyright subject matter: authorship and originality. These categories function to maintain the limits and boundaries of copyright and as such point to the dilemma of cultural difference when including indigenous knowledge within this framework. My third section will then move to a consideration of the subjectivity of copyright, prompted through postmodern critiques, identifiable through the cultural intersections between law, culture and politics. In turn this will make possible the fourth section that will examine how the creation of an indigenous subset within intellectual property in general, has been actualised. What is developed here is an appreciation that the intersection of indigenous knowledge in intellectual property law is defined and in response to the characteristics of intellectual property law that include its complex history, its categories of measurement and the inevitable influence of political and economic discourse.

Ultimately the chapter will highlight how the difficulties facing intellectual property law in securing the indigenous knowledge as a subject, rather than being 'new' are actually part of a continuum – of law working through an ongoing series of problems that it has been addressing for years. The past histories of intellectual property inform the present. The chapter concludes that the dominant problem set for intellectual property law – and this affects the inclusion of indigenous knowledge – is how law grants property status to intangible knowledge. In this sense it is argued that what many intellectual property laws share is this central problematic,

manifested in various legal forms and practical negotiations of authorised identifications of property.

The construction of intellectual property

The appearance of intellectual property has been largely tackled in terms of an exploration of the emergence of its particular, distinctive categories and subject matter. As a subject of history, the most studied category has been copyright. Though not necessarily claiming the story of copyright as somehow representative of the history of all intellectual property laws, copyright historians have suggested a model of truth about intellectual property laws and a method of historical inquiry in general, directing historians towards discovering the origins of the relevant laws.

What the origins of copyright have been taken to be has differed, reflecting diverse disciplinary approaches and interests. Publishers and booksellers[7] put forward a version, legal historians[8] have presented an account, literary theorists[9] have offered another version, different from the Marxist perspective[10] that, in turn, differs from the 'postmodern' perspective.[11]

In an overview of such histories, Kathy Bowrey notes how many of these histories fail to meaningfully engage with each other.[12] In her article, Bowrey discusses the approaches to a history of copyright from different disciplines, and the striking reluctance in generating inter-disciplinary conversations. Bowrey concludes by stating,

---

[7] See: J. Feather, *The Provincial Book Trade in Eighteenth Century England* Cambridge University Press: Cambridge, 1985; and, V. Bonham-Carter, *Authors by Profession Volume One and Two* The Society of Authors: London, 1978.
[8] See: B. Kaplan, *An Unhurried View of Copyright* Columbia University Press: New York, 1967; and, R. Patterson, *Copyright in Historical Perspective* Vandebilt University Press: Nashville, 1968.
[9] See: E. Eisenstein, *The Printing Revolution in Early Modern Europe* Cambridge University Press: Cambridge, 1983.
[10] See: B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. by Kingdom, E.) Routledge and Keegan Paul: London, 1979. Edelman was strongly influenced by the early Soviet Jurist Evgeny Pashukanis writing in the 1920's. See: E. Pashukanis, *Law and Marxism* Arthur, C. (ed), Ink Links: London, 1978.
[11] The postmodern perspective is strongly influenced by Foucault. See: M. Rose, "The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship" Sherman, B., and Strowel, A (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford, 1994; M. Rose, *Authors and Owners: The Invention of Copyright* supra n.5; M. Woodmansee and P. Janszi (eds), The *Construction of Authorship: Textual Appropriation in Law and Literature* supra n.5; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Durham, London, 1998. For a cultural studies perspective see: J. Gaines, *Contested Culture: The Image, The Voice and The Law* University of South Carolina Press: Chapel Hill, 1991.

> History shows that our understanding of copyright develops out of the interaction of a number of perspectives, even though few writers seem prepared to acknowledge this. At first each discipline wanted to pursue their own definition of the subject. Later on definitions were built in reaction to those earlier territorial claims. The argument was over deciding *what the legitimate interests and concerns of copyright are* and *who is authorised to speak for them.* There was an unwillingness to make space for the diversity of experiences and interests involved with copyright.[13]

What Bowrey advocates is a cross disciplinary approach to understanding copyright and its significance within legal relations of power. Her point about the difficulty of achieving such a perspective is indicative of how the borders of copyright and more generally intellectual property law are patrolled.[14] That the histories don't tend to speak to each other points to a larger issue of knowledge management. In such circumstances knowledge about how copyright is constituted is limited. In terms of governing space, such limitations can be seen as a tactic that guarantees the authority of the legal voice to speak about copyright through the language of law, leaving the other narratives as partial and contingent to accessing the domain of legal discourse.[15] This process is not unique to law for all major disciplines rigidly patrol their boundaries, but it is notable because it is this process that produces discourse and subsequently affects the power of discourse to perpetuate itself.[16] There is also a tendency to ignore political and social contexts and the effects of these in shaping the law. The histories tend to remain abstract rather than situated in historical epochs. What is at stake here is the fluidity of disciplinary exchange and the recognition of diverging historical accounts according to different sources, agendas and points of view. The legal narrative of intellectual property's history assumes access and legal competence to understand and reproduce this discourse.[17] This secures the legitimacy of the discourse to distribute an 'authentic' meaning and thus

---

[12] K. Bowrey. "Who's writing copyright's history?" (1996) 18(6) *European Intellectual Property Review* 322 [emphasis in the original]. See also: C. May "Why IPRs are a Global Political Issue" (2003) 1 *European Intellectual Property Review* 1 at 1 concerning recent works related to globalisation and patents.

[13] K. Bowrey, "Whose writing copyright's history?" Ibid. , at 329.

[14] In particular Bowrey refers to a dismissing review of J. Gaines work *Contested Culture* (above n.11) to highlight how the borders of copyright law are policed. "Westering's review is not really about the substance of Gaines' book, it is about maintaining control over the copyright discourse – who can address it and in what terms." K. Bowrey, "Whose writing copyright's history?" Ibid. , at 327.

[15] See also the concern for the narratives of the legal discourse in D. Deazley, "Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters" (2003) 25(6) *European Intellectual Property Review* 270.

[16] See generally: M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* Tavistock: London, 1970; and more specifically: M. Foucault, "The Study of Discourse" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* University of Chicago Press: Chicago, 1991.

[17] S. Almog, "From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law" (2002) 13 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1.

perpetuate the ways in which debates about intellectual property engage with new (and differing) subject matter.

Historical influence

Few histories speak to the space that constitutes intellectual property by extending analyses through a particular history of copyright to intellectual property law as a whole. One notable exception is Brad Sherman and Lionel Bently's work *The Making of Modern Intellectual Property.*[18] This book addresses the imbalance in histories of copyright, patents, designs and trademarks in order to explain how the whole legal field of intellectual property has been constructed.

What is different in this appreciation of the history of intellectual property is that the writers locate the production of the category of 'intellectual property' with jurisprudential concerns about the making of 'modern' laws. By modern law Sherman and Bently refer specifically to the *form* of the law, namely its abstract and ahistorical representation in legislation, spoken through the language and logic of political economy and utalitarianism.[19] They reject the view that an understanding of intellectual property can be derived from a concern for the origins of particular laws that are now recognised and encompassed by the rubric 'intellectual property law'. In suggesting that the domestic and specialist considerations of intellectual property, such as a history of copyright, do not explain its genesis, their analysis leads to an argument that it is the struggles of making 'modern law' that has significantly contributed to the evolution of the category in law that came to be termed 'intellectual property'.[20]

Sherman and Bently begin their history by noting the distinction between pre-modern intellectual property law and modern intellectual property law. The distinction, which they are the first to admit is "somewhat artificial",[21] is nevertheless a useful way for considering the differences in identifying what we now understand as intellectual property law. For example they note that the period around the 1850s marks the historical moment when intellectual

[18] B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999.
[19] Ibid. , at 3-4.
[20] Ibid. , at 1-10.
[21] Ibid. , at 3.

property law, with its bounded figure and specific categories including internal logic and language, emerged. Prior to this period, intellectual property law was haphazard and incomplete. The argument is that far from being readily determined and uniform, the development of intellectual property law as a distinct category of law has been slowly developed over a period of time, namely as law came to grapple with a series of issues that threatened its coherence. For until the 1850s there was no discernable law of copyright, patents or designs: the subcategories recognised in the general category of intellectual property. Instead, prior to this period, there was an agreement that "law granted property rights in mental labour, although the nature of this legal category was itself uncertain."[22] Thus prior to the 1850s there was no clear or discernable way of managing intellectual property law. The pre-modern was subject specific and reactive as it tended to respond to particular problems when they were presented. In comparison what characterises modern intellectual property law from the 1850s is that it is more abstract and forward looking, in this way the focus of the law was shifted away from the labour embodied in the subject matter to concentrate more on the object produced by the subject matter.

Sherman and Bently's approach is to cut through the social and cultural histories of copyright, patents and designs to locate the struggles with which law was intrinsically engaged. For example they suggest that what the Eighteenth Century contest over literary property really demonstrated was that law was unable to effectively determine the metaphysical dimensions of intangible property.[23] As this specific problem was not to be solved easily, it became a constant point of legal consideration and contestation throughout the Eighteenth and Nineteenth Centuries. They claim that the crisis this created, in understanding the order and object of copyright law, was handled by changing the sphere of legal concern away from its disorder, through a shift in the meaning and concerns of intellectual property in general.[24] It is argued that in the late Nineteenth Century intellectual property law took on a new and recognisable shape close to that which we currently understand, where the main concern settled on defining the object of legal protection rather than evaluating the properties of the legal subject. As such, law was able to shift its gaze from the problem of determining the metaphysical dimensions of

[22] Ibid. , at 3.
[23] Ibid. , at 5.
[24] Ibid. , at 4.

intangible property (for example, what was an original work), and focus instead on the object or commodity, that the intangible subject matter produced. For example discussing the original in terms of what is worth copying is worth protecting.[25]

Through moderating the perspective, the problem of metaphysical property appeared resolved. The shift of the gaze meant that the internal logic of copyright law was withdrawn from view. This left within the body of the law incremental disputes about the object of legal protection. The issue of defining the protected intangible property in copyright still persisted however, the question of determining the metaphysical foundations or basis of the law was sidestepped. Consequent to this shift in gaze, struggles to identify and measure knowledge through a prism of mental labour still troubles intellectual property law today. However such problems, if noticed at all, are attributed to unusually challenging facts and circumstance, rather than generated through the legal processes of definition and inherent to the law.[26]

Sherman and Bently suggest that the way of framing intellectual property excludes consideration of its own historical contingency.[27] They suggest that modern law enables the subject matter of intellectual property to be decontextualised – to become a 'legal object'. Of specific importance to this process are the narratives that intellectual property law has produced of its own history. Thus Sherman and Bently characterise the preoccupation with writing narratives that locate the emergence of copyright with the 1710 *Statute of Anne* or patents with the 1624 *Statute of Monopolies* as a byproduct of the creation of the legal subject of intellectual property itself.[28] The purpose of such narratives is to present intellectual property law as an increasingly coherent and stable body of law derived from Statutes.[29] The cost of such narratives is the marginalisation of discussion about the complexity in the emergence of the concept of intellectual property law. Intellectual property laws are (only) presented as unsettled and complex in the historical past. Those problems are 'resolved' through time via various key reforms. Thus current laws are largely ahistorical in the sense that they only

---

[25] The examples given here are mine.
[26] See for example *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112, concerning the subsistence of copyright in a telephone directory. A discussion of the case will be made later in the chapter. See also: K. Bowrey, *Copyright and Culture: Australian Law and Controversies* forthcoming 2003 at [2.8].
[27] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 6.
[28] Ibid. , at 206.

contextualise the past in order to show problems having been overcome. The face with which such laws front the future is comparatively featureless and capable.

These writers' retort to the popular narrative of intellectual property presents a different view of intellectual property's history. It becomes clear that there was neither cohesion between categories of intellectual property nor a well-defined sense of what intellectual property actually was or should be. Moreover this indeterminacy characterises and underpins the modern law.

The difficulties in granting property rights in mental labour were central to the development of the category of intellectual property law. Importantly the Eighteenth Century became marked with new concerns, economic and industrial, that required the law to change its form; from subject specific law to a general 'body' of law replete with coherent and universal categories of assessment. What such a change achieved was to shift the attention away from the problems that threatened the coherence and universality of the law. By the redirection of attention, the ability to probe the metaphysical dimensions overlooked the key contributing factor, namely the fluidity of mental labour. As I discussed in Chapter Two, the emphasis on labour to justify property relies upon Locke's natural rights thesis. However the fluidity of mental labour sets a differential and thus affects how a natural rights argument is adopted and utilised to justify a right in intellectual property. This is not to say that with a shift in the focus of the law such a problem disappeared, for indeed on closer examination intellectual property law is still characterised by how it reconciles and rearticulates proprietary rights in creative endeavor. In this way intellectual property still maintains the primary difficulties that marked its 'premodern' form. Thus the most profound and certainly lingering issues for intellectual property law revolve around the problem of understanding the metaphysical dimensions of intangible property.

---

[29] Ibid. , at 206-212.

The literary property debates

The literary property debates of the Eighteenth Century[30] are notable because they provide contextualisation for the struggles with which the law was engaged. Not only do they illustrate difficulties that are still paramount to intellectual property law, but also reveal how, in a variety of ways the law sought to resolve these complexities. It should also be added that individuals also played a significant role in directing the path that the law could take in response to such difficulties. As Mark Rose notes, the English struggle over copyright, "fought in polemical pamphlets as well as actual legal cases, generated a body of texts where aesthetic and legal questions are barely distinguishable."[31] What is evident through Rose's comment is that the literary property debates provide a space for considering, not only how the law responded to the challenge of metaphysical property, but also that the arguments by proponents, opponents, jurists and others influenced the shape the law took. How Sherman and Bently extend this is to suggest that in these early debates it is possible to discern arguments that attempt to grapple and understand intangible property, and that these arguments inevitably expose the struggles as ones within the law itself. Their point is that far from only happening within literary property and copyright, the struggle that law was intrinsically engaged also extended into other areas that would later be grouped under the axiom, intellectual property.

Thus the literary property debates provide a focal point where the concept of intangible property was thrashed out and as such predominately included devising a method for appreciating the nature of intangible property. Within these arguments for literary property the notion of property rights in mental labour was at the forefront of the debate. The arguments also exposed how notions of 'property' were translated into the debates and how the natural right through an individual's labour was adapted, developed and justified. What the literary debates also signal is how a corresponding key process for the law was in identifying what the limits and boundaries of the intangible subject matter could be.

---

[30] The literary property debates argued for and against common law literary property. The litigation was between the London and Scottish booksellers. The key cases were: *Millar v Kinkaid* (1750) 4 Burr. 2319, Eng. Rep. 210; *Tonson v Collins* (1760) 1 Black. W 301, 96 Eng. Rep. 169; *Osborne v Donaldson* (1765) 2 Eden. 328, 28 Eng. Rep. 924; *Millar v Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201; *Donaldson v Becket* (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

[31] M. Rose, "The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship" supra n.11 at 32.

At first instance the struggle for the law began as one of identification.

In terms of identifying intangible property, there were three key points, raised by opponents and supporters alike, that highlighted the difficulty for the law in recognizing intangible property. The first involved the circumstances that such property could be legitimately acquired; the second involved the problem of identifying mental labour in literary property; and the third concerned the "economic and cultural consequences of recognizing a perpetual textual monopoly."[32]

Inevitably, arguments for perpetual common law rights in intangible property raised the question of how title in property arises. At this period in time, property was commonly conceived in political theory as being acquired through first occupancy.[33] However, as intellectual ideas could not be 'occupied' in the same sense as land, it therefore followed that intellectual ideas could not be seen as property. One jurist, Justice Yates, who constantly argued against the common law right, highlighted the difficulty with equating property rights with ideas. As he noted "[t]he occupancy of a thought would be a new kind of occupancy indeed" for an object of property "must be capable of distinct and separate possession."[34] For an example of the difficulty in grasping a property right in an intangible form consider the following argument made by Justice Yates in *Millar v Taylor* (1769).

> But the property here claimed is all ideal; a set of ideas which have *no bounds* or *marks* whatever, nothing that is capable of a *visible possession*, nothing that can sustain any one of the *qualities* or *incidents of property*. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the Author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.[35]

---

[32] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 21. See also: K. Bowrey *Don't Fence Me In: The Many Histories of Copyright*, Doctor of Juridical Studies, University of Sydney, 1994 (unpublished).
[33] Locke had discussed this concept that he developed from Roman law but it did not justify property in itself, except so far as occupation equaled cultivation. As I discussed in the previous chapter it was re-popularised by Blackstone in the late Eighteenth Century.
[34] *Millar v Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201, at 230.
[35] *Millar v Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201, at 233. I have added the italics to point to the ways in which property was to be known and the future elements that were used to help understand intangible property: this involved making the intangible into a visible possession that had its own marks of identification which could therefore became property.

In response to this kind of reasoning and fearing that it would undermine the common law right, the Stationers and their supporters argued that a different concept of property was required; one that was "appropriate for the case at hand."[36]

As an alternative position, they presented the case that there was property in mental labour based on Locke's *Two Treatises of Government* and that this natural rights thesis functioned as a (familiar) marker of property. As discussed in the Chapter Two, this was a selective reading of Locke.[37] While Locke was a supporter of an author's literary property, he was not concerned with defining what it is that an author 'owns' and justifying that as a 'right'.[38] Those who favoured perpetual common law literary property focused on labour as the source of the property right.[39] But they argued that the style and sentiment of the author was what 'occupied' the text.

As Peter Drahos has argued, Locke's writing, particularly in Book Two of *Two Treatises of Government* has been profoundly influential in the natural rights theory of property.[40] He notes however that the real value of Locke's work is that his argument, which relies upon a concept of natural rights to justify intellectual property, necessarily depends upon a concept of community because "appeals to labour in labour theories of property are essential exhortations to keep certain metaphysical assumptions, and a concept of community, in place."[41] In this sense Drahos' point is worth remembering, for arguments regarding individual labour could only be made within a context of a community, where the power to derive rights in property from the intellectual commons – a shared space from which ideas and creations were seen to circulate – required the individuation of labour.[42] The significance of the change in conceiving

---

[36] B. Sherman and L. Bently *The Making of Modern Intellectual Property* supra n.18 at 22.
[37] See Chapter Two at page 60. In fact Locke published two books at almost the same time. *Two Treatises of Government* was first published in 1689, while *An Essay Concerning Human Understanding* was first published in 1690.
[38] K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.26 at [1.4].
[39] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 23.
[40] P. Drahos, *A Philosophy of Intellectual Property* Dartmouth Press; Sydney 1996.
[41] Ibid. , at 41.
[42] For more on the influence of Locke in intellectual property see: P. Drahos, *A Philosophy of Intellectual Property* ibid. , at 41; J. Hughes, "The Philosophy of Intellectual Property, (1988) 77 *The Georgetown Law Journal* 287; M. Rose, *Authors and Owners* supra n.5; D. Saunders, *Authorship and Copyright* supra n.5; B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18; E. Hettinger, "Justifying Intellectual Property" (1989) 18(1) *Philosophy and Public Affairs* 31.

property as derived through the labour of 'man' meant that intangible property could be attributed as private property.

It should be noted that the difficulty in conceiving the nature of the property right was not unique to the literary debates and to the formation of copyright.[43] It would however be dangerous to generalise this problem as occurring throughout all regimes currently grouped under the axiom of intellectual property. What makes the shift worth commenting upon is that while other areas of intellectual property did not have the same crisis in defining the property right as copyright did, the shift to understanding the property as a right in labour subsequently influenced the other regimes that were to come under the rubric of intellectual property. In this way the dilemma in defining the property right for literary property was resolved with the increasing reliance upon possessive individualism.[44]

Certainly a primary element that emerged from the literary property debates was this reliance upon labour as denoting a property right. There were those who argued for and against such positions. Indeed Yates J saw that the right was more of a personal right than a property right. As Rose recounts, Yates "insisted on maintaining the distinction between a personal right and an object of property. He did not deny that a personal right might be incorporeal but he did deny that anything incorporeal could be treated as property, in the same sense as a house or land."[45] To countenance such opposition, proponents for the common law right, advocated that the property was neither in the physical books nor the ideas expressed, but actually "something else entirely, that consisted of style and sentiment."[46] Thus the argument circled back to identifying the subject matter. This moved the law in a direction where identification of the subject matter became central to ascertaining the right.

---

[43] The difficulty of conceiving the nature of the property rights was also debated in 'real' property too, for example in regards to custom, squatting and aristocratic inheritance claims. The real property debates were similarly philosophical but were grounded in corporeality.

[44] It is worth remembering that the notion of possessive individualism was not a stable theory either, as it changed through its application in a variety of cases, depending on any number of individuals who utilised and manipulated it to justify the point or argument at hand.

[45] M. Rose, "The Author as Proprietor" supra n.11 at 39.

[46] Ibid. , at 39.

That intangible objects were not marked by boundaries in the same manner that physical objects were, led the early jurists to compare the right in literary property to that of patents. In this sense, measuring the obvious tangibility of property in one area to the perceived intangibility of literary work. In *Tonson v Collins* (1760) Blackstone J, argued that "one essential requisite of every subject of property was that it must be a thing of value"[47] and that for literary property the thing of value was 'sentiment'. Influenced by Yates' J dissenting position that there was no distinction between copyright and patents, Blackstone moved his discussion to the subject of property where, evoking the earlier differentiation between literary and mechanical invention by another jurist, he stated that "where two engines might resemble each other, they could never be identical because materials and workmanship must differ. But every duplicate of a literary text was the same text because its essence was immaterial."[48] Herein lay the development that was to significantly affect the shape the law took – pushing the law to focus on the object produced by the intangible subject matter and defining copyright in terms of its points of differentiation to patents.

These questions about the nature of property were philosophical in justifying the origin of the right. However in practice, only a partial explanation of the nature of the property was provided. This was because it was difficult in practice to identify the boundary to such a right. This problem was played out in questions over the derivative works such as translations and abridgements. If the text was not identical – was it an infringement of the owner's right? As well as this, and because of disagreements over the appropriate justification argument to apply, the legal questions focused relationally on the problems that law was likely to have in identifying the existence of such property rights, rather than establishing the boundary. Traditionally, property was seen to definitively demarcate a zone of exclusion, at which point it became necessary to show that within intangible property there was something that was "capable of being visibly and distinctly enjoyed."[49] Thus, the challenge was to provide marks that would enable literary property to be identified and distinguished. It is hard to say how and when precisely this issue was resolved, however it was consistently argued in terms of literary

[47] *Tonson v Collins* (1760) 96 ER 180.
[48] M. Rose, *Authors and Owners* supra n.5 at 89.
[49] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 25.

property, that the words in print provided the mark necessary to identify property.[50] As Rose notes "[d]ressed in language, the writer's ideas became a property that could be conveyed from owner to owner."[51]

Whilst the initial decision by the King's Bench in *Donaldson v Becket* (1774) found for an author's common law right in property, the reversal of the decision by the House of Lords, declaring that copyright was a limited term right, highlighted that the answer to the question of literary property was far from clear.[52] The case presented a failure to endorse any particular foundation for the literary property right and as such highlights the indeterminacy of the law in this area. In the following decades, owing to the lack of clarity in determining property in mental labour, the law was developed and interpreted by competing demands. Interestingly the objections to a perpetual literary property right raised in *Donaldson v Becket* (1774) laid the foundations for a shift to a different kind of analysis of intangible property rights.

Making of modern law

As well as foundational issues about the origin and boundaries of the right, it was also argued from analysis following *Donaldson v Becket* (1774) that literary property could not be considered as property because no harm could be made against the owner in the taking of the property. That is, the nature of the intangible property meant that the harm to the owner through taking the property was difficult to measure and identify. This point was argued against by highlighting the future financial benefits that the owner would not be able to share. Economic concerns thus became an adequate means for measuring and identifying the loss of this unique form of property. Hence translation, abridgements and other derivative markets slowly came within the purview of protection to justify this extension of the private right. The following line of reasoning was established: that inadequate legal protection of the economic value of the work would provide little incentive to produce. That this argument relied upon the importance

[50] This was reaffirmed by Blackstone where he states "Now the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or to the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed." Quoted in M. Rose, *Authors and Owners* supra n.5 at 89-90.
[51] Ibid., 91.

of economics is significant; for the argument is only possible in a period where the liberal democratic form of an economy was beginning to have its own status and regimes of logic.[53] In a parallel development the law became an integral vehicle for upholding that logic.[54] In this way being deprived of the economic realm was how the harm against the owner was to be understood in regards to this new form of property relationship. The development in intellectual property law of an integral relationship between property and economics has been dynamic and, as will be considered in more depth at a later stage of this work, significant: specifically in the way in which modern intellectual property law approaches and evaluates an object for protection.[55]

A further problem, after these considerations about identifying the property relation in intangibles, was how to describe the subject matter in law itself. Such a problem existed for literary property, patents and design and arose because it was the subject matter - the intangible, not the product - the book, that was supposedly protected in the law. Specifically, when describing the subject matter, the law spoke of the intangible property in dynamic terms, as something that required action through the function of mental labour. However when it came to dealing with the intangible product, the law was unable to represent it in a way that reflected the process of intellectual origin. Specifically, the "law lacked the language with which to reproduce the nature of the intangible."[56] This was a difficulty in phrasing the difference between the 'creation' or intellectual labour and the shaping of that labour into a tangible product.[57]

---

[52] See: M. Rose, "The Author as Proprietor" supra n.11. See also: D. Deazley, "Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters" supra n.15.

[53] See: P. Miller and N. Rose, "Governing economic life" (1990) 19(1) *Economy and Society* 1.

[54] The brevity of space does not allow for an in-depth exploration of this parallel development.

[55] I will be examining the importance of value in measuring objects for protection initially in Chapter Four and then in more depth with respect to Aboriginal art in Chapter Six.

[56] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 49.

[57] Interestingly at the same period in which the difficulty of describing the difference between the idea and its expression was contested, the same problem arose in relation to paper money. "Currency had traditionally been solid and material: gold and silver refined to an established standard of purity and parceled into specified weights stamped into coins ...but coinage of this sort was inadequate to meet the demands of a developing commercial nation and during the course of the century...forms of commercial paper were absorbed into the economic system as a legitimate form of currency. Thus money also became phantasmic, a matter of circulation of signs abstracted from their material base." M. Rose, *Authors and Owners* supra n.5 at 129.

The identity of the abstract object became known to the law through the physical object that was produced. Drahos explains the necessity of the transition, where "[a]t some point before property rights attach to the abstract object, the various regimes require(d) some kind of corporealisation of the abstract object."[58] Inevitably the object or product, which could be named and identified, became the subject of intellectual property law. For copyright this meant the artistic work or book; for patents, the invention; and, for design, the tangible reproduction of the design. This logic, coupled with economic discourse, further justified an expansion of literary property-like subject matter to include a very diverse array of cultural/industrial objects.[59]

If exclusive possession was to be granted to an intangible product, it thus became necessary to establish a means of identifying a reproduction of that product. In this sense, for a property right to be granted, the intangible had to be reproducible: for the copy would generate an infringed right in the original property. In addition the property had to be identifiable, insofar as it was possible to identify to what extent it had been reproduced. Thus the law took on a further change when it recognised that the subject matter of intellectual property law could be infringed beyond the immediate form expressed. To this end, legal protection was extended to non-identical copies of the expression. Such a development signals a further change in the process of crafting the law, where it is possible to see how the emergence of categories function specifically to identify the subject matter before the law. In order to highlight this point, it is useful to consider the case of translation, which provided an example of how important it was to identify a work so as to further identify a copy or an infringement.

In *An Unhurried View of Copyright*, Benjamin Kaplan explains that the first substantial question to arise under the *Statute of Anne* (1710) was that of alleged infringement by translation."[60] In 1720, Dr Thomas Burnett brought an action against the translator of his Latin work,

---

[58] P. Drahos, *A Philosophy of Intellectual Property* supra n.40 at 151. See also comments on the model of 'real' property being used for intellectual property in J. Litman, "The Public Domain" (1990) 39(4) *Emory Law Journal* 965 at 970-972.

[59] See comments by F.W. Grosheide, "Another social development that must be mentioned is that copyright has on one hand become more and more the concern of enterprises and institutions, and has on the other hand developed into a legal instrument for the regulation of the transfer of cultural information. Cultural information has, speaking in economic terms, made the step from product to raw material." F.W.Grosheide, "When Ideas Take the Stage" (1994) 6 *European Intellectual Property Review* 219 at 219.

Archaeologaie Philosophicae. The defendant argued that the translation was in fact a "different book"[61] and that the translator was the author of the 'new' book. In this sense, because the translator had put the book into another form, the defendant argued that it was not the same as reprinting because it required the "translator to bestow his care and pains upon it."[62] The judge appeared to accept this reasoning from the defendant, that, if the translation was a work of authorship (and mental labour), at the same time it could therefore not be a copy. The issue of identifying a copy and identifying authorship recurred throughout this period as the law sought to establish means of identifying infringement. Other key cases that sought to clarify this issue involved maps, abridgments and histories.[63] As Kaplan notes, the issue of copying was resolved by not looking at what had been taken, but what he/she had added to make it a work distinct from the copy.[64]

As Kaplan highlights through these early cases, the Eighteenth Century law was caught in judgments of identity. The subject specific nature of these meant that identification of the subject matter was necessarily linked with a concern for aesthetics. In this sense, aesthetic judgments in the form of identifying whether or not a work was infringed relied upon judicial interpretation, as there was no singular underlying principle of the law that could determine an infringement. What this shows is that the direction that the law took, was in fact in response to all the underlying issues whose genesis resided in the identification of metaphysical dimensions of intangible property.

The point to emphasise from this overview of the emergence of intellectual property law is that the law was not a coherent entity with an underlying logic. Rather, intellectual property law functioned disparately, responding to specific issues as and when they arose. There was no obvious line connecting an author to property in the work and the legal principles that identify

---

[60] B. Kaplan, *An Unhurried View of Copyright* supra n.8 at 9.
[61] Ibid. , at 9.
[62] Ibid. , at 10.
[63] For the key case involving whether maps or charts were copyright subject matter see *Sayre v Moore* (1785) 1 East 361, 102 Eng. Rep. 139; and for abridgement, *Dodsley v Kinersley* (1761) Amb. 403, 27 Eng. Rep. 270.
[64] B. Kaplan, *An Unhurried View of Copyright* supra n.5 at 17. Of course, non-protection of translations as well as underdeveloped international protection gave a boost to the British publishing industry at the expense of the French, Flemish and German publishers. National laws did not generally recognise the copyright of foreign nationals nor the rights of colonial subjects. See: K. Bowrey, *Copyright and Culture: The Australian Law and Controversies* supra n.26 at [4.2].

intangible property were slowly and partially assembled in response to specific concerns. In this sense law was deeply involved in its ongoing creation and thus instrumental in creating its own subject matter and developing processes of recognition and identification. As a consequence these factors averted attention from the destabilising potential of the laws inability to fully describe or justify the 'right'. As there was no pre-existing conception of a work, only the law itself could establish the means and process for understanding intangible property. The resulting dynamism of the law is often over-shadowed but it is useful to keep in mind that in present day intellectual property law, the difficulties about "the essence of intangible property continue to appear when law is confronted with new subject matter."[65] Moreover, rather than highlighting the cohesion, it brings to the fore the complexity and messiness of the law both within its construction and its modern function. This will be made more apparent in the context of indigenous knowledge to be examined in the final section of this chapter.

Thus Sherman and Bently explain how law 'gets by' with specifically 'legal' definitions in their consideration of design law.[66] Design, codified as a particular category, produced the first significant transition for intellectual property law. These reforms took place in design legislation between 1839–1843.[67] Of particular interest are two elements, developed in conjunction with design legislation, that have had a significant effect upon the production of intellectual property law generally. The first concerns the introduction of a system of registration, known as the Designs Register. The second involves a shift in the way in which law concerned itself with the 'aesthetics of law' whereby the law itself became interested in the future shape that the law was to take.[68] As Sherman and Bently note this was specifically demonstrated in the organisational mechanism employed by law to move from subject specific analysis to more abstract formation. Thus the abstraction of legal categories influenced the way in which problems were to be resolved, categories organised and boundaries patrolled.[69] As

[65] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 58.
[66] Ibid. , at 63-76.
[67] Ibid. , at 64-65
[68] Ibid. , at 73-74.
[69] Ibid. , at 62.

considered in the previous chapter, the abstraction of the law functioned to maintain the legitimacy in legal narratives of formalism and objectivism.[70]

The significance of registration

With the challenge to British design from other trading nations, a variety of initiatives were developed specifically to improve the state of British design. Of these, the *Designs Registration Act* (1839), one of two acts[71] aimed to extend the scope of current design protection through the process of registration. Through the Act, the length of time offered for protection for designs was extended. This was premised on the prerequisite that the design was registered. The introduction of a process of registration is an important moment in the history of intellectual property law. For registration effectively enabled the centralization of particular forms of knowledge by recording the characteristics of the product. This meant that the law was increasingly able to rely on institutionalised characteristics and avoid subject specific judgments.

A primary feature of the registration system, as was developed for designs, was that it regulated and managed specific information. The Register became the institution for accumulating, monitoring and distributing information about the forms that mental labour could take. Moreover, the process of registration intrinsically established a means of producing proof about the nature of a design. For example, if an image was registered as a design, it could not later be claimed that it was instead a patent.[72] In addition the burden of proof fell to the creator rather than the law to establish what protection it deserved. Essentially, the system of registration facilitated a way of categorising and cataloguing the product of intellectual labour, the work itself.

The role of registration in controlling information was central to the development of the categories of intellectual property law. Further, through the development of this system of

---

[70] See Chapter Two from page 50.
[71] The other was the *Copyright of Design Act* (1839) which offered shorter periods of protection (3 months) and registration was not necessary.
[72] For a discussion of this see: B. Sherman and L. Bently *The Making of Modern Intellectual Property* supra n.18 at 79-82.

recording and documenting knowledge, bureaucratic power took on a new dimension as it was extended into another sphere. Importantly this was because the system of registration became publicly controlled rather than privately regulated as had been the case through specific entities such as guilds.

Publicly controlled knowledge is an intrinsic mechanism of government. While Sherman and Bently do not mention the role of governance in regulating knowledge through registration, it is implicit in their argument. These changes in categorising and regulating specific knowledges also occurred at a time when bureaucratic power in the form of modern governance was consolidating itself.[73] It is not a coincidence that in the same period that governance takes on its contemporary shape that intellectual property law also begins to take its current form. Both develop parallel systems of understanding and conceptualizing the power of knowledge and the importance of developing programmes that monitor its progress. For intellectual property law this was achieved through registration. For governance this was increasingly achieved through law. Both facilitated a means for the future direction of the other: a bureaucracy seemingly acting in response to individual initiative. Such controls were also self regulatory, in the sense that the onus was on the creator to conform to the conditions of registration in order to secure protection. In this way then it is possible to see a specific mode of governance occurring wherein the creator elects to participate in their own governance in return for legal protection. Further, the legal actor becomes simultaneously an object of the law and a self-actualising subject where the blurring between the two categories, rather than destabilising the unity of the opposition, enhances the inter-relations.

The registration process effectively contributed to the closure of intangible property over the second half of the Nineteenth Century. As Sherman and Bently note, "creations were not only radically detached from their creators, they also acquired a degree of juridical autonomy they had not previously experienced."[74] Registration provided a means of decontextualising the object produced by the subject matter, effectively affirming the product as a 'legal object'. Further, registration effectively centralised knowledge through establishing offices in centers of

---

[73] See: M. Foucault, "Governmentality" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.
[74] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* supra n.18 at 177.

production such as London and Paris. With the increase in processes of centralising government occurring in Europe in the mid Nineteenth Century, registration became a necessary vehicle of governance. The spread of modern registration systems was itself instrumental in providing possibilities for managing the identification of specific categories of knowledge.

A further feature that influenced the shape of intellectual property law was the way that the registration process codified the object of protection through its representation on paper. As the process for registration became more refined and rationalised, it led to patterns of standardisation that could be applied in a variety of locales. For if the process of standardisation could be applied in varying countries, intellectual property law could take on an almost universal status where the same protection could be guaranteed as if there was a standard normative mode of measurement. Consequently registration could become an end in itself.

Registration thus proved to be one of the most profound techniques in the organisation of knowledge and the production of modern intellectual property law. Without such systematised processes of documenting, archiving and managing specific categories of knowledge, it is unlikely that intellectual property law would have gained the reified status and power that it currently sustains. Registration for intellectual property allowed the codification of knowledge to became one of the necessary mechanisms for producing an effective 'body' of intellectual property law and also for promoting the benefits of an intellectual property regime.

Rational institutions and representative systems of government maintain their effectivity through the centralisation of knowledge. As Dipesh Chakrabarty has emphasised, modern governments rely upon techniques of measurement. Viewing government through the eye of colonial administration Chakrabarty observes that,

> one of the first tasks in the British colonialisation of India was to produce modern archives of knowledge that had not been previously systematised or documented. This colonial process relied upon ... methods and categories for information gathering.[75]

---

[75] D. Chakrabarty cited in D. Otto, "Subalterity and International Law: The Problems of Global Community and the Incommensurabilty of Difference" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999 at 161. See also: D. Chakrabarty, *Provincialising Europe: Postcolonial Thought and*

Chakrabarty's point is to highlight the influence of modern forms of storing and managing knowledge, thus making different knowledges *knowable* in the sense that through a centralisation system, they appear open to bureaucratic scrutiny and diagnosis.[76] While his example concerns the way in which difference in colonial states was made knowable to governments and subsequently amenable to management, for example through the introduction of a census, the point can be extended to the purpose and effectiveness of registration in intellectual property law. While intellectual property law registration became a means in itself, it also displayed characteristics crucial to modern forms of governance, whereby centralising knowledge becomes a prerequisite for legal protection. Parallels can be drawn between the rise of these modern ways of documenting and storing knowledge and the increased knowledge that such technologies provided to government that enabled the modification of strategies directing individuals. Registration for intellectual property comes into being during the same historical period that these other ways of acquiring and managing knowledge were actualised. Through this lens, registration within intellectual property law functions as one of a multiplicity of techniques through which knowledge is consolidated within a modern bureaucratic system.

What this overview has highlighted is the interplay of elements that increase the complexity of the law. Further, the modern position of intellectual property law is far from stable and coherent primarily because of the disparate strategies, employed over a period of time, to make it appear as though it is stable. Indeed the difficulties experienced by the law in regards to countering the enigma of intangible property result in important transitions where categories for managing and identifying the intangible property have been elevated to a plane of abstraction. The importance of the work of Sherman and Bently is that it provides scope for considering the structure of the law, and how the struggles within the law itself result in the development of categories of identification and measurement.

Historical Difference Princetown University Press: New Jersey, 2000. For an alternative account of efforts directed towards controlling and regulating knowledge in colonial states see: B. Cohen, *Colonialism and its Forms of Knowledge: The British in India* Princetown University Press: New Jersey, 1996.

[76] See also: A. Agrawal, "Indigenous knowledge and the politics of classification" (2002) 54(173) *International Social Science Journal* 287.

In recognising the importance of the past in shaping present law, the next section considers the individuation of copyright as a subset of intellectual property law. Concepts of authorship and originality become key tools in identifying the intangible property within copyright. The point is to consider how these categories function to influence the shape of the law and the judgments that are subsequently made in relation to identifying new subject matter – for instance indigenous knowledge. Through such an analysis the structure of the law as messy and incomplete is laid bare, where the struggles of modern law to determine the metaphysical dimensions of intangible property are revealed as still actively functioning and directing the way in which the law responds to the introduction of new subject matter.

Markers and Incidents of Intellectual Property

It is surprising that copyright law still retains much of its pre-modern form, in that it is still relatively subject specific. One significant reason for this could be because copyright law did not historically entertain prolonged engagement with the process of registration. Instead in 1911, copyright secured automatic protection for works, as prior to this period copyright protection had also been conditional on registration.[77] The process of registration did little beyond determine 'title' to a text and perhaps unlike patents, trademarks and design, registration could not resolve the underlying difficulty of determining a property in a text.[78] The ellipse in the differential way in which copyright law emerged can also be explained through the different status that literary and artistic work held in relation to 'industrial property.' For the argument that justified automatic protection for literary works arose because it became extremely difficult to minimise a literary or artistic work into a representation of that work: the representation constituting the necessary form for registration. Significantly, the literary work retained its 'original' form and hence protection rather than shifting – as a

[77] The *Copyright Act 1911* (UK) was adopted in Australia through the *Copyright Act 1912* (Cth). The main reason for adopting the law in Australia was that, as the new Imperial legislation was designed to apply to members of the Berne Convention (1886), it was argued that if Australia adopted the Act, Australian copyrights would automatically be respected in France, Belgium, Germany and Spain (amongst others). In addition the Imperial legislation offered a longer period of protection. See also K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.26 at [4.2]. The *Copyright Act 1968* (Cth) is Australia's current copyright act.

[78] For example in the registration of patents a precise description of the invention was necessary in order to limit the specific right to a graphical and textual description available for public inspection. If copyright had kept to the 'title' rationality, copyright claims would have been limited to exact/precise reproductions.

consequent of registration – to acquiring protection through a representation of the subject matter.

This is not to say that copyright law didn't have its own modes of regulating knowledge through forms of categorisation. The categories of originality and authorship have functioned to maintain a perception of coherence within copyright law and established firm boundaries around its subject matter through determining what a work was and how it could be transformed. In this way authorship and originality became the key categories that provide the means for making identifications of copyright subject matter.

As copyright did not require registration, it did not need to reproduce the intangible subject matter into an object of representation. However, copyright law was influenced by this way of understanding the intangible object, where the focus of the law was set upon the object produced by the subject matter – the decontextualised legal object. But copyright took on a unique form to the other categories of intellectual property and the actual subject matter, the intangible knowledge continued to exert pressure in determining the nature of the copyright. Thus copyright law was never totally able to exist on the abstraction of its categories: the specific subject matter in each case was and is ever present and ever influential. Indeed the dependence upon both abstract categories and subject specific concerns characterises modern copyright. To this end the effectivity of copyright law still actively involves negotiating the extent to which the nature of the intangible property can be determined.

The importance of authorship and originality in characterising the nature of the copyright is evident in many examinations of copyright.[79] Both notions have determined the specificity of copyright and facilitated the distinct modes of categorisation pertaining to the subject matter afforded through copyright. The following discussion of authorship and originality foregrounds the subsequent examination if indigenous subject matter. This is because the two key concerns that were raised (and continue to exist) in relation to the inclusion of indigenous art as copyright subject matter centrally engage(d) questions of authorship and originality. Both

[79] For example see: M. Rose *Authors and Owners* supra n.5 at 113-129; and, D. Saunders, *Authorship and Copyright*, supra n.5.

authorship and originality are considered specifically in relation to a work presented as if it were a closed entity, not to the more fluid subject matter determining the existence of the work. It is in this way that criteria of the identifiable author and the original work facilitate the idea/expression distinction that underpins the copyright regime.[80] Importantly, both categories have also incorporated an economic rationale of measurement integral to the internal coherence of intellectual property law as a whole. In this way copyright has become a powerful vehicle for the articulation and reaffirmation of liberalism ideals and ambitions of governance.

Authorship

Mark Rose has done much to facilitate an appreciation of the importance of authorship to the emergence of copyright.[81] As has been exposed through his work, it was ostensibly relations between booksellers and publishers that pushed the law to consider the category of the author, even though ironically, in the literary debates, authors were noticeably absent.[82] As such, the law became deeply involved in constructing how this subject (the author) was to be understood before the law and consequently within society.

Early histories of copyright, such as the work by Feather and Bonham-Carter[83] primarily sought to explain "why the priority of the law was not that of protecting the author's private property rights in the text."[84] In such circumstances it was assumed that the law was relatively disinterested in the changing social status of the 'author'. The prevailing philosophical movement of Romanticism in the Eighteenth and Nineteenth Centuries however, meant that law did become concerned and quite instructive in the modern formation of the notion and identity of the 'author'. While certainly it is accurate to suggest that this was not a primary

[80] The basis for the idea/expression distinction is that property cannot be vested in ideas themselves, only the expression of those ideas that is conveyed in some tangible form. For another discussion of the idea/expression distinction see: F.W. Grosheide, "When Ideas Take the Stage" supra n.58.
[81] See: M. Rose, "The Author as Proprietor" supra n. 11; and, *Authors and Owners* supra n. 5.
[82] Whilst the author was the focal point of the literary debates, they were argued between the different booksellers, hence the term 'battle of the booksellers'. The author provided both sides with a vehicle to centralise the consequent arguments. For example the author became representative of the argument of a common law right, even though it was the booksellers who were arguing for this right.
[83] J. Feather *The Provincial Book Trade in Eighteenth Century England* Cambridge University Press: Cambridge, 1985; and, V. Bonham-Carter, *Authors by Profession, Volume One and Two* The Society of Authors: London, 1978.
[84] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition) The Law Book Company, Sydney 2002 at 17.

concern for the law, it was inevitably an effect of the law. By this I mean, that because of the multiplicity of factors influencing the law and its relationship with the legal subject of the 'author', an inevitable byproduct was the transference of characteristics identifying the 'author' within the law to the wider society. The focus on questions of literary property in law could not help but be influenced by Romantic assertions of 'natural rights': subsequently effecting how the concept of the author as an individual and also as a legal entity was seen before the law as the agent determining status and authority within society.

Defining the category of the 'author' was the means for establishing the legitimacy of property in a 'work.' The work of Michel Foucault highlighted that the rise of the author in western liberal societies was intrinsically tied to relationship between the text and a system of property relations.[85] In this sense, the law in authorising such property relations necessarily affected the functionality of the subject named as the 'author'.

As noted above, the *Donaldson v Becket* (1774)[86] case functions as the historical location where law begins to negotiate categories that identify subject matter and in doing so produces legal authority, both in relation to law and society. With no "authoritative legal precedent that endorsed the purported theory of right"[87] the power to define and limit copyright was left with parliament, through which statutes regulating the period of the right were endorsed. It is through *Donaldson v Becket* (1774) that it was affirmed that copyright was a creature of positive law,[88] whereby the power to limit and define the right rested within the statute, rather than existing as a common law right.[89] Through this judgment copyright was affirmed as providing an 'economic right'.

Rose's interest in the case is in how it conveys the emergence of the author as a proprietor.[90] Indeed one purpose of his work is to highlight the historical emergence of the concept of an author, which began and was effectively completed in the eighteenth and nineteenth centuries.

---

[85] M. Foucault, "What is an Author?" supra n.5.
[86] *Donaldson v Becket* (1774) 4 Burr 2408, 98 Eng. Rep. 257.
[87] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.84 at 20.
[88] Ibid. , at 20.
[89] See also: D. Deazley, "Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters" supra n.15.

In this way Rose disputes the narrative of the ahistorical 'author-myth' positioned as a naturally occurring legal subject. He specifically points to *Donaldson v Becket* (1774) to show that there was no automatic connection between authors and texts. Instead, Rose points to a variety of factors, both cultural and legal, that were required before the notion of an author could be established. A key observation illustrating that "before the modern author could come into being there had to exist a market for books to sustain a commercial system of cultural products."[91] Rose observes that "the concept of an author as an originator of a literary text, rather than a reproducer of traditional truths" had to be realised in society, before it could be actualised.[92] It is also worth noting that written cultures endorsed the position of the author, as writing and recording was understood as a process of individuation.[93] Traditional truths were seen to circulate much more prolifically in oral cultures that were identified as 'communal'. This in part speaks to the dilemma of identifying and individuating indigenous works, as indigenous people are still largely seen to be reproducing traditional truths within an alternative paradigm of 'community' to that relied upon by intellectual property law.

Rose suggests that the law was responsive to the cultural influence of possessive liberalism in shaping the notion of an author, but that there were other ruptures and discontinuities that also facilitated the production of the author and the category of authorship before the law.[94] It is these multiple vectors that help configure the notion of authorship in the abstract, where the 'author' becomes a legal subject, known to the law in its abstraction. In this way authorship also becomes a legal category in its own right that can measure and identify a 'work'. Rose's insights about the rise of modern authorship expose the complexity of the law and the difficulty in locating a specific period where the law was seen to arrive at a particular definition of the author in relation to a text. In its abstraction authorship becomes a self-justifying concept that averts attention away from the problem of boundaries. In conjunction with the

---

[90] M. Rose, "The Author as Proprietor" supra n.11.
[91] Ibid., at 29.
[92] Ibid., at 29.
[93] See: S. Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* Routledge: London and New York, 2001 at 99.
[94] For instance, these other ruptures included economic and political change. See M. Rose, "The Author as Proprietor" supra n.11. Also see: M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author" (1984) 17 *Eighteenth Century Studies* 425.

new economic logic of the law, authorship provides a useful (if not also self-fulfilling) category through which identification of subject matter can be made.

It is precisely the lack of clarity in the terms that seek to identify subject matter, that still makes copyright susceptible to concerns regarding definitions of what constitutes intangible property. According to modern copyright the author is seen as the first owner of the property. While 'author' is not defined in *Copyright Act 1968* (Cth),[95] the concept does imply that the author is the originator of the ideas expressed in a material form. The connection between authorship and originality remains an important link in modern copyright and it is in this way that the two terms function to identify copyright subject matter, for if there is no identifiable author, then there is no copyright. Likewise, if there is no originality invested in the work, then there is no protection. Of course the boundaries here are not as clear as they seem, for there is no definition of an author or of originality in the statute, therein providing the possibility for a range of cultural objects to be considered as copyright subject matter.

Originality

Originality, like authorship remains undefined in the *Copyright Act 1968* (Cth). Similarly originality has historically helped determine the nature of the intangible property. In the literary property debates, originality helped identify, to some extent, the process of individuating an idea and expressing it in a work. In this way originality was concerned with a *judgment of the relationship* between the work and the creator.[96] It also functioned in the Nineteenth Century as a means of determining whether a work infringed another work.[97]

Through this early period, originality served as a means to identify the defendant's work from the plaintiffs, and inquiry into originality was not directed towards the plaintiff's work alone – a shift that occurred in the Twentieth Century.[98] Thus originality was used as a mechanism to

---

[95] Except for photographs were the author is the person who takes the photograph, *Copyright Act* 1968 (Cth) s.10(1).
[96] B. Sherman, "From the Non-original to the Ab-original" Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford 1994 at 119.
[97] See my earlier comments about the case of translation.
[98] The early Twentieth Century case that signals this shift is *University of London Press Pty Ltd v University Tutorial Press Ltd* [1916] 2 Ch 602.

consider the equilibrium of interests invested in a determination of an 'original' work. For example this was a key element in early cases involving sea charts,[99] road maps[100] and the French dictionary.[101] Drawing a balance between protection and access did not involve a determination between private property rights.[102] The key question was how to balance the original effort of both parties, rather than upholding the private rights of the plaintiff. In this way broad social considerations were imbued in determining a copyright, including the benefits to the public and the existing market for works of an informational nature.

The importance of the concept of originality in determining copyright can be conveyed through the observation that the term functions as a means for identifying both the mental labour or creativity of the 'author' and the nature of the property. Through a perception, consolidated in the literary property debates, that ideas come from an 'intellectual commons',[103] the notion of originality was developed as a way to individuate and understand the distinct transformation of the 'ideas in common' as the unique expression of an individual who has a right to its ownership. In this way, individualisation occurred when the idea was extracted from the shared space of knowledge, and independently expressed. Originality then, not only pertained to the individual but also identified the nature of the expression of the intangible subject matter. The abstract notion of originality functions as a mechanism for identification, through which the subject becomes knowable and individuated.

In the early period of copyright law, prior to the *Imperial Copyright Act* of 1911 that, on adoption by commonwealth legislature, extended British copyright law to colonies and dominions including Canada, New Zealand, Australia and South Africa,[104] originality was implicit within the concept of creativity: each act by an individual in producing a unique object

---

[99] *Sayre v Moore* (1785) 1 East 361, 102 Eng. Rep. 139.
[100] *Cary v Kearsley* (1802) 4 Esp. 168, 170 Eng. Rep. 679.
[101] *Spiers v Brown* (1858) 6 WR 352.
[102] K. Bowrey, "Originality in Copyright: How low can you go?" UNSW Seminar Paper, 11 September, 2001. As Bowrey also explains, "Many Nineteenth Century cases do not see originality as referring to a question about the subsistence of copyright – in terms of testing what the plaintiff has done to produce the expression. They understand originality as involving a contextual and relational judgment about this work's position to the marketplace. Whether copyright should protect this 'original' work depends upon the consequences of its protection for others." K. Bowrey, *Copyright and Culture: Australian Law and Controversies* supra n.25 at [2.08].
[103] For a useful discussion on the concept of intellectual commons see: P. Drahos, *A Philosophy of Intellectual Property* supra n.40 from 54.
[104] S. Wright. *International Human Rights, Decolonisation and Globalisation: Becoming Human* supra n.93 at 119.

required creativity and was necessarily original. Following 1911, originality was written into the statute as the *Copyright Act 1912* (Cth) confirmed that every work that was claimed as copyright must be original. In Australia, by the *Copyright Act 1968* (Cth), subsistence of copyright existed in "every *original* literary, dramatic, musical and artistic work."[105] One of the outcomes of this interpretative process was that the originality requirement came to be read as a reference to the plaintiff's work alone, with the question of the originality of the defendant's work only arising as a sub-issue under the issue of infringement – in relation to whether or not an alleged taking of the plaintiff's work was substantial, given the changes that the defendant may have made to the work.[106] For example, in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) protection was denied to the compilation of horse racing details written on a display board justified through the extent that,

> some original result must be produced. This does not mean that new or inventive ideas must be contributed. The work need show no literary or other skill and judgment. But it must originate with the author, and be more than a copy of other material."[107]

In *Kalamazoo (Aust) Pty Ltd v Compact Business Systems P/L* (1985) Thomas J determined that copyright subsists in the pegboard systems constructed by employees of Kalamazoo. The point of comparison is with the plaintiff's work alone. He states:

> while I refuse to find that the authors showed great skill, I did find that their preparation required a degree of concentration, care, analysis, comparison... In each case some awareness of contemporary developments and the marketability of such forms played a part in their creation.[108]

The shift in how originality was used to identify a plaintiff's work rather than a defendant's work speaks to the reprioritisation of interests in defining 'original'. Remembering the Eighteenth Century case of translation, it was the defendant's work that was considered closely to see what new elements had been added, not what had been taken from the plaintiff's 'original' work. Part of this shift in the Twentieth Century was more a concern that defining originality must be done as objectively and fairly as judicially possible, and this meant considering the plaintiff's work over that of the defendant's without reference to the work's value in aesthetic terms. As the early Twentieth Century case (which underpins current

---

[105] *Copyright Act 1968* (Cth) s.32.
[106] K. Bowrey "Originality in Copyright: How low can you go?" UNSW Seminar Paper, Sept 11, 2001.
[107] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 511 (Dixon J).
[108] *Kalamazoo (Aust) Pty Ltd v Compact Business Systems P/L* (1985) 5 IPR 213.

Australian judicial interpretation) *University of London Press Ltd v University Tutorial Press Ltd* (1916) demonstrates, the formulation was:

> The originality which was required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.[109]

The difficulty of determining the boundaries of originality in particular cases however, demonstrates the challenge of applying such an abstract concept as a legally imposed standard. For the standard is ambiguous. It is difficult to determine who 'wins' through the indeterminacy of the law. Attention must be directed at specific instances of case law – for example what actually happens with the ambiguity of the categories in the actual practice of the law? The importance of judicial determination highlights the position of case law in informing the more 'abstract' theory.

Recent Australian case law[110] highlights the extent to which a work constitutes originality has required questions of judgment by the court for which there is no clear point of reference. This has pushed the law to a space where the Court decides the merit of originality in works on a case by case basis, the law still being subject specific and case specific in its determination of 'originality'. It also shows that issues about the nature of copyright and its justification and boundaries were not resolved clearly in the Nineteenth Century, despite the management discussed by Sherman and Bently, of intangible rights.[111] The problems were merely hidden beneath a superficial classification of interests and impoverished definitional rubrics.

The Australian case law demonstrates the difficulties facing the Court in deciding on matters of originality. Commenting in his judgment from the initial hearing of *Telstra v Desktop Marketing Systems* (2001), a case that, at first instance, involved determining whether the compilation of names, addresses and phone numbers found in the white or yellow pages constituted copyright subject matter, Finkelstein J states;

> In precisely what sense a work must be original is not clear and the resolution of that question lies at the heart of this case. A work will lack originality if it is copied or

---

[109] *University of London Press Ltd v University Tutorial Press Ltd* (1916) 2 Ch 602.

[110] The recent Australian case law is *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.

[111] B. Sherman and L. Bently, *The Making of Modern Intellectual Property* n.18 at 101-128.

> adapted from another. This does not mean that the subject matter of copyright must be new or novel, as is the case of an invention the subject of patent protection. To the contrary, much of what is found in literature, drama or music is not new, but nevertheless it is proper subject matter for copyright.
>
> Originality means at least, that the work has been created by the author.[112]

The issue of originality underpins this case, but the indeterminacy of the term poses real difficulties in deciding both on the subsistence of copyright and consequently, infringement. As noted above, Finkelstein J and subsequently Chief Justice Black and Justices Lindgren and Sackville in the Full Federal Court appeal, recognise that the question of originality underpins the case.

Establishing the originality of the telephone book speaks to the problem central to this chapter's discussion: the difficulty in determining what the intangible element actually is within subject matter brought before the court. Within copyright, the phone book comes under protection as a special kind of literary work: as a compilation.[113] In this regard the question of arranging the information becomes one of labour rather than creativity. Desktop Marketing argued that as copyright cannot exist with facts, and as names, phone numbers and addresses found in the white pages are constituted as facts that freely circulated in the public domain, copyright did not exist and by virtue of its non-existence, was not infringed. Alternatively, Telstra argued that by way of the intellectual labour exerted in the directories, the product was an industrious collection of factual data sufficient to attract copyright protection as a compilation. The extent of the labour, mental and physical, exerted in compiling the phone book, became a measure of its originality. Finkelstein J seems genuinely astonished when he comments that "[a] casual reader of a directory might be surprised to learn of the complexities involved in its preparation."[114]

The stability of the category of originality is maintained by shifting the way in which originality is determined. Intellectual labour becomes the signifier for originality and is justified through considering the plaintiff's work in isolation. It is in this way that the surety of the category is

---

[112] *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* (2001) FCA 612.

[113] In the *Copyright Act 1968* (Cth) s.10(1) a *literary work* includes:

a) a table, or compilation, expressed in words, figures or symbols; and,
b) a computer program or compilation of computer programs.

confirmed. Indeed, it could be argued that the position taken in regards to originality functions as institutionalised justification that maintains the coherence of legal categories of originality and authorship, because copyright depends upon them for its own perpetuation.[115] The legal principle of originality is decontextualised, elevating it to a more universal and abstract, rather than specific, level and the law maintains the appearance of objectivity, even if it has to decide on a case by case basis what constitutes an 'original' work. However, for those who remain unsatisfied with the judicial claims of objectivity, it is clear, as with most legal classifications, "originality is not natural and secure, but culturally and historically determined."[116]

The decision by the Full Bench of the Federal Court in *Desktop Marketing*[117] demonstrates how the linkages are made that connect authorship and originality but also points to how copyright law depends upon the specific, in this case the technological facts that led to the creation of the database, for confirmation of the abstract, that is, the production of 'original' work. The case also highlights how low the Australian threshold for originality actually is. Chief Justice Black and Justices Lindgren and Sackville in the appeal follow the precedent set in the first instance by Finkelstein J. In his judgment Lindgren J cites from *Halsbury's Laws of England* that;

> Only original works are protected, but it is not requisite that the work should be the expression of thought, for Copyright Acts are not concerned with the originality of the ideas, but with the expression of thought, and in the case of a literary work, with the expression of thought in print and writing. The originality which is required relates to the expression of the thought. It is not required that the expression should be in an original or novel form but that the work should not be copied from another work; it should originate from the author.[118]

The argument linking authorship to originality is nicely demonstrated in this quote by Lindgren J. Its utilisation in *Desktop Marketing* highlights two points. The first is that it represents the standard judicial argument that justifies both the property right and the work as property through categories of copyright. The second is the reluctance of the law and the courts to recognise the difficulty that evoking the abstraction of such categories perpetuates an inability within the law to fully grasp the problem. Jane Ginsburg has also argued that the law

---

[114] *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* (2001) FCA 612.
[115] J. Gaines, *Contested Culture: The image, the voice and the law* University of North Carolina Press: Chapel Hill, London, 1994 at 13-17.
[116] B. Sherman, "From Non-original to Ab-original" supra n.96 at 120.
[117] *Desktop Marketing Systems Pty Ltd* v *Telstra Corporation Limited* [2002] FCAFC 112.

"encounters far more difficulty accommodating works at once high in commercial value but low in personal authorship."[119] In the silences brought into the law with its modern 'development', what is made possible is the reification of the author and work, giving both a suggestion of secure, self-evident meaning. When proprietal claims challenge the status of either the author or the work by a competing commodity, it is necessary to affirm the priority of the legal precepts of the author and the original, so that the stability of the categories and the law itself is maintained. As McKeough et al observe;

> To some extent the concept of what constitutes a work within the Act and the concept of originality are intertwined. It is difficult to discuss what amounts to a work without discussing originality, since without a sufficient degree of originality, a work will not come into existence.[120]

Thus the problem still remains one of determining and identifying what the intangible element is for copyright protection through abstract categories and circular relations of justification. In this way, legal argument functions as a powerful forum, "in which dominant narratives of social reality are produced and alternative discourses silenced."[121]

The category of originality, because of ambiguities in definition, depends upon the judgment of the court to translate and apply the abstraction into contextual meaning. The function of the court then becomes one that manages categories of copyright and inevitably the stability of the law. In short, the court plays a fundamental role in upholding the legitimacy of categories that measure and identify copyright. The court governs the way in which interpretations of the law are made. To this end, each judgment of originality that the court makes in order to contextualise the abstract term becomes a matter of fact and degree[122] determined differently in every case. Recognising that judges do not exist in a vacuum but are social and cultural beings very much like the rest of the population then means that if each case is measured by fact and degree and each judge has their own interpretation and methods of applying the law, then it is

---

[118] *Halsbury's Laws of England Second Edition*, 1932, vol 7 at 521 cited in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) FCAFC 112.

[119] J. Ginsburg, "Creation and Commercial Value: Copyright Protection of Works of Information" (1990) 90 *Columbia Law Review* 1865 at 1866. However America has adopted a different standard see: *Feist Publications v Rural Telephone Service* (1991) 499 U.S. 340.

[120] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.82 at 55.

[121] D. Otto, "Subalterity and International Law" supra n.75 at 162.

[122] The notion of 'fact and degree' in originality cases was developed by Lord Atkinson in *Macmillan & Co Ltd v K & J Cooper* (1923) LR 51 Ind. App. 109 at 125 where he states, "In every case it must depend largely on the special facts of the case, and must in each case be very much a question of degree."

possible to argue that these methods are not and have never been 'objective'. Instead such decisions and questions of degree embody cultural influences meaning that inevitably when making a decision, the law will be influenced by cultural factors emanating from the subjective position of the judge in applying the abstract principle upon which the stability of the law depends. The abstract principle primarily being the singularity of an author/original identification as a substitute for a more metaphysical determination of ownership.

Recognising the subjectivity of copyright

The authoritative narrative that promotes the law as abstract and ahistorical fails to meaningfully engage with the reality of subjective decisions that shape the direction taken by the law. Indeed it could be argued that the key failing of the literature accounting for the emergence of intellectual property law (which the previous section has drawn from) is characterised by an absence of political and economic discourses within the theory. The legal literature, although informed by critical legal sensibilities, addresses the jurisprudence of copyright and literary property and its philosophical pretensions whilst scaling over the practice and contemporary Nineteenth Century politics. The stance is justified because of difficulties in factoring in law's indeterminacy. For instance, because the actual emergence of intellectual property is so discordant and diversely expressed, the tendency for legal historians and theorists has been to look to a way of encapsulating the broad sweep, with little focus on the existing cases. However, as McKeough et al observe,

> In reading copyright case law it is important to consider whether theories like romanticism have influenced judicial understandings. Though copyright is ... a creature of positive law, despite *Copyright Act 1968* (Cth) s8, not all important copyright principles are expressed in the text of legislation. Further, in many places the legislation relies upon 'ordinary' or 'common sense' meaning of terms. There is ample space for romantic and other values coming into the body of copyright law. *Therefore understanding copyright law requires an interpretation of case law in view of many possible social and cultural influences and prejudices, including romanticism.*[123]

It is postmodern and critical legal critiques that in combination have led to dissatisfaction with the authority of legal reasoning in copyright case law. As I discussed in the previous chapter, such critiques point out that the law does not function in isolation, but produces and is

[123] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.84 at 23 [emphasis mine].

produced by cultural values and perspectives. This is in particular regard to 'common sense' decisions that are made in any number of ways by the court when applying a principle that is not explicitly defined in the legislation. This complexity highlights the discontinuity of the law, for cultural and political factors inevitably influence the shape that the law takes.[124]

While Rose's work pointed debate in this direction, he maintained a strong interest in the particular category of authorship. As the discussions of originality above suggest, the cultural production of the author and the twinned concepts of authorship and originality in intellectual property law are among the many potential sites for the recognition of the cultural influence and production of categories within the law. Following from Rose's work and also influenced by Foucault, Rosemary Coombe has written extensively on the inevitable influence of cultural factors on the law.[125] With an interest in the peculiar political intersections that legitimate intellectual property laws, Coombe has also pointed to the dynamism of contemporary cultural practices that promotes individual resistance to monopoly privileges extant within an intellectual property regime. Thus Coombe highlights the multiplicity of experience through which individuals and the law are interconnected.[126] Rather than the spheres being abstract and separated, they are intertwined and contingent upon the other for future development and direction. As a result of cultural influence, the possibilities for shaping the direction that the law takes function within a network of multiple relations, where the constant process of reshaping the law is in direct response to cultural production.

The inevitability of the engagement of law with cultural functions is, in part, due to the difficulty of people as legal subjects who do not necessarily behave in a predictable manner for law or governance. Thus one of the difficulties for the law is that it must be constantly dealing with the complexity of individuals and how they perform as legal subjects.[127] It is almost impossible to speculate upon the specificity of action undertaken by individuals as legal subjects. For certain legal subjects, the law intersects their lives at an extreme rate, almost to

---

[124] I examined this intersection in Chapter Two.
[125] Much of her earlier work has been collected in the book, R. Coombe *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Durham and London, 1998.
[126] Ibid. , see generally the 'Introduction'.
[127] K. Bowrey and M. Rimmer, "Rip, Mix, Burn: The Politics of Peer to Peer" (2002) 7(8) *First Monday.*

the extent that individual lives embody a *performativity* in relation to law and legal bureaucracy.[128] In short, there is no certainty in how individuals relate to the law, and this makes for complex legal subjects. One of the reasons why law is so messy and disorderly is that "citizens make challenging legal subjects."[129] A snapshot of the broader landscape of litigation law points to such difficulties, albeit in only one area of law.

This difficulty is also present in copyright law, where the law has also attempted to accommodate demands raised through the increase in new and different technologies. How individuals negotiate around new knowledge and lay claims of ownership to knowledge affect the response of the law. In this way then, copyright is influenced by relationships between individuals, as legal subjects who intersect the law through an engagement with cultural products, for instance, those increasingly produced through information technologies and digital communications.

Notably Coombe engages with a variety of theoretical and philosophical positions in order to more fully understand the dynamics generated by the law in contemporary cultural practice. Avoiding traditional jurisprudential thought that considers the law through positions that have been historically favoured by the law to the exclusion of others, she notes the tendency within scholarship devoted to intellectual property to limit consideration to legal doctrine and legal rationality.[130] Such literature accounts for the function of the law without critically examining its operation. Coombe continues her point through emphasising that,

> [t]here has been too little consideration of the cultural nature of the actual forms that intellectual property laws protect, the social and historical contexts in which cultural

---

[128] In this way I mean that lives become acted out and mediated through the law in the multiple contexts including courts, police and prisons. For many of these individuals much of daily life is played out or performed in spaces of legal influence. In this sense I describe this as being the 'performativity' of the law, following from Judith Butler's insightful work on the performance of gender. See: J. Butler, *Gender Trouble: feminism and the subversion of identity* Routledge: New York, 1990. Thoughts in this context (and constituting another project of itself) have developed through consideration of the legal performativity of indigenous youths in north west New South Wales, where lives are constantly played out in courts, in police cells and in relation to the law. This prompts questions about what the effects and impacts of this are in a variety of (social and cultural) circumstances. I thank my sister, Sophie Anderson, Senior Solicitor, Western Aboriginal Legal Service, for extended discussions with me on this subject.

[129] K. Bowrey and M. Rimmer, "Rip Mix and Burn" supra n.127.

[130] R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* supra n.125. See also discussion by Deazley in maintaining control of the narrative of intellectual property, D. Deazley, "Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters" supra n.15 at 276.

> proprietorship is (or is not) assumed, or the manner in which these rights are (or are not) exercised and enforced to intervene in every day struggles for meaning.[131]

Coombe considers the particular effects of the law, not in isolation, but with regard to the individual and cultural products generated through the intersection of law and 'culture'.

Through these critical cultural legal frames, Coombe points to the role that individuals play in exercising autonomy from the law and also generating new and productive ways of intersecting with the law. Individual interpretative agency constitutes an embodied approach to the effects of the law and how these effects impact in a variety of dispersed locales. Coombe's observations open a new space by pointing out that when judges make decisions based on 'common sense', they are only one in a number of players that duly influence the cultural shape that the law takes: multiple parties push and wrestle, influence and negotiate the form of the law. These influences occur through particular resistances to the law, but also in the cases that are tested through the law. For cases do not exist in abstraction either, but are generated from a particular time and space, and as reaction to a particular incident or against the law. Recognising this inherent politics allows for alternate readings of the emergence of discrete categories within the law.

As new subject matter comes before the law, increasingly the law must determine the extent of the protection it can grant and the identifying characteristics of the material. But this exposes a challenge, whereby calls for protection of new material – an expectation of legal action – increasingly mean that the law must employ its principles of measurement and identification and ultimately widen the scope of what is considered to be intellectual property. Thus the difficulties are part of a continuum, where the law can be seen to be working through an ongoing set of concerns. The problems are however modified through the changing nature of the subject matter and the multiple levels of expectation generated through individual actors.

It is the widening of the scope of what comes under and can be protected as intellectual property that has become a focus for critical inquiry. The increased power of intellectual

[131] Ibid. , at 7.

property to protect cultural products has facilitated such a focus.[132] In a social environment where trademarks circulate to designate ownership of a product, where digital technology pushes for rethinking the concept of the author and where an individual is exposed to endless merchandising protected by intellectual property laws, critiques of intellectual property seek to point to how such laws are functioning to increasingly control the flow of information.[133]

Contemporary theoretical critiques point to what is excluded from intellectual property and have prompted a reflexivity regarding these exclusions. In this regard the process for inclusion evokes a sustained and prolonged rethinking of how and to what extent these 'new' knowledges can be incorporated. The process is not an instantaneous one. Rather it evolves from a political location that develops and produces itself as a category to be known before the law. The process is sustained and draws on multiple actors and employs a network of relations that eventually produce the 'new' knowledge as a category in its own right.

As I suggested at the beginning of this chapter, it is through postmodern and related critiques that intellectual property law became sufficiently self-reflexive to address the exclusion of indigenous knowledge from its sphere. Yet indigenous knowledge is still seen as a kind of 'special' case for the law because it has the added link to postcolonial discourses. The perception has developed through a reflection of the cultural specificity of the law in regards to indigenous people and the effects of colonisation. It is also perhaps because there has been hesitancy in moving beyond the social construction of indigenous people as 'reproducers of traditional truths', rather than as authors (albeit in different forms) of contemporary narratives. The inclusion of indigenous knowledge suggests that a different concept of 'community' is necessary – but this begins to rely on binaries that are unworkable in everyday practice.

---

[132] See for instance: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications: London, 2002.

[133] For a varying considerations of this see: P. Drahos with J. Braithwaite *Information Feudalism* ibid; L. Lessig, *The Future of Ideas: The Fate of the Commons in an Interconnected World* Random House: New York, 2001; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property Future* Brookings Institution: Washington DC, 1998; S. Shulman, *Owning the Future* Houghton Mifflin: Massachusetts 1999; J. Litman, *Digital Copyright* Prometheus Books, New York, 2001; J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* Harvard University Press: Cambridge, Massachusetts, 1996; S. Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* New York University Press: New York, 2001; S. Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* supra n.92.

Recognising the plurality of relations that have contributed to the production of the category of indigenous intellectual property provides a space to understand the connections between legal scholarship, politics and legal practice. In this way, there is no singular factor that could explain the emergence of a concept of indigenous knowledge within an intellectual property discourse, but rather a multiplicity of factors pushing, constructing and producing indigenous knowledge as a distinct category to be known before the law. Perhaps as Martin Nakata suggests, it is the "Indigenous Knowledge enterprise"[134] and the increased national and international inquiries into indigenous knowledge[135] that help locate concerns and generate levels of expectation for the legal protection of indigenous knowledge. But what characterises the position indigenous knowledge within intellectual property law (as within other discourses) is how it is implicitly imagined as 'different' and indeed separate from 'western' knowledge. This position directly affects the way in which the law treats the inclusion of this previously unconsidered subject matter. The law is deeply involved in constructing how this new subject is to be understood both in law, and as suggested through the case of the 'author', also in society.

The following section will draw out the concomitant factors that have produced the category of indigenous knowledge within intellectual property law. It also looks to the conditions of existence for government intervention articulated through the reports and the case law that will be examined in the later chapters. Moreover, it is important to remember that the production of indigenous knowledge within intellectual property discourse is still actively occurring, as the law continues to grapple with the difficulty of the subject matter; particularly in specific circumstances that demand the functionality of the law while also pointing to its complexity.

---

[134] M. Nakata, "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" (2002) 28 *International Federation of Libraries Association Journal* 281 at 282.
[135] A. Agrawal, "Dismantling the Divide Between Indigenous and Scientific Knowledge" (1995) 26 *Development and Change* 413 at 415.

Creating an Indigenous subset within intellectual property law

> It would be reductionist to see the power of intellectual property in purely prohibitative terms. The law is always simultaneously prohibitative and productive: it creates realities and constitutes possibilities.[136]

The story of how indigenous knowledge has become positioned within the law is complicated, contradictory and incomplete. There is no isolated moment of identification. This is not to say, however that there isn't an undercurrent that can be recognised as intimately intertwined in the construction of indigenous knowledge as a category before the law. In short this is the way in which the law struggles with new subject matter. Thus the difficulties presented to the law, rather than being entirely new are actually part of a continuum – of the law working through ongoing problems that it has been struggling with for years. The difficulty associated with including indigenous knowledge as protected subject matter arises through the problems already discussed involving identification of intangible subject matter, and the justification of a right in property.

A corollary can be drawn between the struggles in the literary property debates: to identify the 'right', to determine the property, what marks and boundaries the property had, and how to identify a copy – and indigenous knowledge, where all these issues are revisited. While indigenous knowledge as new subject matter presents problems for the law, these are to an extent, problems that underlie intellectual property as a whole and as such are not 'new'. What is 'new' or different is the way in which the law responds, and this is due to the multiplicity of cultural, political, economic and individual vectors that influence the direction that the law takes.

I proposed in Chapter Two that law reduces cultural difference but also relies upon it to understand the differing demands brought for legal interpretation. My point was that law rejects difference presented to it in a radical way: it accommodates difference when it is presented through the guise of its own categories and terms of reference. This is a reality of legal engagement with differentials, cultural or political, as it mediates a space that does not

---

[136] R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* supra n.125 at 87.

destablise its own narrative of internal cohesion. Remembering the comments of Noel Pearson, that legal frameworks can be adapted for purposeful strategies of recognition, voicing a concern for indigenous property within a legal framework of intellectual property strategically works to alert the law to a concern that it may have otherwise been blind. Because the challenge is set within the law's own terms of reference it must engage the challenge. To not do so would undermine the narrative of 'universalism'. Thus the possibility of utilising the law depends upon a recognition of the emancipatory potential of property.

A key to understanding the inclusion of indigenous knowledge must consider how the law treats the indigenous difference that is presented. The process of making indigenous knowledge as a category within intellectual property paradoxically seeks to sideline and and cloak cultural difference within the category. Indigenous knowledge is instituted as part of the intellectual property narrative that minimises the specific historical conditions that has resulted in the law being faced with such problems – for example in Australia, colonisation. In addition the law is constructed as the mediator of indigenous difficulties, with little or no reflexivity of the actuality of law in facilitating the process of colonialism. While indigenous people do have a position in relation to the law, as Chapter Two suggested and later chapters will extend, the position is paradoxically exclusionary and inclusive, therefore making the location that indigenous people are expected to mediate extremely difficult. Thus solving the problems presented to intellectual property law is not about countering for the historical disadvantage or working towards establishing some form of indigenous sovereignty, where indigenous people choose how to regulate and manage their knowledge and images. Instead the framework establishes how copyright can incorporate this 'new' subject matter within its entrenched boundaries and in this way the law presumes to speak for indigenous people. As such cultural differences are seen as 'incidental' rather than 'intrinsic' to the production of the category of indigenous intellectual property. While I will be returning to these issues in later chapters, they are raised now in order to stress the complexity of positions that are foundational to the making of the space within intellectual property law specifically for indigenous knowledge.

Political environments and individual influence

By the late 1960s and throughout the 1970s in Australia, two distinct policy changes were evident in the way the government approached indigenous people. The first was a change from a policy of assimilation to one of self-determination and the second was in regards to land rights. The policy shift to land rights was seen in the culmination of statutory land rights legislation in the Northern Territory and South Australia.[137]

The land rights movement consolidated a politics concerned with redressing the imbalance between western law and the interests of Aboriginal and Torres Strait Islander people. That these politics have undergone change and movement over the last thirty years is a testament to the dynamics of cultural production, political agendas, academic focus, and the sustained voice of indigenous people. In this way, the land rights movement presented a dialogic space where the interests of indigenous people were spoken, governmental objectives shaped, legal positions challenged and academic interests honed. While it should be emphasised that this space was never unilateral or bounded, the historical importance of the space enabled flows into various and multiple areas and generated, in particular, rethinking about the function of the law, with specific consideration of indigenous people as citizens[138] and therefore as legal subjects.[139] One example of this rethinking of indigenous people in relation to the law was the recognition that there had historically been and actually existed a parallel body of law for many indigenous people[140] even though the authority of these customary laws remained unacknowledged within the dominant legal system.

Recognising indigenous legal rights and the importance of land rights legislation changed the face and direction of Australian legal history. My point here is to highlight the complex demands of political movements that shape the future direction and action of government and

---

[137] See: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Pitjantjatjarra Land Rights Act 1981* (South Australia).

[138] See for example: A. Curthoys, "Citizenship, race and gender" Daley, C., and M. Nolan (eds), *Suffrage and Beyond* Pluto Press: Sydney, 1994; A. McGrath, "Citizenship, Rights and Aboriginal Women" (1993) 37 *Journal of Australian Studies* 99; and generally, N. Peterson and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* Cambridge University Press: Cambridge, 1988.

[139] See my earlier discussion of indigenous people as legal subjects in Chapter Two at 55.

[140] An attempt to understand indigenous customary law prompted the Australian Law Reform Commission Report *The Recognition of Aboriginal Customary Laws* 1983.

individuals. For on one level, the changes in governmental policy relating to indigenous people necessitated a re-conceptualisation in legal and political discourse of the relationship between many indigenous people, their spiritual connection to land and the importance of cultural imagery. The significance of the land claims were in "introducing conceptions of land ownership that was not only collective but based on spiritual and social connection place."[141] In this way land rights and native title disrupt traditional jurisprudence on property ownership and rights, although such legislation is located and inseparable from such jurisprudence. The disruption highlights the discontinuity of the law and the possibility of developing new and productive legal narratives that incorporate the cultural differences presented by indigenous people as legal actors.

As a compliment to the increasing recognition of indigenous people as citizens, attention was also drawn to the different cultural practices and products of many indigenous people. As Wandjuk Marika explained:

> We have found that within this culture, our art is appreciated and has material value. We have been very happy to sell our paintings and artifacts as this has enabled us to purchase the things that we now need so that our children can have enough to eat, go to school and learn to live as part of two cultures.[142]

In 1973 the National Seminar on Aboriginal Arts was held. The seminar prompted renewed calls for consideration of Aboriginal art as legitimate art in a western sense. While I will be considering the significance of this transition of Aboriginal art from ethnographic specimens to 'high art', in terms of the market and value in Chapter Six, it is worth highlighting that the 1960s and 1970s were a period in Australia where the distinct 'otherness' represented through Aboriginal cultures began to rupture.[143] In this sense, the positioning of Aboriginal people at a point of exteriority to western 'cultures' was destabilised and aspects of indigenous cultures became part of the dominant western ethos: Aboriginal art, as 'art' was one such example. However there still existed a propensity to view indigenous people through the lens of primitivism. The circulation of indigenous products as commodities within a market place was countenanced by the mythological position held by indigenous people who were configured in

---

[141] V. Strang. "Not so Black and White" Abramson, A., and D. Theodossopoulis (eds), *Land Law and Environment: mythical land, legal boundaries* Pluto Press: London, 2000.
[142] W. Marika, "Copyright on Aboriginal Art" (1976) 3(1) *Aboriginal News* 7 at 7.
[143] This followed from the 1967 referendum that granted indigenous people citizenship

romantic, traditionalist and communal guises. The conflict being that whilst indigenous cultural products circulated within a contemporary framework, the indigenous 'creators' remained outside modernity.

Despite the nascent primitivism attached to indigenous people as a general category, certain indigenous spokespeople inevitably influenced the responsiveness of the law in relation to these 'inappropriate' uses of indigenous imagery. For example in 1976, Wandjuk Marika, an artist from Yirrkala in Arnhem Land, wrote in the *Aboriginal News* of his anguish at finding his art reproduced onto tea towels. Marika explained his position, one that he subsequently became the key spokesperson for.

> Sometime ago, I happened to see a tea-towel with one of my paintings represented on it; this was one of the stories that my father had given me, and no-one else amongst my people would have painted it without my permission. But some unknown person copied my painting and had it reproduced in this way, without even first asking my permission. I was deeply upset and for some years was unable to paint.
>
> It was then that I realised that I and my fellow Aboriginal artists needed some form of protection. It is not that we object to people reproducing our work, but it is essential that we be consulted first, for only we know if a particular painting is of special sacred significance, to be seen only by certain members of a tribe, and only we can give permission for our works of art to be reproduced. It is hard to imagine the works of great Australian artists such as Sydney Nolan or Pro Hart being reproduced without their permission. We are only asking that we be granted the same recognition, that our works be respected and that we be acknowledged as the rightful owners of our own works of art.[144]

In this way it could be argued the first case involving the appropriation of Aboriginal art, *Yanggarrny Wunungmurra v Peter Stipes*[145] was developed in part, through an awareness of issues of social justice, but also due to the advocacy of individuals like artists such as Wandjuk Marika. Marika and Wunungmurra shared the social nuances of Yolngu culture whilst also articulating these into a western legal framework. Marika was also aware of the value of Yolngu cultural products within the market. Whilst this first case had limited impact in the political and legal debates on Aboriginal art and copyright due to an anthropological and international focus

---

[144] W. Marika, 'Copyright on Aboriginal Art' supra n.142 at 7.

[145] *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported. See: N. Stevenson, "Case Note: Infringement in Copyright in Aboriginal Artworks" (1983) 17 *Aboriginal Law Bulletin* 5.

at the time on folklore, the second case *Bulun Bulun v Nejlam Pty Ltd*[146] had important consequences for the incorporation of new subject matter into intellectual property law and the genesis of a new area of political focus. For in a more spectacular fashion the case signaled the arrival of a new indigenous agenda that sought to secure legitimate legal rights to control the use of culturally specific knowledge and imagery through the prism of intellectual property law. Significantly, this challenge for intellectual property law in identifying 'new' subject matter and cultural difference was mediated through "white experts, canny lawyers and nice Judges."[147]

The importance of the 1989 *Bulun Bulun* case lay not in the copying of indigenous designs, which had been occurring for decades often with implicit governmental encouragement.[148] Rather the importance was in the shift in political thinking whereby use of indigenous designs was actually considered to be inappropriate and offensive to the indigenous people and communities whose designs were used. Moreover the complexity of the shift is illustrated in that the change in thinking was not singularly based in aesthetic and cultural authority but was accompanied by economic factors; simply that when such designs were copied by non-indigenous people, the indigenous 'owners' or 'custodians' were denied the possibility of engaging within an economic marketplace of relations. Indeed it is difficult to determine what the motivating factors where in the shift in political agenda of governmental agencies: the value of Aboriginal art in the market place, or recognition of the value of the art to indigenous people. Recognising the value of the art in the marketplace was part of a broader logic of the economy intrinsic to liberal governmental ambition,[149] while recognising the value to indigenous people required an appreciation and reflection of the importance and significance of the art to Aboriginal and Torres Strait Islander people.

---

[146] *Bulun Bulun v Nejlam Pty Ltd* (1989) Federal Court, unreported. See Colin Golvan's commentary on the case, "Aboriginal Art and Copyright: the Case for Johnny Bulun Bulun" (1989) 10 *European Intellectual Property Review* 346.

[147] T. Davies, "Aboriginal Cultural Property?" (1996) 14 (2) *Law in Context* 1 at 6.

[148] For example Baldwin Spencer encouraged the explicit copying of Aboriginal designs from South Australian Museum in the early Twentieth Century. For further elaboration on this history see Chapter Six.

[149] Purdy makes the observation that "according to many colonized peoples analysis of colonialism, although racism is never incidental, it is economic exploitation that is fundamental." J. Purdy, "Postcolonialism: The Emporer's New Clothes?" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999 at 208.

The power of personality was also a crucial element in developing any response to the use of indigenous designs by non-indigenous people. As noted above, Wandjuk Marika was influential in prompting consideration of this issue, both within Federal government and what was then called Institute for Aboriginal Studies.[150] Marika's position on copyright was possibly informed by both the early confidential information case *Foster v Mountford*[151] and even the land rights case, *Milpurrum v Nabalco*[152], where the Yolngu people argued for land rights, presenting the now famous Bark Petition as evidence (and title) of knowledge, association and spirituality with the land.[153] Significantly what was revealed through the use of Aboriginal art to convey belonging and knowledge of particular tracts of land was that much Aboriginal art diverged from western aesthetic appreciations and application. This de-stablised the purpose of utilising intellectual property law to protect indigenous imagery for the economic component, in certain cases, was over-laid by a sense of cultural significance that could not be positioned within an economic realm of value. This discontinuity was demonstrated in how questions of 'authorship' and 'originality' relating to Aboriginal art were raised.

The 1981 *Report of the Working Party into the Protection of Aboriginal Folklore*[154] can be seen as both a response to Marika and other Aboriginal artists' concerns about the use of cultural imagery and a recognition of the market demands increasingly being made for indigenous artwork and design. Whilst a detailed consideration of this document will be made in Chapter Four, at this stage it is worth noting that the Report revealed a difficulty in the sense of purpose that still exists as an undercurrent within debates about indigenous intellectual property. This dilemma of purpose, succinctly, is whether legal protection is to secure the protection of indigenous knowledge as a tradition, or to protect the economic interests of indigenous people, or both. To the extent that the Report revealed the difficulty of determining the purpose for

---

[150] The institution formerly known as Institute for Aboriginal Studies is currently known as the Australian Institute of Aboriginal and Torres Strait Islander Studies or AIATSIS.
[151] *Foster v Mountford* (1977) 14 ALR 71. In this case, the Pitjantjatjarra Land Council went to Court to halt the publication of the book *Nomads of the Desert* by Charles Mountford that contained secret/sacred material. The case was successful and the book was withdrawn from publication until the material was removed.
[152] *Milpirrum v Nabalco* (1971) 17 FLR 141.
[153] G. Yunupingu, "From the Bark Petition to Native Title" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997. For an appreciation of the connection between art and land see: S. Cane, *Pila Nguru: The Spinifex People* Fremantle Arts Centre Press: Fremantle, 2002.
[154] Department of Home Affairs and the Environment, *Report of the Working Party into the Protection of Aboriginal Folklore,* Canberra, December 1981.

governmental objectives, the case law *Bulun Bulun v Nejlam Pty Ltd* further exacerbated the tension highlighting the disjuncture necessary for both purposes to be realised.

The 'special' case of indigenous property

Despite the superficial resolution of the meaning of author and originality utilised by the mid Twentieth Century courts, curiously, the prevailing intuition at the time of the first Bulun Bulun case was that Aboriginal art might not be 'original' enough in the relevant legal sense. As is evident from an interview with Colin Golvan, the barrister representing the Aboriginal artists, proving originality of the work infringed was far and above the biggest potential problem that the applicants had in the argument for copyright infringement. As preliminary to the case, Golvan and Martin Hardie (the solicitor engaged for the case) flew up to Maningrida in Arnhem Land and then went to the outstation Garmedie where John Bulun Bulun lived.

> We spent some time with him and talked to him about his work and watched him working. We even filmed him to verify the originality of the work. This probably seems a strange thing to say today, but at the time there was quite a lively discussion in copyright circles about whether Aboriginal artists could claim to be original authors of traditional artworks. There was some thinking that because it was a traditional art form - a kind of anthropological thinking - that the artist couldn't claim copyright in it, as all they were doing was copying an age old image.[155]

The initial commentary was that Aboriginal art was not original, because Aboriginal art was derived from community traditions, copied from an early version by countless (nameless) authors. This commentary thus brought to the fore the potential disjuncture of the two categories for the identification of copyright subject matter: originality and authorship. As Nina Stevenson suggest in an early edition of the *Aboriginal Law Bulletin*,

> The case [*Wunungmurra v Stipes*]...raises some interesting questions. Whilst the authorship of the bark painting is attributed to the first plaintiff, he learnt to paint the story depicted in the painting from another older Aboriginal painter who, according to Aboriginal law, also has the right to the story of the painting. Although the arrangement of the elements and the expressions on the figures may vary between painters of the story, certain features – such as the cross hatching and paneling and the way the figures are placed – will always be the same. The concept of original authorship is somewhat inappropriate in this context. Could it ever be asserted that as Aboriginal plaintiff was not the author of the painting because the painting was, in

[155] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

> effect, a copy and was not totally original to him? Alternatively is the painting a work of co-authorship?[156]

That the issue of originality was critical to the thinking about whether Aboriginal art could be included at all within an intellectual property discourse is curious considering the ambiguous position of 'originality' within the *Copyright Act 1968* (Cth). Further, and this perhaps points to the position of cultural difference within these discussions, there was little if any comparison made to other cases within the long history of rights in literary property, that shared the difficulty of determining originality. For as I discussed earlier, there were a substantial number of cases that explicitly dealt with these difficulties including: translations; maps; sea charts; and, dictionaries. Indigenous art and questions of originality and authorship that arose were seen as totally distinct owing to the 'unique' and wholly different cultural concerns at hand. What is possible to describe as occurring were dual interpretations; one relying on the primacy of 'originality' as a category capable of identifying copyright subject matter and secondly explicitly reading the otherness and difference within indigenous cultures as incommensurable with the law. This view of indigenous cultures fostered an anxiety for the law, where indigenous people as legal subjects were positioned between two dislocated worlds, one of 'tradition' and another of modernity.[157]

In Chapter Two I argued that the law is silently informed by culture. This position is enhanced in the consideration of the intuition that a problem of 'originality' may exist in relation to indigenous subject matter. The law was implicitly informed by cultural factors, for instance anthropological writing that emphasised the 'traditionality' of indigenous societies and art histories that spoke to the repetition of Aboriginal designs. The information that indigenous artists engaged in the same mental labour as other artists was obscured by the differential position of indigenous artists within indigenous communities. The concept of 'community' and the difficulty of 'individuation' precluded the vision of an Aboriginal artist as an 'author'. In a simplistic way, the argument ran along the lines that indigenous artists, as they did not choose what to paint because it was 'traditionally' determined, the labour exerted was that of copy

---

[156] N. Stevenson, "Case Note: Infringement of Copyright in Aboriginal Artworks" supra n.145 at 5.

[157] For a considered work addressing the notion of anxiety in relation to the nation and Indigenous people see C. Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration of the Rights of Indigenous People" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999.

rather than creativity. Thus interpretations of indigenous 'culture', made from a variety of perspectives that were importantly non-indigenous, informed the position that the law took.

As Sherman notes, one of the important reasons why indigenous art was not seen as 'original' was because it was characterised as 'tribal' or 'primitive'.[158] Further, it was suggested that there was no identifiable 'author' in the sense that the artist was 'reproducing traditional truths' that had been handed down, thus voiding any arguments regarding creativity. Similarly, any aesthetic choices made by an artist were governed by custom and not choice: the idea of an 'intellectual commons' was not applicable in this context. At this point it is instructive to remember Mark Rose's consideration about the necessary conditions that allowed the relationship between the figure of the 'author' and the text to permeate society. Rose observed that before an author could be perceived as a creator it was first necessary that the society realised the author was doing more than replicating traditional truths.[159] So while this shift was crucial for the western formation of the author, it was still to occur in relation to figuring (and understanding) indigenous people and culture – there was yet to be an individuation that linked an indigenous artist to a work.

These interpretations of indigenous cultures were part of a complex nexus that included reliance upon anthropological and ethnographic knowledges that made indigenous people knowable, however only in a framework of primitive, tribal and unindividuated communities. Moreover, indigenous people were homogenised as one group, timeless and ahistorical, and these tropes fed any interpretation of the 'Aboriginal' that arose. Shelley Wright has suggested that as a consequent to these western historical discourses that have sought to define Aboriginality, a construction of an "imaginary Aborigine" permeates contemporary political and social discourse.[160] That is the invention of the category of 'Aboriginal' has been developed by western frameworks and eurocentric perceptions of otherness and difference, resulting in a

---

[158] B. Sherman, "From the Non-original to the Ab-original" n.96 at 122. The literature circulating at the time pointing out the difficulty of originality and Aboriginal art includes, K. Puri, "Copyright Protection of Folklore: A New Zealand Perspective" (1988) 22 *Copyright* 23; K. Puri, "Copyright Protection for Australian Aborigines in Light of Mabo" Stephenson, M., and S. Ratnapala (eds), *Mabo: A Judicial Revolution* University of Queensland Press: St Lucia, 1993; D. Ellinson "Unauthorised Reproduction of Traditional Aboriginal Art." (1994) 17(2) *UNSW Law Journal* 327.

[159] M. Rose, "The Author as Proprietor" supra n.11 at 29.

unitary sense of Aboriginal cultures that undermines indigenous experience through demanding a unified 'voice', 'culture' and 'tradition'.[161]

The nature of cross-currents – the paradox of political, social and economic issues – may seem in antithesis to the political climate already discussed that was actively seeking to change how indigenous people were positioned within society and in relation to governmental policy. What is useful to remember about contradictions however, is how they split, redirect and point to the fluidity of knowledge exchanges and political agendas, so that while in one area it may seem clear that a change was occurring in perceiving indigenous people and communities (in regards to citizenship and subjectivity) this was also countenanced by historical misconceptions, mythologies and constructions of indigenous people as existing outside western society. For example, the law, government, academic and indigenous commentators saw, and continue to see, Johnny Bulun Bulun not only as an individual litigant but as representative of indigenous people. In this way the homogenisation of one individual representing all was present within the Bulun Bulun case, and has inevitably overflowed into how indigenous knowledge itself was, and is viewed, reproducing and reaffirming a sense of an imaginary and unitary indigenous culture.

The crisis in identification for intellectual property law exposed an anxiety in the position that indigenous people held in relation to modernity and the 'traditional'. Aboriginal artists were assigned a position outside modernity, in 'traditional' locales, but dually placed within modernity where the art was increasingly valued economically. As Golvan notes in taking the video of John Bulun Bulun working, "[w]e ascertained quickly that there was a lot of authorial content in what otherwise appeared to the untrained eye as simply being traditional art. For example it wasn't hard to see that what was described as a traditional act, was in fact quite

---

[160] S. Wright, "Intellectual Property and the Imaginary Aboriginal" Bird, G., Martin and J. Neilson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996 at 133.

[161] As Wright explains: "This false appearance of unity presents us with one consequence of the 'imaginary Aboriginal'. Real Indigenous persons have enormous difficulties making claims and negotiating positions with governments or other bodies, not only because of the diversity of Indigenous societies ... but also because our own cultural traditions demand that there be 'one' voice or 'one' tradition." S. Wright, ibid. , at 140.

contemporary."[162] It is interesting, yet unsurprising, that labour returns as the key element facilitating the identification of original work, and hence the justification of a property right.

Herein lies one of the difficulties in reclaiming the category of originality for indigenous works, and this difficulty was precisely because when it came to the question of originality, it was not clear how Aboriginal art fitted. Determining the originality of Aboriginal art increasingly raised the question of degree, and this was more and more difficult to ascertain, particularly as it pulled into its possible orbit the seemingly coherent difference in the legal categories between style and content demanded in intellectual property law through the idea/expression distinction. As has been argued by indigenous artists such as Banduk Marika however, style and content are inseparable and indistinguishable.[163] Blackstone's argument in the literary property debates, that style and sentiment occupy the text and therefore justify the property rights, seems to be echoed. Importantly such questions regarding the distinction between style and content in indigenous art returns the law to aesthetic judgments of value and natural rights labour theory.

Thus testing questions regarding the legitimacy of these categories for the law are raised. Prior to the cases mentioned, the problem of originality for indigenous art was potentially the point that would destabilise the legitimacy of the legal categories of identification and justification of intangible subject matter. However, perhaps due to the defensive stance taken by Golvan in the case law, originality was never picked up as an issue in the court, despite the academic writing that had pointed to the potential of a problem. Originality in Aboriginal art was assumed, thus maintaining the coherence of the categories and reaffirming that originality as a category that effectively identifies suitable work for protection. But this generated alternative effects.

---

[162] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.
[163] See Marika's affidavit incorporated into *Milpurrurru & Ors v. Indofurn Pty Ltd and Ors* [1994] 30 IPR 209.

Imbuing Aboriginal art with originality

It could be argued that one of the byproducts of this treatment of the question of originality with regards to Aboriginal art was the production of a slippage in the symbolic meaning of 'original' already circulating in art and anthropological circles. For the term becomes modified and re-imagined in relation to a broader cultural space that speaks to the 'authenticity' of Aboriginal 'culture' as a whole. In assuming Aboriginal art's originality, which is an attempt by the law to sidestep the cultural contingency and limitations of the term and its method of identification, one result is a further homogenisation and romanticisation of Aboriginal cultures. Thus the slippage is that in authorising this form of 'originality', the category of identification for the law moves from identifying the product of the intangible subject matter, to authenticating its genesis in Aboriginal culture. This arises precisely because to deny Aboriginal art originality would suggest that the culture itself is not 'original' because the linkage between the art and the 'culture' had been so effectively made. So as if by default the opposite occurs Aboriginal culture as a whole is positioned as 'original'. This then plays into the historical perception of the 'purity of Aboriginal cultures'. The problem here is heightened by the 'traditional' style of art that is at the centre of the cases. Noticeably, the enunciation of originality within a field of cultural difference modifies its use as an effective and stable category of identification for the law.

The second point to make is that affirming the originality of Aboriginal art effectively brings Aboriginal art into the sphere of intellectual property. Copyright law captures an element of the object through offering a classification of its form. To this end Aboriginal art becomes imbued with features that otherwise it might not have, for example the language of 'originality' did not form part of popular usage by indigenous artists or in the art world prior to the cases. Subsequent to these discussions, there is the *apriori* assumption that Aboriginal art is 'original', in that it is the authentic expression of a unique cultural perspective. Thus one step in the categorisation of Aboriginal art within an intellectual property discourse is completed. Further, a concept of indigenous knowledge is legitimately captured and produced as a legal category of attention and identification. But the slippage between the assumed originality of the art, and how this plays into the 'authentic' Aboriginal culture means that the category of identification for the law is necessarily caught up in not only identifying the copyright subject matter, but

also linking that subject matter to a particular cultural mileu. The difficulty of separating the art from the cultural space where it was produced heightens the anxiety between the positioning of Aboriginal people within both modernity and the evocation of the 'traditional', an anxiety acutely experienced by urban Aboriginal artists.

Anthropological discourse has increasingly become the mode through which indigenous people and cultures are understood by the law.[164] The above anxiety is enhanced by the (white) expert evidence provided in the cases, which is strategically utilised to affirm the 'originality' of the artwork. In this way the law relied on the translation of indigenous cultures and ideas through the prism of an anthropological discourse. Tony Davies points out that the 'white expert' in the Bulun Bulun case, Margaret West, strategically gave evidence that satisfied these questions of 'originality' for the law. Drawing from Golvan's account of the case, Davies reprints West's evidence wherein she states;

> While many bark paintings represent traditional designs, it nevertheless remains that *particular artists have their own distinctive ways of expressing the traditional designs.* Tribal groupings will have the right to depict particular designs by virtue of Aboriginal custom...There is no separate class of artists as such in Aboriginal society. Rather all adults are expected to participate in the process of remembering and recording the dreaming rituals of their tribe. *Nevertheless some painters have come to establish special reputation by virtue of their proficiency and popularity in the western art market.*[165]

But Davies seeks to highlight that the anthropological evidence serves to re-position indigenous people and their cultural practices within a primitive narrative, implying that indigenous people require the intervention of others to explain their perspectives and to secure their cultural rights – they are unable to act on their own behalf. This is further emphasised when indigenous people speak within the court, for the information that they provide is treated as 'factual' and background information, where the problems are ones that indigenous people have, that the law is trying to solve for them. For example, in affidavits presented to the Court, Bulun Bulun speaks of his connection to land and the cultural significance of the artwork, in contrast the expert evidence positions Bulun Bulun's work within a western art discourse that readily transposes to categories of identification in intellectual property law. To

---

[164] This also occurs in native title cases. Recent critical attention has been directed at exploring this problem. See for instance two papers given at *The Native Title Conference 2002: Outcomes and Possibilities* by Patrick Sullivan "Don't Educate the Judge" and Tim Rowse "Expert Witnesses" (forthcoming 2003).

[165] M. West, evidence given in *Bulun Bulun v Nejlam Pty Ltd.* Quoted in T. Davies, "Aboriginal cultural property?" n.147, at 9 [emphasis in text].

this end, cultural differences are configured as irrelevant: as the problems are legal in nature, not cultural.[166] So what remains a legal problem?

Earlier I discussed how closely tied the concepts of originality and authorship are in determining copyright subject matter and thus justifying a right in intangible property. Hence when Bulun Bulun is affirmed as the creator of an 'original' work, the law also produces the status of Bulun Bulun as author and exclusive proprietor. However, this is a status he rejects.[167] It is a culturally untenable status Bulun Bulun must deny because it is a false representation of his (real) association with his community and with the cultural responsibilities to which he is bound as a custodian of the Ganalbingu people. Thus the law is challenged by the ill fit with the relationship of dependence between the identifying categories of 'originality' and 'authorship'. For while these two forms of identification work with the cases that locate an individual indigenous artist with a singular work, for example in *Bulun Bulun v Nejlam* (1989), *Yumbulul v The Reserve Bank of Australia* (1991) and *Milpurrurru v Indofurn* (1994), the blurring of the boundaries between the categories are exposed as, at best, tenuous when presented with multiple owners as occurred in *Bulun Bulun v R & T Textiles* (1998). But in order to secure the legal mode of identification, the challenge is not explicitly made to the notion of 'authorship' but instead to the notion of ownership. In this way the law shifts the problem from its categories of identification. The singularity of the author/original category splits apart and the crisis for intellectual property law moves back to the association between the author as owner. Henceforth *Bulun Bulun v R & T Textiles* (1998) contests various aspects of authorship as ownership, whereby 'originality' and 'authorship' avoid sustained critique and the concern becomes one of ownership, an area that the law can manage.

Thus, the way that copyright law effectively managed the problem of indigenous originality, in defiance of an increasing body of literature that suggested it would be the key struggle, points to two things. Firstly, it illustrates how it is possible to shift problems within the law elsewhere and secondly, even though the problem may emerge in a different place (for instance

---

[166] This point will be further elaborated in the consideration of case law in Chapter Five.
[167] See Bulun Bulun's affidavit incorporated into the judgment where he states that he is a custodian for the painting but not the exclusive owner: *Bulun Bulun v R&T Textiles* (1998) 41 IPR 518-520.

ownership), by virtue of assuming the originality of Aboriginal art, copyright still consolidated indigenous knowledge, in its intangible form, as a legitimate legal category.

The difficulties set for intellectual property law and the new subject matter of indigenous knowledge is not in the application of already existing categories to the product produced by the subject matter, but more the way in which indigenous knowledge challenges intellectual property law to engage in determining the essence of its intangible substance. It is such challenges that provide the possibilities for re-imagining intellectual property. Thus how intellectual property, primarily through copyright, maintain the appearance of stability is through exorcising the indigenous challenge that lays bare the incoherence, incompleteness and dynamism of the legal definitions and categories. The laws appear stable and secure by redefining the problems of cultural difference. In this way the structure and authority of law is maintained.

Beyond re-emerging in later case law as an issue of attributing ownership, there are other ways in which the 'indigenous' problem is reconfigured, conveyed and produced as a category within intellectual property law. For example, this category is most obviously developed through case law, but that process was supported and accelerated through bureaucratic initiative, political impetus and individual action. This reveals the multiple agencies governmental, legal and individual that function to position Indigenous knowledge within the law. Ostensibly, the production of indigenous knowledge in intellectual property law, due to the variety of dimensions and intersections of influence, generates a new space of intervention, both in legal attempts to manage the category and governmental efforts to develop appropriate strategies of protection. Securing the domain as legal is the preliminary step required to more concrete solutions being found through litigation and potential legislation.

Conclusion

The purpose of the chapter has been to expose the complexity and messiness of the law – specifically, that intellectual property law, far from being a coherent body of law, is characterised by internal struggles to identify and determine the nature of the subject matter that it protects. In this regard, the history of intellectual property law that has been provided,

functions to illustrate that what we currently know as intellectual property is a relatively recent phenomenon. In addition I have illustrated that it is the difficulties within modern law itself that have led to the construction of categories that identify the subject matter of the law. This work has followed from Sherman and Bently in locating a history of intellectual property law that speaks to the construction of intellectual property law as a whole, rather than subject specific interests.

Following from this general overview of intellectual property law, the observations of the internal struggles within modern law itself were located within the particular space of copyright. My purpose has been twofold. Firstly to give some 'meat' to the earlier observations in Chapter Two about the complexity of the law, through an analysis of a particular category of intellectual property law, and to thrash out and differentiate some of the features that characterise copyright law. I specifically drew attention to the function of categories of originality and authorship in directing and identifying subject matter for copyright protection. It is possible to see that these categories function within an existing framework of intellectual property law, that in essence, have been established in order to provide some countenance to the metaphysical dimensions of intangible property.

In looking at the characteristics of copyright law, I have also shown a range of cultural factors that engage and intersect positions of the law ultimately influencing the direction that the law takes. This approach is integral to an appreciation of how and to what extent indigenous knowledge has been produced as a category in its own right within intellectual property law. My point is to show the extent of elements that push, negotiate and construct indigenous knowledge within an intellectual property framework, and that this framework imposes conditions of possibility in regards to outcomes and discussions of property rights in indigenous knowledge.

The corollary drawn between early literary property debates in the Eighteenth Century and the difficulties presented by indigenous knowledge highlight how the problems of identifying indigenous knowledge are part of a continuum; where intellectual property law must revisit earlier difficulties concerning knowledge as property and the extent to which the right in

intangible property can be determined. Indigenous knowledge surprises the law by how familiar these problems are. It does however present the law with difficult cultural contexts providing challenges that demand a new and timely response. In particular, this plays into the shift at a national and international level that has underpinned consideration of indigenous people as 'special' legal subjects. The complexity of legal subjectivity reveals that the law is not a coherent stable entity, but a product of social and political construction. It is precisely the messiness and complexity of the law that reveals the possibility for the law to respond to subject specific issues.

It is in regard to this complexity that the following chapters will consider the multiple sites where the articulation of a relationship between intellectual property law and indigenous knowledge has manifested itself. What follows is a consideration of how governmental reports, case law, individual responses in Australia and international interest have effectively positioned, managed and consolidated indigenous knowledge as a specific category within intellectual property law.

The next chapter will address the effects produced when discussions about intellectual property and indigenous knowledge are phrased and mediated through the language and logic of intellectual property law. This analysis will be informed by an examination of two governmental reports that utilise a variety of strategies to manage indigenous knowledge and justify its position within a framework of legal relations of intellectual property. What follows is a sustained examination of governmental process of engagement: recognising the multiple vectors that have effectively come to produce the category we now know as indigenous intellectual property.

Chapter Four

Government and the production of knowledge

Law has established certain pre-eminent boundaries in addressing the problem of indigenous knowledge. These include the way in which concepts of indigenous knowledge are positioned within the law and the extent that protecting a diversity of indigenous interests in controlling and disseminating knowledge systems is secured through an expectation of legal remedy. The challenge of how to stop the unauthorised use of indigenous knowledge is firmly constituted as a problem to be solved by and managed in the legal domain.

Chapters Two and Three illustrated the primary interest in this thesis, which revolves around the construction of the new intellectual property category. On one level this category has evolved through the instigation by indigenous people, pushing for recognition of indigenous rights and sovereignty, and owing to the political influence of decolonisation and human rights. Over the last two decades there has been a concerted (but disputed) push in law for the recognition of the 'value' of indigenous knowledge.

The early reaction of the law was promising but uncertain.[1] There was hesitancy in regards to the 'appropriateness' of reconciling western legal principles to indigenous concepts of knowledge and ownership. However the following development in the production of indigenous knowledge within the law was not further litigation. It was governmental action. For law is not just court determined (directly applying the law). It is also managed through

[1] See my earlier discussion in regards to *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported (Chapter One) and *Bulun Bulun v Nejlam Pty Ltd* (1989) Federal Court, unreported (Chapter Three).

bureaucratic intervention, as law establishes and defines governmental spaces of intervention which may ultimately lead to legislative reform.

As noted earlier, the culturally specific nature of indigenous knowledge presents law with a challenge regarding the position of 'culture'. How the law treats difference is on its own terms, that is, what it can admit is mediated through its own modes of identification and categorisation, largely established through precedent. As indigenous intellectual property is not a 'legal' category in the sense that it is not derived from a specific piece of legislation in synthesis of common law, how did indigenous knowledge come to be firmly grounded in the legal sphere? Does the nature of its fabrication affect how the issue is talked about and constituted as a problem? To what extent do the discussions present the possibility of an outcome? What, if any, potential remedies exist beyond the law? Is the position of indigenous knowledge within intellectual property law a collision of irreconcilable values?

This chapter is divided into four sections. The first will consider the development of the legal category of indigenous knowledge through an examination of the way in which law establishes governable spaces. In particular, my approach will address the position of indigenous intellectual property as a legal category, enclosed in a legal space, defined and understood by the language of the law for later judicial and legislative consideration. The second section will begin with an appreciation of the importance of economic incentive and the commodity production of Aboriginal art in constituting indigenous knowledge as an object of law reform. This will be achieved through paralleling the incorporation of photography and cinema as intellectual property subjects with Aboriginal art and hence indigenous knowledge. Drawing upon insights provided by Bernard Edelman, my argument is that the economic nexus functions as impetus for the law to take on and forward legal problems with significant economic implications.

The third section considers recent arguments that reject the above instrumentalism of the law through positing certain difficulties in securing intellectual property rights in indigenous knowledge. In particular this recent analysis asserts a politics of sovereignty. It is argued that understanding intellectual property as a feasible option for protecting indigenous cultural

integrity mistakes the complexity of the agenda: for claims regarding the protection of indigenous knowledge are actually an assertion of indigenous sovereignty. In this sense, an expectation is generated that the law can facilitate the preservation of cultural integrity and identity. This expectation collides with the liberal conception of the individual that intellectual property law embodies. The relationship between liberalism and the individual is destabilised through the idea of cultural membership, where an individual's interests and sense of identity are dependent upon a particular reading of 'culture'. However, questions remain regarding the possibility of law understanding this dilemma. Is the disparity of purpose incommensurable?

The final section is a site specific study of the paradoxical enclosure and openness of the bureaucratic agenda. It considers the extent that the category 'indigenous intellectual property' is captured by the economic/law nexus. Further, it explores the space that allows sovereign claims to be recognised. To this end my argument will consider the two leading governmental reports released within Australia: the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, and the 1994 *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. These two reports are significant precisely because they have directed the legal approach in Australia to protecting indigenous knowledge. However, the difficulty of negotiating an agreeable purpose in the protection of indigenous knowledge undermines each report. I will explain that this affects how indigenous knowledge is produced and made knowable as a legal subject. The authority of the bureaucratic reports has affirmed the legal authority of intellectual property and as such has been instructive in the perpetuation of a governable space, where debates concerning intellectual property and indigenous knowledge may be heard, phrased and understood.

Overall the chapter will illustrate how the category 'indigenous intellectual property' exposes the real difficulties for the law – precisely to what extent cultural difference can be accommodated and how the law treats indigenous difference. The chapter explores these tensions and difficulties generated through governmental reports, infused with political agendas, before moving to an examination of case law in the following chapter, where these dilemmas are played out in the legal arena of courts and judicial determination.

Law and Governable Spaces

I argued in Chapter Two that law establishes governable spaces. By this I referred to the way that law, through certain means, lays claim to a particular problem or issue. Evidenced through the conjunction of 'indigenous' with 'intellectual property', the key phrase found in literature pertaining to this field of concern, the problem of providing protection to indigenous knowledge is positioned as a legal concern. This means that outcomes and possibilities are refracted through the prism of the law. Importantly however, by establishing and directing a space, the law is not a sole agent of governing. As I considered at the end of Chapter Three, there are multiple layers that produce and translate indigenous conceptions of ownership and desire to control culturally specific knowledge into an intellectual property framework including political influence and individual agency.

At the inception of uncovering a challenge like protecting indigenous knowledge, law identifies and locates the problem as legal. This means that the judicial techniques of identification and judgment that are made, secure the authority of the law to attend to the problem, and ways of mediating solutions. Moreover, this in turn influences and moderates how outcomes are imagined. Producing indigenous knowledge as a 'type' of knowledge and as a legal concern, generates new ways of conceptualising the particularities of the issue. It also depends upon a broader notion of law than that centered on courts and their output. Language is fundamentally engaged in this process. As Nikolas Rose has observed,

> [g]overnable spaces are not fabricated counter to experience; they make new kinds of experience possible, produce new modes of perception, invest precepts with effects, with dangers and opportunities, with saliences and attractions. Through certain means ... new ways of seeing is constructed.[2]

It is with respect to the above insights that it can be argued that a general conception of indigenous knowledge has come to occupy the space of intellectual property law. In other words, a new space for understanding and shaping possibilities of action has been produced. As I have already considered, this positioning is complicated. It is a result of factors, including

[2] N. Rose, *Powers of Freedom: Reframing Political Thought* Cambridge University Press: London, 1999 at 32.

individual action, political agendas and social and legal focus. Nevertheless, these the interplay of these emphasise and enhance legal continuity in naming problems of knowledge ownership, exchange and transmission as necessarily evoking rights and expectations of intellectual property. Intellectual property law is presented as a quasi-natural category providing the 'perfect' vehicle to deliver solutions for problems of knowledge control articulated by indigenous people. Through the instrumentality of the law, liberalism projects its capacity to acknowledge 'minority rights.'

Significantly, while legal processes establish governable spaces, this is never achieved completely or unequivocally. There always exists a possibility of imagining something new, a different way of managing the immediate problem. However over time, through bureaucratic reports and governmental intervention, the legal space consolidates its own authority to act and interpret the concern, even as an unfinished project. The bureaucracy is significant in attempting to mediate the terms of the legal discourse. Other elements that may influence the space become integral mechanisms in informing the legitimacy of legal categories. The process of managing a problem as legal generates its own language, logic and possibility, not only about what the problem is, but how to adequately address it.

Governable spaces in effect establish their own regimes of truth. Michèle Barrett argues that Foucault's principle of the 'will to truth' has been historically constituted –

> As a modern example, Foucault gives the case of legal discourse, which has increasingly abandoned a theory of justice as its justification, and moved towards the externally guaranteed 'truth' of sociological or medical knowledge: it is as if even the work of law could no longer be authorised in our society except by a discourse of truth.[3]

For example, Agrawal has argued that the dichotomy generally presumed between indigenous knowledge and scientific knowledge relies upon a discourse of truth that presents indigenous knowledge as specifically relating to nature and/or the environment and scientific knowledge, as rational and western.[4] Extending this in a later article examining the politics of classifying and archiving indigenous knowledge, Agrawal explains how the 'scientisation' of indigenous

---

[3] M. Barrett, *The Politics of Truth: From Marx to Foucault* Polity Press: London, 1991 at 142.

[4] A. Agrawal, "Dismantling the Divide Between Indigenous and Scientific Knowledge" (1995) 26 *Development and Change* 413

knowledge, involving certain judgments such as 'particularisation', 'validation' and 'generalisation' can "collectively be seen as the basis for establishing the truth content of a particular indigenous knowledge-based practice. In this sense scientisation can also be seen as being identical to 'truth-making.'"[5] The point is that how indigenous knowledge comes to be understood in law is also through processes of classification and 'truth-making'.[6] In even classifying indigenous knowledge as a 'type' a model of truth about is nature is made. The law is then engaged in circulating this concept of indigenous knowledge both within law and within society.

The function of language

Language is intrinsic to managing concerns within established governable spaces. This is owing to the continual definition and redefinition of what is within the competence of the space. Yet different agencies seek to control 'language' through limiting it or correcting it. This is due to the function of language within governmental agendas.

Language is constitutive of government and facilitates the management of domains of knowledge.[7] This has been argued from a variety of perspectives.[8] For instance Bernard Cohen has argued that the 'command of language' was instrumental to the colonial enterprise in India. Cohen's point is that from the outset of colonial administration in the Indian sub-continent the ability to govern was hindered by a problem with language, namely that the channels of

---

[5] A. Agrawal, "Indigenous knowledge and the politics of classification" (2002) 54(173) *International Social Science Journal* 287 at 291.

[6] See also: S. Smallacombe, "On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000.

[7] I have developed this point through two influential articles by P. Miller and N. Rose. See: P. Miller and N. Rose, "Governing economic life" (1990) 19(1) *Economy and Society* 1; N. Rose and P. Miller, "Political power beyond the state: problematics of government" (1992) 43(2) *British Journal of Sociology* 172. See also N. Rose, *Powers of Freedom: Reframing Political Thought* supra n.2 at 28-31.

[8] Miller and Rose are not the only people to argue such a point, even though their influence has been considerable. See also: B. Cohn, *Colonialism and its forms of knowledge* Princetown University Press: Princetown, New Jersey 1996; E. Said, *Orientalism* Penguin Books: London, 1985; A. Barry, "Lines of Communication and spaces of rule" Barry, A., N. Rose and T. Osborne (eds), *Foucault and Political Reason: Liberalism, Neoliberalism and Rationalities of Government* University of Chicago Press: Chicago, 1996; D. Harvey, *Justice, Nature and the Geography of Difference* Blackwell Publishers: Oxford, 1996; R. Apthorpe, "Writing development policy and policy analysis plain or clear: On language, genre and power" Shore, C., and S. Wright (eds), *Anthropology of Policy: Critical Perspectives on Governance and Power* Routledge: London and New York, 1997.

communication were interrupted by the diversity of languages and knowledges.[9] To an extent this was remedied through converting Indian forms of knowledge into European objects – where the British established apparatus that translated Indian languages thus making them knowable within the dominant colonial power structures. "The subjects of these texts were first and foremost the Indian languages themselves, re-presented in European terms as grammars, dictionaries, and teaching aids in a project to make the acquisition of a working knowledge of the languages available."[10] The object and purpose of colonial management of Indian knowledge was cultural and economic. As Said has argued, language is an instrument,[11] a central mechanism in facilitating modes of information gathering and knowledge management which are intrinsically tied to political and economic agendas.

Peter Miller and Nikolas Rose focus on how the language of economics shapes governmental direction and utility. Their attention to the economy is indicative of the position of the economy within modern liberal states and colonial Empires. The economy generates and mediates key relations between power and language. Miller and Rose argue that "before one can seek to govern a domain such as an economy, it is first necessary to conceptualise a set of processes and relations as an economy which is amenable to management."[12] What Miller and Rose articulate is an appreciation that the economy is not a naturally occurring entity. Rather it is a socially constituted phenomenon. In this sense, the genesis of a language that provides a means for discussing the economy is a pre-requisite in appreciating characteristics of a domain named as the economy. Through language, the logic and framework generate a process that establishes the economy as an intelligible field with its own limits and capabilities. In short, developing a language of the economy produces a new domain of knowledge, and as government is dependent upon knowledge, it is through language that "governmental fields are composed, rendered thinkable and manageable."[13]

---

[9] As Cohn suggests: "The years 1770 to 1785 may be looked upon as the formative period during which the British successfully began the program of appropriating Indian languages to serve as a crucial component in their construction of the system of rule." B. Cohn, *Colonialism and its forms of knowledge* supra n.7 at 21.
[10] B. Cohn, *Colonialism and its forms of knowledge* supra n.78 at 21. In particular see the Chapter 'The Command of Language and the Language of Command'.
[11] E. Said, *Orientalism* supra n.8 at 292-293.
[12] P. Miller and N. Rose, "Governing economic life" supra n.7 at 6.
[13] Ibid. , 6-7.

A postcolonial awareness has created an interest in reflecting upon language and language games. Language shapes the possibility of action, individual and governmental. Thus the function of language is understood as constituting how a particular problem or concern is to be understood and subsequently managed. How indigenous knowledges are made thinkable in a legal context shapes the potentiality of outcomes.[14] The intelligibility of indigenous knowledge, to be identified, phrased and characterised, is crucial for the delivery of legal remedies. In this sense, it is not the interpretation of a particular word, nor what a word means. It is instead the circulation of phrases that identify the domain of knowledge, 'indigenous intellectual property' and subsequently direct knowledge about it. As Nikolas Rose writes;

> It is not so much a question of what a word or a text 'means' – of the meanings of the terms such as 'community', 'culture', 'risk', 'social', 'civility', 'citizen' and the like – but of analysing the way a word or book function in connection with other things, what it makes possible, the surfaces, networks and circuits around which it flows, affects and passions that it mobilizes and through which it mobilizes. It is thus a matter of analysing what counts as truth, who has the power to define truth, the role of different authorities of truth and the epistemological, institutional and technical conditions for the production and circulation of truths.[15]

Governmental reports, case law and precedent, as well as academic articles that discuss and debate 'indigenous intellectual property' establish networks through which this concept is understood. The power to circulate what 'indigenous intellectual property' is, how it includes and excludes aspects of interpretation of what constitutes indigenous epistemology, political particularity and context returns us to earlier observations concerning governable spaces. What in effect such reports, case law and articles produce is a conception that indigenous knowledge, as a unitary category, is an established subject of intellectual property law. Importantly this reification of the subject of law even occurs when critiques focus on the inapplicability of intellectual property framework. The legal language dominates such discussions, to the extent that understanding the limitations necessitates engaging in the language of intellectual property

---

[14] This has been explored elsewhere, for instance the way in which language is translated in native title claims and how this effects whether a native title claim is understood within the context of the court. See generally J. Henderson and D. Nash (eds), *Language in Native Title* Aboriginal Studies Press: Canberra, 2002.
[15] N. Rose *Powers of Freedom: Reframing Political Thought,* supra n.2 at 30.

to explain why the law won't work,[16] or why indigenous knowledge doesn't fit the legal schema.[17]

The general concern for how knowledge of a cultural nature can be made intelligible before the law means employing a variety of mechanisms that direct the discussions without being seen to do so. It is in this way that language functions to readily identify the problem and make it amenable to legal solutions. In this light, indigenous knowledge is authorised through the language of the law whereby determining the 'truth' of indigenous knowledge is made acquiescent to strategies of governance. For language not only makes the "acts of government describable; it also makes them possible."[18]

Reflecting upon the instrumentality of language, James Boyd White notes how "one of the deepest habits of our culture is to talk about language not as a field of action, but as if it were transparent or neutral ... the function of language is to point to something, or label it or ... to signify it."[19] With increased attention to the importance of language in making sense of the 'real', it is accepted that language is a powerful mechanism for translating elements of society into an intelligible form. While language has a real force of its own, it is also in a constant state of flux and this enables language to function as a type of power.[20]

Positioning concepts of indigenous knowledge within a regime of legal enunciation produces a discursive shift. Discursive shifts derive from the intersection of spheres of knowledge,

---

[16] See for instance: K. Maddock, "Copyright and Traditional Designs: An Aboriginal Dilemma" (1988) 34 *Aboriginal Law Bulletin* 8; D. Ellinson, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17(2) *UNSW Law Journal* 327; M. Blakeney, "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" (1997) 19(6) *European Intellectual Property Review* 298; M. Blakeney, "Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law – The Australian Experience" Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

[17] See for instance: M. Dodson, "Indigenous Peoples and Intellectual Property Rights" *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney 1996; L. Ford, "An Indigenous Perspective on Intellectual Property" (1997) 3(90) *Aboriginal Law Bulletin* 13; M. Davis, "Indigenous Peoples and Intellectual Property Rights (1996-7) 20 *Parliamentary Library Research Paper* 1.

[18] N. Rose *Powers of Freedom: Reframing Political Thought* supra n.2 at 28.

[19] J. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* University of Chicago Press: Chicago and London, 1990 at ix – x.

[20] R. Apthorpe, "Writing development policy and policy analysis plain or clear: On language, genre and power" Shore, C. and Wright, S. (eds), *Anthropology of Policy: Critical perspectives on governance and power* Routledge: London and New York, 1997.

inevitably producing a new form of knowledge about a subject.[21] Indeed the vocabulary of legal clarifications on the questions of property and knowledge hints at the power of language. Shifting indigenous knowledge into a legal sphere not only modifies how indigenous knowledge is talked about but also how the law treats cultural difference and imagines viable solutions to problems of inappropriate use.

Translating indigenous knowledge into a legal framework of understanding minimises and compartmentalises aspects of knowledge that otherwise constitutes an indigenous epistemology.[22] This is most clearly demonstrated in the way that indigenous people and commentators note the inability to separate Aboriginal art from land and spirituality.[23] But this also produces the binary as it fails to account for the inter-cultural dimension of indigenous knowledge and art practice. In the context of intellectual property, the translation of property and ownership modifies those concepts. The diversity and specificity of indigenous experience means that indigenous people can and do actively engage in discourses of property including ones hinged on western understandings of the term. Indigenous people have also vigorously contributed to how indigenous knowledge has engaged with a property discourse.[24]

The space of indigenous intellectual property makes features of indigenous epistemology intelligible to the law. While Paul Patton is looking more closely at this process in the context of native title, his observations resonate closely with the field of intellectual property law. As Patton observes,

> The translation of Indigenous relations to land into common law concepts raises questions of cultural and anthropological as well as legal interpretation, all of which arise within limits set by colonial power relations. To the extent that it represents both

---

[21] M. Foucault explains the process of a discursive shift in "Politics and the Study of Discourse" Burchell, G., C. Gordon, P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991

[22] For an argument on the translation of indigenous language for evidence in native title see: P. Sutton, "Linguistic Evidence and Native Title Cases in Australia" Henderson, J., and D. Nash (eds), *Language in Native Title* Aboriginal Studies Press: Canberra, 2002.

[23] See: B. Marika's comments in C. Eatock and K. Mordaunt, *Copyrites* Australian Film FinanceCorporation Limited, 1997. Also see: G. Yunupingu, "From the Bark Petition to Native Title" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997.

[24] See in particular, T. Janke *Our Culture: Our Future Report on Australian indigenous cultural and intellectual property rights* (produced for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and the Aboriginal and Torres Strait Islander Commission [ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, 1998, demonstrates the way that indigenous spokespeople actively assert relations of property. I will be considering Janke's work in Chapter Seven.

> the translation of Indigenous relations to land into common law rights and the failure of such translation, the means by which common law has translated indigenous people's relationships to land provide stark illustration of the aporetic characterization of all translation.[25]

Patton's comments regarding the translation of indigenous relations of land into common law concepts of property can be extended into indigenous relations of knowledge into statutory frameworks of intellectual property. What is lost in the translation from the 'indigenous' to the 'western' is an appreciation of the diversity of the cultural exchange thereby generating a limit in appreciating cultural differences in the transfer, exchange and delivery of knowledge. As White aptly observes, "in law there is always conflict and always loss: the stories of the two parties conflict or compete and do so not only in detail but in their shape and their language, in the deepest meanings from the speaker and to others."[26] This is most apparent in the way that the production of the legal category of indigenous knowledge is exposed to a singularity of identification and justification. Thus indigenous knowledge is rendered open to modes of categorisation that help identify the intangible subject matter to the law. This is achieved through deploying the object of legal protection such as art, dance, design onto indigenous knowledge, and mediating the shift from the intangible to the tangible. Through this process, indigenous experience of knowledge exchange is summarily transformed into intelligible and pre-existing categories produced both in law and through social mechanisms.

Naming a legal problem

The positioning of indigenous knowledge within the discourse of intellectual property law seeks to emphasise the commonalities between indigenous and non-indigenous systems of knowledge use and circulation. Notably this is the appreciation that indigenous knowledge increasingly functions within a network of commodity relations.[27] Certainly this is a key

---

[25] P. Patton, "The translation of indigenous land into property: the mere analogy of English jurisprudence..." (2000) 6(1) *parallax* 25 at 28.

[26] J. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* supra n.19 at 262.

[27] For instance in 1993 the Australia Council conducted a survey and found that "the value of purchases of Aboriginal arts and souvenirs by international visitors was estimated at $46 million per year" M. Langton, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* Council for Aboriginal Reconciliation: Canberra, 1994. See also: M. Blakeney, "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" (1997) 19(6) *European Intellectual Property Review* 298 on the anticipated value of the bush foods industry.

element in understanding how the expression of indigenous knowledge in the form of art was and is able to utilise copyright law. As Colin Golvan explains;

> The interest in Aboriginal artwork has provided Aboriginal communities with a source of income previously unknown. While individual artists sell works, and receive fees in their own right, the money they receive is often shared among families and tribal groups ... An economic infrastructure has built up around the growing art market.[28]

Thus the commonality of indigenous experience within the market economy enables the legal system to locate a central feature of indigenous imagery and expressions of knowledge to be protected. However this emphasis on commonality imposes legal standards. As Tony Davies astutely notes, "copyright cannot however be viewed as a neutral form, and the process of protecting imagery through copyright imposes specific demands on participants. As such, Aboriginal people have to construct their claims within the constraints of copyright litigation, rather than in terms of their own conceptions of authority and imagery."[29] Golvan, recognising this difficulty and that it was fundamental in the copyright cases of the early nineties, explains that;

> The business of preparing affidavits is tricky too because that is a classic example of the reduction of knowledge. Clearly the affidavits were crafted by western lawyers. If you left the Aboriginal people to explain their story you would get a totally different sort of analysis about what is being said. I mean assuming you would be able to translate what was being said. You would have a whole different content which would be totally unusable for legal proceedings. But that is part of the nature of clashes of cultures, problems with integrating one system of knowledge with another.[30]

Constructing claims that phrase the problem in legalese is not only done when indigenous people present their claims to the court, but is also facilitated by non-indigenous experts who function to verify and contextualise such claims. Patton, above, referred to the importance of considering anthropological interpretation in the translation of indigenous relations to land into common law. The transference of this point is equally pertinent to the translation of indigenous 'rights' to cultural knowledge into the framework of intellectual property law. As White states, "translation is thus the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages and between people."[31] In this sense

---

[28] C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 10 *European Intellectual Property Review* 346 at 346.
[29] T. Davies, "Aboriginal Cultural Property?" (1996) 14(2) *Law in Context* 1 at 3.
[30] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.
[31] J. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* supra n.19 at 257.

anthropological interpretation presents a form of knowledge through which the 'impossible discontinuities' between indigenous people's perception of knowledge and legal manifestations of property and ownership can be traversed. To wit, anthropology facilitates an appreciation of 'Aboriginality' both in relation to law and relation to cultural difference. The expert functions as a *translatory* expert, interpreting and reinscribing indigenous concerns into the legal framework. Expertise thus becomes a central vehicle in affirming the legitimacy of legal enclosure and governable space: for the expert translates indigenous perceptions for the court but mediates these through the prism of legal categories and boundaries.[32] The expert is afforded a relation of power in mediating the indigenous interests within the demands of the legal framework.

While the positioning of indigenous knowledge within a legal space relies upon the importance of language, individuals who utilise and put the language into a field of enunciation are just as vital. As I explained in the previous chapter, Tony Davies has made note of the importance of expert knowledge in helping the court understand cultural differences.[33] But in seeking to make cultural difference intelligible before the law, such difference is also, paradoxically, explained out of the law. This is owing to how such differences are being translated into a space of commonality, where the basic underlying principle is to highlight that Aboriginal art can be protected because it is the same as western art: that it functions within a marketplace of economic relations.

The economic currency of the law

It is significant that in displacing indigenous difference within the law, the economy becomes the measure of commonality – or abstract uniformity. Indigenous cultural difference and the market are deeply implicated within each other, however the disparity between protecting the commonality of economic incentives extant within the intangible subject matter of indigenous knowledge, and the significant cultural differences that lead indigenous commentators to parallel the protection of knowledge to the protection of cultural identity and integrity (a claim

[32] This process is also replicated in native title cases.
[33] T. Davies, "Aboriginal Cultural Property?" supra n.29 at 6-10.

of difference), highlight the tensions and issues at stake. What follows is an account of how the inclusion of indigenous subject matter is due to economic considerations. This parallels the incorporation of photography and film into an intellectual property discourse. This analysis emphasises the importance of economic factors in rendering a category appropriate for intellectual property protection.

Clearly the purpose and function of intellectual property is historically and politically tied to promoting economic incentives. This explains why intellectual property laws are increasingly important components of world trade and the subject of world trade arguments.[34] Inescapably intellectual property is deeply imbued with commercial dynamics that dually inform and identify intangible subject matter. Modern intellectual property law approaches and evaluates an object for protection through an integral relationship between property and economics. As discussed in Chapter Three, following the Eighteenth Century literary property case *Donaldson v Becket* (1774),[35] the argument was made that one could identify the harm of taking the property of intellectual labour through the financial benefits that would be deprived to the 'originator' of the work.[36] Economic concerns thus became incorporated as a means for measuring and identifying the loss and thereby worth, of this unique form of commodity.

The knowledge economy

In considering the relationship between knowledge of commodities and knowledge of the economy, Kalpagam argues that a process of colonial governmentality is directed towards shifting the value of 'things' into a realm of commodity. He states that;

> As things move into the status of 'commodities' and the exchange value of the thing requires significance, they also come within a new regime of knowledge. Their names, functions, methods of production, measurement, production, consumption, trade patterns all come together and cohere to form the regime of value. When such a value regime becomes widespread, more and more things acquire the status of commodities, and are brought within the fold of exchange, and the 'economy' gets constituted thereby ... The knowledge of commodities is therefore a precondition for constituting knowledge of the economy.[37]

---

[34] See Chapter One at page 5 and Chapter Three at page 86.
[35] *Donaldson v Becket* (1774) 4 Burr 2408, 98 Eng. Rep. 252
[36] See Chapter Three at page 95. B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999 at 195.
[37] U. Kalpagam, "Colonial governmentality and the economy" (2000) 29(3) *Economy and Society* 418 at 430.

Whilst knowledge of the economy is essential to developing a language to address commodities, in the last few decades, knowledge has become valuable in its own right. Grosheide explains, that "[c]ultural information has, speaking in economic terms, made the step from product to raw material. This also explains why national governments are now more than ever alert to matters of intellectual property rights. Trade in cultural information or intellectual property rights has become a substantial part of national economies ... "[38]

Debates and discussions about the knowledge economy proliferate. As Drahos with Braithwaite suggest:

> We have seen lying at the heart of the knowledge economy are intangible assets – for example, algorithms that drive computers and formulae that underpin chemical processes of production. The intellectual property rules governing the ownership of these assets have been globally and profoundly changed in the last twenty years. These rules impact on who can and cannot be an entrepreneur in the knowledge economy.[39]

These debates have taken many forms including: the proliferation of information technologies; the proactive collection and archiving of knowledges; questions regarding the social and cultural impact of knowledge economies; and, most importantly for our discussion here, who 'owns' knowledge in this new economy.

As one instance in the growing awareness of the value of knowledge, Agrawal has considered the privileged position that indigenous knowledge has come to occupy in scientific and development discourses.[40] This reversal of fortunes for indigenous knowledge has led to the development of multiple databases for storing, recording and classifying differing forms identified as 'indigenous' knowledge.[41] These databases range from the local to the international, with support ranging from NGOs to international researchers and agencies such as the World Bank and UNESCO. As Agrawal notes, the purposes are, " to protect indigenous knowledge in the face of myriad pressures ... [and] to collect and analyse the available information and identify specific features that can be generalised and applied more widely in

---

[38] F.W. Grosheide, "When Ideas Take the Stage" (1994) 6 *European Intellectual Property Review* 219 at 219.
[39] P. Drahos with J. Braithwaite *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications Ltd: London, 2002 at 17.
[40] See: A. Agrawal, "Indigenous knowledge and the politics of classification" supra n.5 at 287.
[41] See also: P. Drahos, "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Collecting Society the Answer?" (2000) 6 *European Intellectual Property Review* 245.

the service of more effective development and environmental conservation."[42] Acutely aware of the increased currency of indigenous knowledge, Agrawal notes that efforts to document and 'scientise' indigenous knowledges can position such knowledge in domains where it can be "refined and privatized through the existing system of patents and intellectual property rights."[43] The key point is an increased recognition of the 'value' and currency of knowledge and that with this shift in value comes the desire to make such knowledge privately and exclusively owned.

In a similar way to Agrawal, Drahos (with Braithwaite) focused attention to the multiple ways in which, owing to the value of knowledge, legal structures have been developed providing control and monopoly over certain forms of information. The title of their book, *Information Feudalism: Who Owns the Knowledge Economy?* points to an interpretation of the effects of increasing economies of knowledge. Their argument is that information is a valuable resource, where ownership stakes are high.

> Intellectual property rights are a source of authority and power over informational resources, on which the many depend – information in the form of chemical formulae, the DNA in plants and animals, the algorithms that underpin digital technologies and the knowledge in books and electronic communities. These resources matter to communities, to regions and to the development of states.[44]

Thus the knowledge economy enables the management of increasingly valuable forms of knowledge whilst also positioning such knowledge within a discourse of currency and commodity.

The dynamic between intellectual property and the economic process of valuation, has been examined by scholars seeking to explain how commodity forms of production function as key informing elements of intellectual property law.[45] Certainly economic considerations were an

---

[42] A. Agrawal, "Indigenous knowledge and the politics of classification" supra n.5 at 288.
[43] Ibid. , at 294.
[44] P. Drahos with J. Braithwaite, *Information Feudalism*, supra n.39 at 12.
[45] See for instance: C. May, *A Global Political Economy of Intellectual Property Rights: The new enclosures?* Routledge: London and New York, 2000; S. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* State University of New York Press: New York, 1998; P.E. Geller, "Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?" Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays in Copyright Law* Clarendon Press: London, 1994; R.V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*, Westview Press: Boulder Colarado, 1996; G. Smith and R. Parr, *Valuation of intellectual property and intangible assets* John Wiley: New York, 1989.

important element in elevating the concerns of competing booksellers in the literary property debates of the Eighteenth Century. Not surprisingly in 1920s Marxist scholars were developing analyses that considered the production of the commodity through the law.[46] In 1979 Bernard Edelman revisited the early concerns articulated by Pashukanis in the site of intellectual property, considering the development of photography and cinema as legitimate subject matter within this regime of law.[47] In *Ownership of the Image: Elements for a Marxist Theory of Law*[48] drawing upon Althusser's observations regarding the effects of Marxist theory on modes of production, Edelman is concerned with producing a general theory of the production of such legal categories and that their inclusion is dependent upon processes of capitalism whereby all aspects of creation are reduced to a commodity form intrinsic to market production.[49]

Edelman and commodity forms

Edelman's key interest is in how the expansion of property rights is made to new commodity forms. His study, located in France[50] considers the inclusion of the photograph as a new category of subject matter in copyright law, and argues that the acceptance of this new category was directly tied to its market potential. The strength and utility of Edelman's argument is in his exploration of how new subject matter is fitted into categories for intellectual property protection. Thus from the perspective of economic advantage and the commodity value within the marketplace, interesting parallels can be drawn between Edelman's analysis of the inclusion of the photograph and the inclusion of indigenous knowledge, specifically through the commercial considerations influencing and enhancing the

---

[46] E. Pashukanis, *A General Theory of Law and Marxism* Arthur, C. (ed), Ink Links: London, 1968.

[47] For another discussion of photography as 'difficult' subject matter see: K. Garnett, "Copyright in Photographs" (2000) 5 *European Intellectual Property Review* 229.

[48] B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. by Kingdom, E.) Routledge and Keegan Paul: London, 1979.

[49] See: P.Q. Hirst, "Introduction" to B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* Ibid., 1-18.

[50] France has a different history in the emergence of intellectual property to that of Great Britain and consequently Australia. For an account of this differing history see: C. Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793" (1990) 30 *Representations* 109; C. Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* University of California Press: Berkeley, 1991. The *Berne Convention for the Protection of Literary and Artistic Works* (1886) standardised copyright protection at an international level. Original signatories included France, United Kingdom, Belgium, Germany, Haiti, Italy, Spain, Switzerland and Tunisia. Australia became a signatory in 1928. See: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works 1886-1986* Kluwer: London, 1987; K. Bowrey, *Copyright and Culture: Australian Law and Controversies*, forthcoming 2003 at [4.2].

value of Aboriginal art in a market place of relations. For intellectual property law, Aboriginal art represents a new commodity form, albeit one that plays on its 'age-old' pre-market status.

Edelman's initial concern, when considering the development of the law covering photography and cinema, is in understanding how the photographic form 'appropriates the real',[51] that is, it involves the taking of an image that would otherwise exist within the public domain and invests it with property rights. For instance a photograph of a lake or a monument is a reproduction of something that existed as 'real' prior to the photograph capturing it as an image. The image, re-appropriated from the real, then becomes the property of the photographer executed through the mechanical process of taking a photo (where labour has been exerted). Thus the re-appropriated 'real' becomes a recognisable object to the law, which is "always-already invested with property"[52] because the law anticipates that ownership of the image invariably belongs to someone.

Property is of primary importance here, for it is through the notion of property that creation can be understood: property makes the invisible visible. In this sense Edelman argues that property as a concept of law is a juridical fiction. As a fiction it permits the transition from the intangible – 'creation', 'intelligence'; to the tangible – the painting, or the work.[53] The tangible is characterised in terms of private property: it can be owned. The premise upon which all this spins is that the public domain is public property. By capturing an image of the public domain through an act of invisible creation, the negative becomes the private property of the owner. Moreover, the 'real' becomes an object, produced as a subject before the law.

Analogous to issues of locating the 'original' component of indigenous knowledge and hence satisfying categories of identification within copyright (considered in Chapter Three), there was considerable debate as to whether photography was an act of 'creative endeavor', an important category for measuring intangible subject matter in copyright. The mechanical process involved in photography separated it from previously assumed 'creativity' that produced the tangible painting or literary work. That the camera was a machine disrupted the linearity that

---

[51] B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* supra n.48 at 38.
[52] Ibid. , at 38.
[53] Ibid. , at 40.

had previously constructed the association between the 'creator' and the 'creation' in the artistic form. As Edelman explains,

> The law recognised only 'manual' art – the paintbrush, the chisel – or 'abstract' art – writing. The irruption of modern techniques of the (re)production of the real – photographic apparatuses, cameras – surprises the law in its quietude of its categories.[54]

To this end, Edelman considers the historical stage wherein the juridical birth of photography and the cinema is made possible. In doing so, he points to the importance of socially bestowing photographers and film makers as 'creators' thus providing the cinematic industry with the benefit of legal protection whereby economic value is invested in the photographer or film maker as a 'creator' and 'owner' of the work. This can be paralleled to Rose's comments about the social production of the 'author' for the purposes of the literary property debates.[55] In short, for the purposes of the law there must be an identifiable individual that can be pinpointed as the legitimate 'owner' of the private property.

Edelman recognises that the economic importance of photography and the cinema lead to a fundamental revision of them within the law. His point is not to describe the economic process but more the way in which "this process is reproduced within the law and the way in which the law makes it effective."[56] Thus the law presents itself as responsive to economic demands and capable of reconstructing itself in response. The artistic recognition of the photographer and the recognition that the photographer is a 'creator' was a necessity of the industry. The effectivity of processes making this possible was by proceeding through the 'aesthetic'.[57] The outcome being that the pseudo-aesthetic is subtly mixed with commercial considerations or as Edelman phrases it "the aesthetic is subordinated to commerce."[58]

Like the difficulties with identifying indigenous knowledge as intangible subject matter, photography needed to carry identifiable marks necessary for legal protection. In other words, photography must be made an 'artistic' activity where 'creative labour' has been invested.

---

[54] Ibid. , at 44. See also: K. Bowrey, "Copyright, photography and computer works: the fiction of original expression" (1995) 18(2) *UNSW Law Journal* 278.
[55] M. Rose, "The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship" Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays in Copyright Law* Clarendon Press: London, 1994.
[56] B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* supra n.48 at 49.
[57] Ibid. , at 50.

Photography needs to be understood socially as an artistic product and as all artistic products are always-already subject to the market, the commodity form of the product becomes the production of the artifact. This point can equally be applied to the recognition of Aboriginal art as an artistic product and thus a commodity form. This leads Edelman to observe that, "art is both 'product' and 'moment' of capital."[59]

Edelman's analysis reveals an astute awareness for how the law functions to produce categories that it can understand and work with and how the law is also responsible for circulating these within society. In this sense, the law is not only responsive to the market but also to the cultural conditions that render the applicability of the law in a particular context important. For it is not only the development of the cinematographic industry that makes the production of 'creativity' of the object of photography important, but also that at the time of such debates, there were "50,000 people who live by photography in France."[60] In this way the law is responsive to the cultural context that facilitates the market. It does not produce the market alone but is implicitly involved with it and its perpetuation.

The production of art as commodity is an act of law and jurisprudence. It is thus unsurprising that legal values regarding Aboriginal art support the social production of economic value in Aboriginal art. Following Edelman's argument, the real that is re-appropriated to produce the product, Aboriginal art, is understood through the intangibility of indigenous knowledge. As Martin Nakata has noted, indigenous knowledge is now understood as an enterprise, an industry, and this social production demands legal response.[61] The commonality in legal approach to photography and Aboriginal art belies the challenge of identifying indigenous subject matter. All the elements that the law needs to classify new subject matter are here, however they are disguised by more prominent concepts of 'tradition' and perceptions of incommensurate cultural positions. As Colin Golvan comments;

---

[58] Ibid. , at 50.
[59] Ibid. , at 57.
[60] Ibid. , at 50.
[61] M. Nakata, "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" (2002) 28 *International Federation of Libraries Association Journal* 281 at 282. See also: C. Nicholls, *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art Exhibition Catalogue*, March 2000.

> It had never dawned on me before that some of the artists, the first time that they saw the waterhole they were depicting was with me from an aeroplane when we finally found it, using maps to locate it ... And I only realised then that what they were depicting was from their own dense of, you know their own imagery...they had incorporated it into their own sense of present and the real.[62]

It is this 'real', this imagery, that is precisely what the law works upon to make a subject of property. A key differential however, is that the real, and the product, Aboriginal art, have not been securely abstracted and decontextualised as legal objects. What this then means is that cultural values beyond the economic currency of knowledge continue to exert pressure in how this subject is identified. For example, issues of cultural identity and integrity become intertwined with the protection of Aboriginal art, the protection of indigenous knowledge and the function of intellectual property law. As a result, these techniques of valuation make it difficult for law to develop reflexivity toward different cultural positions and contexts especially ones indifferent or opposed to the commodification process.

Intellectual property to the protection of cultural integrity

There is an assumed inherent incommensurability in reconciling the economic incentive underpinning intellectual property law and the 'cultural value' of indigenous knowledge and forms of expression.[63] This has produced arguments for a 'new' form of intellectual property that takes into consideration the different value system attributed to indigenous cultures. In the case of indigenous subject matter, intellectual property requires modification. As Mick Dodson explains;

> Intellectual property is in part represented by all forms of knowledge, cultural expressions and the manifestations of culture. For Indigenous peoples this may take the form of knowledge about land, the use of environmental resources and time honoured conservation practices, the knowledge of sites, the collective ownership of cultural materials, or works of art. It is about our rights to own, control and manage these things and our rights to share any benefits that derive from their use by others.[64]

Here we have an example of how the term 'intellectual property' is adapted to suit particular indigenous concerns for the legal recognition of the contextualisation of indigenous cultural

---

[62] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

[63]For instance see the range of articles arguing this position in Chapter One footnote number 8.

[64] M. Dodson, "Indigenous peoples and intellectual property rights" supra n.17 at 30.

expression. These are described by Dodson as 'rights to own control and manage' and 'rights to share benefits'. It is evident that there are two forms of rights articulated: one as a form of self-determination right, and the other, economic.[65] In particular, Dodson's use of intellectual property rejects the decontextualisation of concepts of indigenous knowledge, insisting that they are embodied, rather than abstract. The shift insists on a different reading of intellectual property, one that primarily ties property to cultural identity rather than economics.

Property rights in culture

In 1998 a provocative article, "Can Culture be Copyrighted?" was published.[66] The article by Michael Brown provided an evaluation of the increased attention to calls by indigenous people for the application and modification of intellectual property laws to suit increasing concerns regarding the inappropriate use of cultural knowledge and material. The article suggests that fostering intellectual property rights in cultural knowledge will generate a new field of complexities, thus making the forms of protection for indigenous knowledge legally untenable. For Brown identifies the problems of inappropriate use of cultural knowledge as actually problems in the transfer and exchange of information.[67] Here Brown suggests that it is the metaphysical questions about how knowledge is exchanged between individuals, communities and cultures and the changing ways in which this is understood in an increasingly globalised world, that form the crux of concerns that culminate in arguments for increased and augmented intellectual property rights. Brown's argument is that providing property rights to indigenous knowledge through intellectual property law negates consideration of these complexities and limits thoughtful alternatives because concerns for protection of indigenous knowledge are not necessarily reducible to economic concerns, but on a broader philosophical scale represent attempts to readdress a power imbalance where the value of cultural

---

[65] Shelley Wright has drawn attention to the way in which international economic law and human rights and self-determination emerged at similar historical moments, yet, curiously remained two separate discourses. "It is as if the international law of human rights and the international economic law of globalisation and development have been progressing within parallel universes. They eerily replicate similar principles (the universality of basic Euro-American economic and political principles; rights to control natural resources and development; massive incursions into the concept of State sovereignty, the general spread of international law both within and between states) but never seem to touch. The one area of human rights that does directly address economic issues, economic and social rights, seems to have no influence on the development of international economic law." S. Wright, *International Human Rights: Decolonisation and Globalisation: Becoming Human* Routledge: London and New York, 2001 at 22.

[66] M. Brown, "Can Culture be Copyrighted?" (1998) 39(2) *Current Anthropology* 193.

knowledges to indigenous communities is recognised.[68] In this light, Brown argues that advocating property rights in indigenous knowledge is in response to decolonisation, but the inherent political complexity of this remains undisclosed. The pivotal points for Brown involve: the issue of control of 'culture'; an increased attention to the 'politics of difference'; and, the consequent difficulty that these present for the law.[69]

Brown's argument problematises the position of 'culture' within a domain of rights, ownership and legislation through the insistence of intellectual property rights in cultural knowledge. From a context where legal theorists and anthropologists recognise that the "prevailing concepts of intellectual property are in crisis"[70] Brown seeks to develop an appreciation of how indigenous demands to own and control information are equally problematic. He specifically argues that attention should be given to the way in which the 'transfer of information' between cultural groups occurs in order to develop an awareness of the problems inherent in laws that seek to control the transfer of cultural information.

For Brown, the flow of information through historical epochs is crucial to understanding the problems that protecting cultural knowledge may generate. While he is careful to note the differences in information gathering and distribution that exists in liberal democratic societies and within indigenous societies, Brown insists that developing exclusive rights over various forms of cultural knowledge could jeopardise free flows of information between and through cultures.[71] Brown is challenged by what he perceives as significant threats to freedom of

---

[67] Ibid. , at 199.

[68] This value has a variety of positions owing to the diverse indigenous experience throughout Australia. Nevertheless, an obvious example of the disparity mentioned above is that the value of Aboriginal art for indigenous communities such as the Yolngu in Arnhem Land is both the connection to land and its inherent spirituality. However, there is necessarily an economic valuation of art even for the Yolngu, in that its success within the economic realm has provided economic empowerment and a means for Yolngu people to become (to an extent) economically independent and even in some circumstances affording the return to outstations on 'traditional' lands.

[69] Perversely, contract law could address some of Brown's concerns, given that the text of the contract need not be limited to narrow economic concerns.

[70] M. Brown, "Can Culture be Copyrighted" supra n.66 at 197.

[71] Ibid. , at 204. The argument for 'free' flows of information is problematic – as is the call that 'information wants to be free'; for both presuppose a natural state of informational exchange that is beyond social relationships. Free information can only exist when relations of power are negligible, and this is always contrary to social engagement. In addition indigenous practices involving secret/sacred knowledge raise testing questions regarding the free flow arguments. This is because, in certain circumstances indigenous knowledge is highly regulated rather than being open and therefore accessible to all.

information in the public domain that intellectual property rights in 'culture' pose. Further, Brown is concerned about the codification of indigenous knowledge whereby protection is achieved through "any number of schemes to codify culture and thereby protect it from misuse."[72] He argues that attempts to impose new broader controls on the flow of knowledge raise troubling questions that should be resolved or at least discussed before supporting new legal regimes that "codify cultural property and potentially criminalise its unauthorised possession."[73]

Speaking as a cultural theorist Brown sees and interprets the issues of indigenous cultural and intellectual property against those of legal scholars. Yet the controversial nature of Brown's ideas and his analysis of what the nexus of the problems are, have been peripheral to the legal discourse. This is perhaps because practically, the law has to respond to legal questions and expectation of remedy. The space to consider philosophical questions and moral implications undermines the capacity of the law to function – and this is not solely the problem of the law, but also the ways that social problems are shifted into a legal domain for remedy.[74] Nevertheless Brown argues that property discourse replaces what should otherwise be a more extensive discussion of the moral implications of positioning indigenous information within an intellectual property framework.[75] To Brown, transcending the legal boundaries presents ethical and moral dilemmas that potentially destabilise the project of naming and securing indigenous intellectual property.

The recent work of Madhavi Sunder is sympathetic to Brown's initial arguments, however this time from a position informed by contemporary legal discourse.[76] Sunder's primary agenda teases out the increasing intersection between intellectual property rights and identity politics.[77] Aware of the increasing rise in identity based justifications for new intellectual property rights

---

[72] Ibid. , at 203.
[73] Ibid. , at 204.
[74] Remembering Pat O'Malley's argument from Chapter Two, that it is of interest when a social problem is (re)made into a legal issue. See Chapter Two.
[75] M. Brown, "Can Culture be Copyrighted?" supra n.66 at 199.
[76] M. Sunder, "Intellectual Property and Identity Politics: Playing with Fire" (2000) 4(1) *Journal of Gender, Race and Justice* 69.
[77] I raised this intersection in Chapter Two at page 41.

Sunder explores the implication for both intellectual property law and identity politics.[78] Her analysis provides an illustration of what was noted in Chapter Two as the turn to the cultural in the law.[79] In this sense, identity claims force the law to consider the world beyond its boundaries.[80] She argues that it is increasingly difficult to determine what "cultural changes are the product of modernity and what changes are as a result of a cultures historical influence of imperialism."[81] Thus legal intervention in the name of preserving cultural integrity has the effect of making cultural boundaries harder to transgress. Further, asserting a property right in culture is potentially dangerous due to the process of evoking a past and assuming a cultural homogeneity, "that does not exist in the modern world."[82]

Notwithstanding the legitimacy of the claims, Sunder questions the success of outcomes derived from an intellectual property framework. Her main concern involves the evocation of the notion of property over cultural knowledge and thus she questions the possibility of genuinely adapting the property discourse to secure rights in cultural knowledge. Sunder alerts her readers to what she argues is a profound shift in intellectual property law where:

> law has traditionally allocated rights to exclusive control and exclusion over intellectual products in order to provide *economic incentives* for production, it now contemplates awarding intellectual property rights in order to protect the *identity* of the property owner regardless of the economic consequences of non-protection.[83]

The most striking point made by Sunder concerns the misrepresentation in seeing intellectual property as protecting indigenous rights in cultural identity rather than protecting rights in property: that the desire for cultural survival has been translated into "claims for intellectual property rights in culture as a bulwark against cultural imperialism and cultural appropriation."[84] Her point is striking precisely because of the implications it raises for law. If successful arguments for indigenous intellectual property are concerned with maintaining the

---

[78] The rise in discussion of identity politics can, in part, be traced to Iris Young's work *Justice and the Politics of Difference* Princeton University Press: Princeton, 1990. Also see: I. Young, "Hybrid Democracy: Iroquois Federalism and the Postcolonial Project" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000; C. Taylor, "The Politics of Recognition" Gutman, A. (ed), *Multiculturalism and the 'politics of recognition'* Princeton University Press: Princeton, 1992.

[79] See Chapter Two at page 47.

[80] See the collection of essays in A. Sarat and J. Simon (eds), *Cultural Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism* Duke University Press: Durham and London, 2003.

[81] M. Sunder, "Intellectual Property and Identity Politics: Playing with Fire" supra n.76 at 71.

[82] Ibid., at 75.

[83] Ibid., at 71-72 [emphasis in the text].

[84] Ibid., at 73.

cultural integrity of indigenous cultures, then certainly the fabric of intellectual property has changed.[85] That is, the development of new forms of intellectual property for indigenous knowledge will have to change current liberal democratic perceptions of property.

Both Brown and Sunder assume that intellectual property is a stable and coherent body of law and therefore, even these critiques of intellectual property reaffirm the narrative of unified intellectual property law. But what Brown and Sunder do not consider is that the difficulty facing intellectual property law is not necessarily about granting property rights in cultural identity *per se*, but more the difficulty of grappling with the new subject matter that is identifiable as specific cultural knowledge. In this way, the limits of how the current law enables, understands and configures indigenous intellectual property necessitates a consideration of how the new subject matter embodies 'cultural knowledge' that is unique and specific to the group or community from which derivation is traced. It is precisely the economic incentives extant within indigenous knowledge, whether through art or biodiversity, that has made the development of a legal category possible. That is, economic value underpins the position of indigenous knowledge within the law, and focusing on other issues regarding preserving cultural identity and cultural integrity misunderstand the purpose, function and possibility of including indigenous knowledge within an intellectual property framework.

Brown and Sunder mistake the complexity of the problem as being about recognisng identity, rather than how the law tackles and treats cultural difference. Moreover, asserting the distinctiveness of cultural material is not a new issue for intellectual property law. The stark observation however, is to the apparent lack of previous considerations regarding the 'cultural' implications of intellectual property law. With or without the demands for inclusion of indigenous knowledge, intellectual property law is implicitly cultural, existing within a legal space that is informed and constructed through liberal democratic regimes of knowledge. In this light then, the challenge for the law is not to grant property rights in 'culture', for this is already happening when property rights are ascribed for example to literary works, inventions and designs, unique cultural products. Rather the challenge for the law is to grasp the different

[85] Whether this is actually borne out in Australian case law is left to the next chapter.

objects produced through indigenous knowledge and to establish processes that identify their value.

With these comments in mind, Brown and Sunder do raise challenging questions about what is at stake beyond the legal discourse. While presenting a popular narrative about intellectual property law that misses the real dynamism of this discourse, their questions and perception of the law represent fundamental concerns that warrant attention. These questions reject the instrumentalism of the law and assert an alternative politics of sovereignty encapsulated through arguments about cultural integrity and cultural identity. To an extent, as Kymlicka has highlighted, these challenges are difficult for a liberal theory of equality that the law is engaged in administering. For the law, and liberalism in general, the underpinning concerns are those regarding community and cultural membership. As Kymlicka asks, "What does it mean for people to belong to a cultural community – to what extent are individuals interests tied to, or their very sense of an identity dependent on, a particular culture? And do people have a legitimate interest in ensuring the continuation of their own 'culture', even if other cultures are available in the political community?"[86] But again this form of debate relies upon a division being made between 'cultures' and types of knowledge that may be possible in the abstract but fail in the context of practice.

An expectation of justice helps position indigenous sovereign claims within the legal discourse. However this does not mean that indigenous sovereign claims are consequently subordinated to liberal ideals of justice and equality.[87] On the contrary such claims demand a shift in the cognisance of the law, and the responsiveness of governmental agendas. Potentially, the criticism of intellectual property, for its disavowal of communal rights, also exposes a fundamental critique of liberalism. Namely the capacity for modern liberal states to conceptualise a concept of community that is beyond the relationship between the individual and the state.[88] In some sense this helps us understand how the argument for intellectual property protection shifts purpose from an economic agenda to an argument for protection in

[86] W. Kymlicka, *Liberalism, Community and Culture.* Clarendon Press: Oxford, 1989, at 3.
[87] See Chapter Two, especially the discussion on critical legal theory.
[88] Albeit supported by notions of legal personality that includes collective identity in the form of corporations – a unique form of community the law shows a great deal of flexibility in accommodating.

cultural identity and a preservation of cultural integrity. But the extent that legal bureaucracy can recognise and even appreciate such political positions remain as key concerns. Michael Dodson explains;

> It is clear that our laws and customs do not fit neatly into the preexisting categories of the western system. The legal system does not even know precisely what it is in our societies that is in need of protection. It is along way from being able to provide for such protection. The existing legal system cannot properly embrace what it cannot define and that is what lies at the heart of the problem.[89]

Kymlicka argues that it is necessary to highlight that membership of a cultural community is an important consideration within liberal theories of justice. It is this sense of a cultural community and expectations of justice that motivates indigenous assertions of intellectual property rights. Further it is this cultural community that ties cultural identity and cultural integrity as legitimate 'properties' of that community. It is generally accepted that indigenous people have differing rights, and that these rights pertain to the protection of their 'culture'.[90] Again Michael Dodson argues that;

> We need a different way of conceptualising 'intellectual property' – one that is not bound to Western notions of property law, founded upon individual rights. A reform of intellectual property regimes should not seek to compartmentalise and categorise elements of culture in order to legislate. A new regime must be based on the fundamental recognition of Aboriginal and Torres Strait Islander peoples' cultural integrity. Such a regime must not impose definitions, but rather should provide for the definition and nature of intellectual property to be established by Aboriginal and Torres Strait Islander peoples, and in accordance with our laws and customs.[91]

Dodson's comments highlight two important discursive shifts. One involves the power of indigenous people to adopt a language of rights for their own particular needs and circumstance,[92] and secondly that this adoption results in adaptation: where political pressures on legal institutions and governmental objectives are shaped. Indeed governmental action becomes aimed at directing the context in which special 'rights' and 'property' are positioned and accommodated. However, an effect is that this process naturalises these rights, so that

---

[89] M. Dodson, "Indigenous peoples and intellectual property rights" supra n.17 at 32.
[90] J. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, U.N Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4(1986); and E.I. Daes, *Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous Peoples*, Final report of the Special Rapporteur, Mrs. Erica-Irene Daes in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights, Geneva, 47th Session, E/CN.4/Sub.2/1995/26.
[91] Ibid. , at 34.
[92] See for instance, Noel Pearson's comments about utilising legal frameworks as tools of leverage in Chapter Two at page 64.

essentially difference becomes peripheral and informing rather than intrinsic to the way in which governmental objectives respond to indigenous concerns. 'Culture' is the explanatory tool that relies on difference in order to minimise it.

However, the fundamental question remains whether the legal bureaucracy can understand these contrary politics and affect a pragmatic shift, or whether the 'disparity of purpose' between economic relations, sovereignty claims and liberal challenges are incommensurable within the domain of intellectual property. Neither Brown nor Sunder address the crucial issue of power and how this plays into efforts to imagine remedies to the inappropriate use of cultural imagery. As the comments by Mick Dodson illustrate, not only does power complicate the issues that Brown and Sunder raise even further, but it remains an underdeveloped and undisclosed component in all intellectual property discussions about the protection of indigenous knowledge.

With these broader questions in mind, it is time to examine in greater detail the way in which problems of protecting indigenous knowledge have been framed in Australia by governmental efforts in the form of bureaucratic response. What will become evident as I examine initially the *Report of the Working Party into the Protection of Aboriginal Folklore* and secondly *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander People*, is the profound difficulty of reconciling certain indigenous interests within a legal framework. Recognising that indigenous rights exist in protecting and controlling cultural information is only the first step. What follows is an extrapolation of how a dilemma of purpose characterises each governmental incentive, and this dilemma circulates around contested systems of value. In order to transcend such difficulties however, the Reports increasingly turn to the security and logic of the law to uphold and deal with issues that cannot be relegated solely to a legal domain. What then occurs, and what these Reports demonstrate, is the process of foreclosing debate so that the above questions we have just considered are seldom advanced. Enhancing both the legitimacy of the law, and positioning the problem of inappropriate use of indigenous knowledge as a legal problem, the Reports rely on traditionalised interpretations of Aboriginality, leaving contemporary and inter-cultural indigenous exchanges as peripheral 'problems'. Through the Reports an homogeneity of indigenous experience is reshaped which

is, at best, imaginary. Participation by indigenous people demand that they identify with an impossible standard of authentic 'traditional' culture.[93] A consequent of this is that indigenous people are presented with "enormous difficulties both in making claims and negotiating positions."[94]

Study of the bureaucratic agenda

Until this point, the chapter has considered the various ways in which the space of indigenous intellectual property has been produced and what questions are relegated beyond the scope of legal concern, namely a politics of difference, of sovereignty and of context. Important issues regarding the economic value of indigenous cultural products have been intrinsic to the positioning of indigenous knowledge within intellectual property law. With attention to the ways by which knowledge is increasingly valued as a commodity in western society, governmental attention has been directed to the importance of developing frameworks that secure indigenous rights to knowledge, whilst also delivering surety to the legal discourse as the key agency dealing with knowledge management, access and distribution. What complicates the agenda of using the law to protect indigenous knowledge can be characterised as a dilemma of purpose: is the use of the law to further the economic interests of indigenous people, or to preserve indigenous knowledge as part of a valuable cultural artifact and an important part of constituting indigenous cultural identity, or both?

Report of the Working Party into the Protection of Aboriginal Folklore

In December 1981 the *Report of the Working Party on the Protection of Aboriginal Folklore*[95] was released. In keeping with the international interest on 'folklore' at the time, the Report commenced debate in Australia on the adoption of a legislative approach to the protection of

---

[93] See also the work: E. Povinelli, *The Cunning of Recogntion: Indigenous Alterities and the Making of Australian Multiculturalism* Duke University Press: Durham and London, 2002.
[94] S. Wright, "Intellectual Property and the 'Imaginary Aboriginal'" Bird, G., G. Martin and J. Neilson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996 at 140.
[95] Department of Home Affairs and the Environment *Report of the Working Party on the Protection of Aboriginal Folklore* Canberra, December 1981.

Aboriginal art.[96] The Report was initiated in 1973 through the first National Seminar on Aboriginal Arts and, coinciding with a political environment of land rights, a resolution was forwarded that the newly formed Aboriginal Arts Board should develop procedures "which would enable each tribal body to protect its own particular designs and works and to strictly control the use of them by non-Aboriginals."[97] The resolution was designed by the Copyright Committee of the Australia Council and, in turn, suggested that the government of the day should establish a committee to "protect Aboriginal artists."[98] As the Report notes;

> The first meeting of the Working Party was held on 28 October 1975. In 1979 it became clear that substantial issues beyond copyright were raised and the possibility of transferring the responsibility of the Working Party to the Minister for Aboriginal Affairs were canvassed. In the event it was considered more appropriate to transfer the Working Party to the Minister for Home Affairs and the Environment.[99]

The Report resulted in several recommendations. The primary recommendation concerned the introduction of special legislation in the form of an 'Aboriginal Folklore Act'. It was envisaged that the Act would protect Aboriginal folklore by providing for: prohibitions of using certain material; prohibitions on destructive uses of Aboriginal material; payments for the use of material in a commercial nature; the development of a system for clearing the use of works; an Aboriginal Folklore Board; and, a Commissioner for Aboriginal Folklore.[100]

The Report began with a preliminary discussion of the concerns regarding the "use of Aboriginal designs taken from the original works by Aboriginal artists."[101] This context is positioned very clearly within an economic framework as the designs were used for

---

[96] National attention to intangible cultural heritage was paralleled by international attention. The 1967 Stockholm Revision Conference of the Berne Convention discussed the inclusion of provisions relating to folklore – but considered the term 'folklore' too difficult to define. The UNESCO – WIPO *Tunis Model Law on Copyright for Developing Countries* 1976, discussed the way in which 'national folklore' should be protected. In July 1977 WIPO and UNESCO convened a 'Committee of Experts on the Legal Protection of Folklore'. In Feburary 1980 and 1981 WIPO and UNESCO convened meetings of a 'Working Group on the Intellectual Property aspects of Folklore Protection'. The Report of the Working Group culminated in the UNESCO-WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* 1982. Concerns for the protection of moveable cultural property had been on the international agenda for several decades (although not necessarily in the context of indigenous rights) see *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 and *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970.

[97] Department of Home Affairs and the Environment *Report of the Working Party on the Protection of Aboriginal Folklore* supra n.95 at 3.

[98] Ibid. , at 3.

[99] Ibid. , at 4.

[100] Ibid. , at 4.

[101] Ibid. , at 5.

commercial gain.[102] The Report also points to the 1976 case *Foster v Mountford*[103] where photographs of a secret/sacred nature were included in an anthropologist's publication. The publication was restrained by a court injunction utilising the law of confidential information. The Report notes that "this example highlights the difficulty which confronts non-Aboriginals proposing to use Aboriginal material, namely, that of finding an authority entitled to give permission for it to be used."[104] As this quote indicates, the Report espoused an inclusive nationalist objective. The purpose is not only to consider means to protect indigenous imagery, but also mechanisms that allow non-indigenous peoples to access and use (predominately in an economic context) indigenous imagery as well.

The Report was surprisingly candid regarding the problems that developed over the course of its writing and release and these were openly incorporated into the body of the text. The first problem related to terminology and the second to the inability to adequately differentiate Aboriginal 'folklore' from other Aboriginal material or knowledge. The Report was guided in using the term 'folklore' because of its usage within other international reports, but reinterpreted the term giving it 'local' subjectivity.[105] 'Folklore' was considered a sufficiently vague term to recognise the "traditions, customs and beliefs that underlie forms of artistic expression."[106] The key difficulties of the term (beyond that it was not technically legal) however, were acknowledged in the following way:

---

[102] This was also confirmed by the groups who were invited to comment. "A summary of the report by the Department of Aboriginal Affairs was sent to interested parties. State and Territory governments, relevant Aboriginal organisations, interested non-Aboriginal groups and commercial users of Aboriginal folk art were all invited to comment." R. Bell, "Protection of Aboriginal folklore: Or do they dust reports?" (1985) 17 *Aboriginal Law Bulletin* 6.

[103] *Foster v Mountford* (1977) 14 ALR 71. See also *Pitjantjatjara Council Inc v Lowe* (1983) Victoria Supreme Court, unreported – noted in (1982) 4 *Aboriginal Law Bulletin* 11.

[104] Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* supra n.95 at 6.

[105] Ibid. , at 7. Despite its pejorative connotations identified by Indigenous peoples, folklore continues to be used as an international standard. For a contemporary reference see World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, Switzerland 2001; World Intellectual Property Organisation Secretariat, *Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Fourth Session, Geneva, December 9 - 17, 2002. For a discussion of the problem of folklore see: M. Blakeney, "Protection of Traditional Knowledge under Intellectual Property Law" (2000) 22(6) *European Intellectual Property Review* 251.

[106] Ibid. , at 7. Also R. Bell, "Use of the term 'folklore' recognises that the traditions which underlie the Aboriginal arts are tightly integrated within the totality of Aboriginal culture. Expressions, in a variety of art forms, comprise the folklore traditions built up in a community." R. Bell, "Protection of Aboriginal folklore: Or do they dust reports?" supra n. 99 at 6.

> We realise that the word 'folklore' in the proposed legislation could be subject to several misinterpretations. The word is not used narrowly to refer to oral literature only, as it is sometimes used. Nor do we mean to imply that Australian Aboriginals possess a rudimentary, unsophisticated artistic tradition; nor that Aboriginal traditions are static or even dead ... [n]evertheless the word folklore has been adopted as a compromise meeting the *conceptual* and *international legal* requirements for such a term.[107]

From the first bureaucratic initiative, the legal discourse was instrumental in directing the way in which indigenous knowledge was to be phrased. The primary authority was legal and governmental not indigenous, and indigenous people were sidelined from participating in any discussion concerning the 'best' terminology for their knowledge structures and forms of expression. Indeed if they had been involved, arguably the pejorative meaning contained in the term 'folklore' would have excluded it from being the key term used to identify indigenous knowledge within legal frameworks.[108]

A further difficulty faced by the Working Party was in deciding on the purpose of the specific legislation. It was unclear whether the legislation was to preserve Aboriginal 'folklore' as part of a continuing tradition, "allowing it to evolve within its *traditional context* unhampered by *external* influence"[109] or whether the aim of the legislation was to protect the economic interests of Aboriginal people.[110] While the two purposes were not necessarily mutually exclusive, the Working Party saw that they took the policy objectives in different directions.[111] The key problem with the difficulty of purpose that characterised the Report was dually the use of the term 'folklore' that positioned the term as perpetually in the past and the perception that culturally specific knowledge, positioned within a 'traditional' context, evolved 'unhampered by cultural influence'. Fundamental flaws in viewing indigenous people as only existing in 'traditional' contexts have been instrumental in producing the anxiety of positioning

---

[107] Ibid. , at 7 [emphasis mine].
[108] "Although I do not agree with the term folklore to describe aspects of cultural heritage, I commend that Report for the initiatives it sought to encourage." M. Dodson "Indigenous peoples and intellectual property rights" supra n.17 at 35.
[109] Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* supra n.90 at 11 [emphasis mine].
[110] R. Bell, "The working party concluded that Aboriginal folklore is a national resource which should be protected in the interest of both Aborigines and the general public, but which should also be accessible to users. It identified two main areas where existing laws are inadequate: the use of traditional materials for commercial purposes without benefit to traditional owners." R. Bell, "Protection of Aboriginal folklore: Or do they dust reports?" supra n.102 at 6,

indigenous people both within modernity (with economic considerations) and simultaneously outside it, in traditional locales. In terms of fostering an anxiety that still characterises debate in this area, this Report instrumentally perpetuated such myths regarding the location of indigenous people and the unchanging nature of tradition. This has influenced current debates over who is legitimately entitled to claim 'ownership' of culturally specific knowledge. The Report presented an impossible position for indigenous people to negotiate.[112]

Within the Report the disjuncture between economic interest and the preservation of cultural identity and integrity destabilised the expectation and function of intellectual property law with regard to indigenous knowledge as new subject matter. In this sense, the Report while advocating the possibility of using laws of intellectual property, notably copyright, it strongly emphasised the limitations of these laws.[113] Golvan observes that "the Working Party concluded that the reliance on copyright was not appropriate in order to protect Aboriginal folklore."[114] This was in part because 'folklore' was a vague descriptive term with no suitable legal equivalent. To this end indigenous cultural expression remained unidentified to the law. As an alternative the Report recommended the establishment of 'special' legislation, developed in consideration with the differing requirements of Aboriginal people but also taking into account difficulties facing non-indigenous people with the use of indigenous cultural material. Thus the approach taken by the Working Party adopted a "national interest perspective on reform."[115] Importantly what followed the Report were laws protecting tangible indigenous material such as sites and artifacts through the Heritage Acts.[116] Indigenous knowledge

---

[111] Department of Home Affairs and the Environment *Report of the Working Party on the Protection of Aboriginal Folklore* supra n.95 at 11.

[112] This impossible position is also replicated in the Yorta Yorta native title case, *Members of the Yorta Yorta Community* v *State of Victoria* [2002] HCA 58 where the Yorta Yorta people were ostensibly denied native title because their traditions had changed over time. There was no fixity to Yorta Yorta tradition, yet this provided the key argument for the Government that the Yorta Yorta could not prove 'continuity' to their land therefore denying native title rights. See: L. Strelein, "*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 – Comment" (2003) 2(21) *Land, Rights, Laws: Issues of Native Title* 1; R. Bartlett, "The obsession with traditional laws and customs creates difficulties establishing native title claims in the South" (2003) 31(1) *The University of Western Australia Law Review* 35

[113] Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* supra n.95 at 13 –17.

[114] C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" supra n.28 at 347.

[115] T. Davies, "Aboriginal Cultural Property?" supra n.29 at 18.

[116] See generally Commonwealth legislation: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Protection of Moveable Cultural Heritage Act 1987* (Cth). The State and Territory legislation focuses on different elements of Aboriginal and Torres Strait Islander Heritage. For example, the *National Parks and Wildlife Act 1974*

surprises intellectual property law because its metaphysical dimensions are not easily determined.

There is a striking emphasis in the legislative recommendations made in the *Report of the Working Party* on paternal legal authority in securing Aboriginal cultural practice. As Davies argues, "legislation posits its own authority, and to date has denied recognition to Aboriginal practices as an authoritative source of control over use of their imagery."[117] The Report discloses that legislation and bureaucracy are the only feasible and realistic outcomes for securing the use of Aboriginal arts, both by Aboriginal and Torres Strait Islander people but also non-indigenous people. In recommending that a Commissioner for Aboriginal Folklore should be appointed for the purpose of determining infringement, issuing clearance for use of works and negotiating payments, issues regarding how power in law is exercised come to the fore. The implication is that the Commissioner would be a governmental representative and, by implication, non-indigenous. Autonomy for indigenous people to negotiate and control use is removed in the recommendation that determining these elements be first put through a Commissioner. Beyond assuming the inability of indigenous people to engage in such complex negotiations, the recommendation effectively removes indigenous involvement and denies indigenous interpretation and self-determination. The Report reshapes the issue as requiring legal authority and state intervention. This reshaping is significant and reaffirms the legislative approach as the dominant way of considering any solution to the problem of protecting indigenous knowledge.

Throughout the Report, indigenous people are defined as either 'customary users' and/or 'traditional owners', through which the homogeneity of Aboriginality is imposed. Whilst indigenous concerns are central, indigenous voice is absent.[118] This inevitably positions

---

(NSW) allows the Director-General of the National Parks and Wildlife services to create and control Aboriginal places, including those with Aboriginal remains. The *South Australian Aboriginal Heritage Act 1988* seeks to protect Aboriginal heritage in South Australia. The *Aboriginal Heritage Act 1972* (WA) protects places, sites and objects used by Aboriginal people.

[117] Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* supra n.95 at 18.

[118] This is evident through the anthropological tone of the Report – indigenous people are subjects of the report. For example, "For Aboriginals, their beliefs and actions are sanctioned by reference to a complex concept which is commonly called in English, 'the Dreamtime'... A song, a dance or a visual design may be presented only on specific ritual occasions when other interested parties are present. By these means an artist's individual creativity is

indigenous people in a position of exteriority to the content of the Report and also creates a barrier to actively engaging with its recommendations. Indigenous culture is romanticised and represented as a unitary phenomenon. Davies extends this observation by pointing to the way the legislative approach fixes in time specific cultural practices and assumes that these practices and how they relate to imagery are unified.[119] Normative assumptions regarding indigenous cultural practice overwhelmingly preclude the reality of indigenous practices and the diversity of positions and attitudes by indigenous peoples to the use of cultural imagery.

Taken as a whole the *Report of the Working Party* establishes a precedent in regards to managing indigenous cultural material that highlights the instrumentality of mechanisms of governance. As programmes function as the link between theoretical concerns or thinking and practical intentions and applications, *Report of the Working Party* can be seen as a programme of government: a strategic way of making reality thinkable and practicable. The Report is an attempt to make the problem of protecting Aboriginal 'folklore' open to remedy. The Report also functions to legitimate indigenous knowledge as a specific area of governmental attention. For our current purpose it illustrates how certain frameworks for understanding the specific ways in which practices are developed that try to shape, mobilise and sculpt particular choices, needs and wants of indigenous and non-indigenous peoples to the subject indigenous intellectual property. The space through which the problem of misusing indigenous knowledge is to be understood is produced so as to be amenable to discrete projects and further programmes of governance.

However with this in mind, it is actually the following Report, *Stopping the Rip Offs* that consolidates this space and forecloses alternative visions. Significantly through *Stopping the Rip Offs*, the governable space of 'indigenous intellectual property' is consolidated, where the process of managing the problem of indigenous knowledge generates its own form of language, logic and possibility. The *Report of the Working Party* was an important precursor, but it is really *Stopping the Rip Offs* that secured the production of the legal category, fleshing out

---

kept within the bounds of cultural norms. He may follow his own aesthetic inclinations only so far as they do not infringe the rights of others over the themes employed." Ibid. , at 8.

[119] Ibid. , at 19.

governmental ambition and marginalising questions about minority rights. It is to this Report that I now turn.

Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples

In October 1994, the Federal Government[120] released the Issues Paper *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples.*[121] Expressly, the intention of the paper was to improve legal protection for Aboriginal and Torres Strait Islander arts and cultural expression.[122] The release of the Issues Paper occurred prior to the final hearing and decision in *Milpurruru v Indofurn* (1994).[123] Such was the interest in the outcome of the case from legal, governmental agencies and individuals, that the Issues Paper appeared responsive to the increasing discussions about the possibility of legal protection for indigenous artistry. The Report was reactive, as evidenced in the title, and timely in relation to the case then before the Federal Court. It is clearly a product of a unique set of issues being played out in Australia.

Notably *Stopping the Rip Offs* was developed after an increasing number of cases relating to the inappropriate use of Aboriginal art were appearing in the Australian courts.[124] Contrary to the opinion expressed in the *Report of the Working Party*, it appeared as though copyright provided a viable tool for protecting the use of Aboriginal art. Concerns regarding legal limitations, in terms of originality and individual authorship, were being addressed by the Court to the satisfaction of the indigenous litigants and counsel representing the indigenous artists. It was evident that it was both the disparity of economic return and the culturally inappropriate use of the Aboriginal artwork that formed the crux of these cases. Significantly the Issues Paper was

---

[120] The Federal Government in 1994 was formed by Labor under the leadership of the Prime Minister Paul Keating.

[121] Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* Australian Government Publishing Service: Canberra, 1994.

[122] Ibid. , at ii.

[123] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209.

[124] From 1981 three cases appeared before the Courts and many others were settled. As Golvan explains due to the number of cases at one point, Lin Onus was instrumental in setting up the first arts management company "to assist in managing these cases. I mean there were so many cases at one point that we needed a bit of a system." C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A. See also: V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* Touring Exhibition Catalogue, 1996 as a historical record of these cases. Johnson's more contemporary work is the House of Aboriginality Project at www.mq.edu.au/house_of_aboriginality.

also riding on the success of the *Mabo* decision that confirmed the possibility for law to be responsive to indigenous concerns in relation to land and self-determination. This political environment, which differed from the previous decade when the *Report of the Working Party* had been released, reaffirmed the authority and primacy of the law to act 'on behalf' of indigenous people. Thus the legitimacy of intellectual property law was translated into the scope and focus that the Issues Paper took.

As noted earlier, law in western liberal democracies establishes governable spaces and these in turn, maintain and distribute relations of power. In order for the law to work effectively it cannot be seen to be anything other than 'fair' and 'neutral'. Jane Gaines notes that the legal discourse does not question its own categories as it depends on them for its perpetuation.[125] In the same way as noted by Gaines, the central characteristics of intellectual property law utilised in the Issues Paper strategically position 'indigenous knowledge' within such categories. To effectively manage knowledge the intangibility of the subject matter must be made knowable through established forms of classification. This is precisely what occurs when indigenous knowledge is positioned within the already existing categories of copyright law, for instance 'art', 'dance', 'song'. Thus the language of the Issues Paper and how indigenous concerns are phrased emphasise the instrumentality of the legal enclosure to demarcate and isolate the extent of the legal challenge. A legal logic is imposed in both how the new subject matter is understood and how the subject matter is identified, thus affirming the legitimacy of the legal categories.

The aim of the Issues Paper reveals the scope of its purpose and identifies the key audience. The Paper states,

> The Government wants to find a better way to protect and promote Aboriginal and Torres Strait Islander arts and cultural expression. This issues paper outlines the current copyright protection available and suggests new ways to improve that protection. The paper has been designed to provide the community, but particularly Aboriginal and Torres Strait Islander peoples, with an opportunity to comment on this

[125] J. Gaines, *Contested Culture: The Image, the Voice and the Law* The University of North Carolina Press: Chapel Hill, London, 1991 at 15.

> important area. Responses received will assist the development of options for reform.[126]

The way that the Issues Paper directs its purpose to the broader community, as well as indigenous people, follows from the *Report of the Working Party* with regard to the nationalist approach to the problem. However the Issues Paper departs from this national agenda with the series of questions, "What do you think?" as the preliminary page before the main content begins. As Stephen Gray has noted, these questions are not really directed at *all* Australian indigenous people. They are instead directed to one particular group of indigenous artists still living in 'traditional' communities.[127] This inference is apparent through the questions such as: "what should happen if an artist, musician, dancer from outside your community misuses the traditional images, designs, songs or dances of your community without its permission?"; "what should happen if a member of your community misuses any traditional images and designs of your community?"; and, "if disagreements between people and your community arise over the use of your traditional arts and cultural expression, what do you think should be done?"[128]

Two things are occurring here that are not only noteworthy but fundamental to the production of indigenous knowledge within intellectual property law. Again indigenous people are assumed to be a homogenous group residing within 'traditional communities' and secondly, by virtue of existing within 'traditional' communities are positioned outside modernity and hence seemingly all the more innocent and in need of protection. Gray also makes the astute observation that what the questions reaffirm is the sense of the 'authentic' Aboriginal artists who reside in remote communities replicating timeless imagery.[129] As he states, "in the same breath as admitting that communities are continually evolving, it [the Issues Paper] makes the seemingly contradictory statement that the focus is upon forms of artistic and cultural

---

[126] Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* supra n.121, see backcover. See also: C. Hawkins, "Stopping the Rip Offs" (1995) 20(1) *Alternative Law Journal;* (1995) 3(72) *Aboriginal Law Bulletin* 1 (joint issue) at 7.

[127] S. Gray, "Squatting in the Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14(2) *Law in Context* 29 at 39.

[128] Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* supra n.121 at 1.

[129] S. Gray, "Squatting in the Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" supra n.127 at 39.

expression 'which are based on custom and tradition.'"[130] Not only does this deny the diversity of indigenous experience, it also justifies the actions of the state and negates any form of indigenous autonomy. The danger of these elements of the Issues Paper is that they, (perhaps unwittingly), replicate visions of indigenous people produced through colonial and primitivist discourses. Indigenous people are denied access to contemporary practices of modernity, they, like their art, are timeless, authentic and ahistorical.

It is telling that only eleven responses were received from indigenous communities, corporations and cultural centres. This is despite that "approximately 3000 copies of the Issues Paper [were] distributed to ATSIC Regional Councils, Regional Offices, Aboriginal Legal Services, Land Councils, indigenous media associations, Aboriginal art centres, copyright interests and art interests, inviting comment on the paper."[131] It starkly illustrates fundamental issues of access, for instance how intellectual property law, and copyright in particular, was translated or made understood to each indigenous individual and community, as well as their willingness to engage with mechanisms of governance. The complexity of intellectual property law, in terms of property and ownership, was not adequately explained in the Issues Paper and hence hindered the capacity of indigenous individuals, communities and organisations to respond. It could be argued that this was, and continues to be, a significant oversight in helping (and encouraging) indigenous people to utilise and develop benefits from an intellectual property regime. It still remains exclusionary in practice, even though considerable effort has been made to identify and produce indigenous knowledge as a intellectual property category.

In addition, the failure of the paper to recognise the paternalism embedded within its pages, seriously undermined its capacity to engage with the complexity of issues facing indigenous people. As Gray posits, "the notion of 'protecting Aboriginal and Torres Strait Islander arts and cultural expression is itself problematic. It could be argued that this implies a paternalistic government extending its benevolence to certain people and artistic forms, as opposed to

[130] Ibid. , at 39.
[131] C. Hawkins, "Stopping the Rip Offs" supra n.126 at 10.

recognising and accommodating itself to a dynamic and independent set of cultures."[132] This paternalism is explicit in two key areas: the photographs of the white politicians that form the only visuals within the text; and, the brief four year period recounting the role of the government in Aboriginal and Torres Strait Islander affairs.

The foreword to the paper features photographs of three men representing the Government. The 'face' of government is translated literally through the photos of Duncan Kerr, Minister for Justice; Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs and Michael Lee, Minister for Communications and the Arts.[133] As the only visuals in the text, the faces of government authorise the document and advocate the accountability of government. It suggests the commitment that these men and the government have to 'finding adequate ways of protecting Indigenous arts and cultural expression'. The photographs starkly represent perceived differences between the two 'whole' cultures. Additionally the photographs suggest 'open government' and in this way strategically seek to limit the bureaucratic origins of the work through personalising the Issues Paper.

It is difficult to ignore the suggestion that three white men in positions of power authorise the indigenous subject matter and content. This is significant and indicates the structural paternalism historically implicit in governmental agencies when treating indigenous matters. It has direct correlation to the historical relation between indigenous people and effects of colonisation discussed in Chapter Two. Inevitably such an assumption underpins the document. The following paragraph describes the role that the government has had in the past lives of Aboriginal and Torres Strait Islander peoples. The paragraph begins;

> Since 1990, prime responsibility for Aboriginal and Torres Straight Islander policy advice, including matters that affect Aboriginal and Torres Strait Islander arts and cultural expression, has rested with the Aboriginal and Torres Strait Islander Commission (ATSIC).[134]

That the representation in *Stopping the Rip Offs* of the history of the Government's role in Aboriginal and Torres Strait Islander Affairs dates back to 1990 is significant. In total there is a

---

[132] S. Gray, "Squatting in the Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" supra n.127 at 39.

[133] These men and their relevant portfolios were part of the 1994 Labor Government.

history of four years, from 1990-1994 (when the Issues Paper was published). The account presents a positive (and partial) representation of the governmental involvement in Aboriginal and Torres Strait Islander affairs, and promotes the successful role of government in securing 'self-determination', as ATSIC is popularly interpreted as the key institution for the delivery of self-determination.[135] Conveniently anything outside the four-year time frame is relegated outside the text's jurisdiction.[136] Furthermore, as the photographs similarly demonstrate, there is still a very active and dominant role in Aboriginal and Torres Strait Islander affairs played by white politicians. Notably the then Chairperson of ATSIC, Lowitja O'Donoghue is not photographed or mentioned in the text.

Positioning itself within the legal discourse, *Stopping the Rip Offs* effectively facilitates how the legal logic and language will be inscribed upon concepts of indigenous knowledge. In this way indigenous cultural expression becomes tied to the legal logic of intellectual property law, and most effectively appears as naturally given. Further, the circulation of the trope of property provides a way of understanding indigenous knowledge; it reduces the complexity of indigenous knowledge into an intelligible form open to legally rationalised strategies of measurement, value and protection.

Legal discourse provides the vehicle through which the object of concern, 'Aboriginal and Torres Strait Islander arts and cultural expression' can be examined and subsequently understood. *Stopping the Rip Offs,* abstaining from using the term 'folklore' invents a new description of indigenous knowledge through the term 'Aboriginal and Torres Strait Islander arts and cultural expression'. Again this term locates indigenous knowledge relatively neatly in the framework of intellectual property classifications and identifications.[137] As I argued earlier

---

[134] Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* supra n.121 at 2.

[135] In his memoirs of political office, Robert Tickner records, "Before the creation of ATSIC, the indigenous individuals and communities to whom the governmental programs were directed had no say in determining what the programs would be and how they would be implemented ... The advent of ATSIC changed all that. By law the minister was stripped of almost all powers over the detail and direction of Indigenous programs. Those powers were placed in the hands of an elected national board of commissioners." R. Tickner, *Taking a Stand: Land Rights to Reconciliation* Allen and Unwin: Sydney, 2001 at 48.

[136] This is problematic considering the fraught colonial history of Australia.

[137] Blakeney has explained how the shift from folklore to 'traditional' knowledge has changed the discourse – where folklore was contextualised within copyright or copyright-plus terms, traditional knowledge is broad enough to embrace a broad range of traditional knowledges. He states: "In this circumstance the discourse would

in this chapter, categories of art, dance, music or design help make expressions of indigenous knowledge intelligible to an intellectual property framework. Through the language and classifications of intellectual property law, indigenous knowledge is rendered thinkable and amenable to intervention. As White explains,

> The law builds itself over time, by discarding possibilities for speech and thought as well as by making them; and what it discards for some person or people will be a living language, a living truth.[138]

As a stated objective the Issues Paper functions to explore how the law can provide 'adequate protection for Aboriginal and Torres Strait Islander arts and cultural expression' whereby law is the principle subject, concerned with the object, Aboriginal and Torres Strait Islander arts and cultural expression. Legal discourse maintains its dominance by channeling discussions of the 'object' of concern through itself.

In using a dominant western regulatory mechanism of government such as law, relations of power are exerted, for power is made possible through a "plurality of relationships."[139] One result of these relations is the production of knowledge, for example, what it is possible to know about intellectual property and indigenous knowledge. Importantly, processes of knowledge production highlight the variety of political movements that exist and are put into play in varying strategies. *Stopping the Rip Offs* indicates a paradox, namely that the terms of what is to be recognised and included are very vague, except when there is a commodity at stake. At that point the object of legal protection becomes surprisingly clear. For the differentiation is only sensitive and sensible in terms of securing the commodity. Aboriginal art is realised as the moment of capital. This gives intellectual property law its purpose and mode of identification. The issues of how the law treats difference are relatively benign within these Reports, that is, the bureaucratic agenda recognises difference, but fails to enagage with it in any meaningful way. Treating cultural difference is left to the courts, where as we shall now consider, new and inventive ways of accommodating indigenous difference within liberal concepts of justice and governmental strategies of managing knowledge are imagined. The

---

shift from the environs of copyright to those of patents law and biodiversity rights." M. Blakeney, "Protection of Traditional Knowledge under Intellectual Property Law" supra n.105 at 252.

[138] J. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* supra n.19 at 262-263.

[139] M. Foucault. "Clarifications on the Question of Power" *Foucault Live: Collected Interviews, 1961-1984* (ed. Lotringer, S.) Semiotext(e): New York, 1989 at 260.

courts are left with no choice – they must deal with difference because indigenous people are present to express their voice and contextualise indigenous cultural identity through cultural and legal expression.

Conclusion

Following the two governmental reports, *Report of the Working Party* and *Stopping the Rip Offs*, indigenous knowledge was ultimately affirmed as a category in Australian intellectual property law. Significantly both reports consolidated the problem of the unauthorised use of Aboriginal art, design and knowledge as open to governable strategies of description, intervention and normalisation. Inevitably this affected how remedial solutions were developed and the way in which the law has sought to accommodate indigenous cultural differences. Both reports functioned to secure a governable space, replete with regimes of truth, including who is authorised to speak and under what circumstances.

As the position of indigenous people in the abovementioned Reports highlight, the tendency is to locate indigenous culture as a unitary phenomenon, where there exists one voice and one perspective. Such a position is enhanced by the pervading emphasis on 'tradition' as a marker identifying cultural expression and cultural knowledge as 'indigenous'. This undermines the capacity for indigenous people to actively engage and utilise economic frameworks and thus generate legitimate forms of economic return either for themselves or their families and/or communities. The construct provided to indigenous people forecloses any real recognition of desires held by indigenous people to gain control of cultural knowledge for economic reasons. This is because the economic rationale disrupts the reliance on 'tradition' to identify indigenous knowledge. The lack of any sustained negotiation and discussion, in governmental reports and legal initiatives, with the diversity of indigenous experience further exacerbates this concern and consequently places indigenous people in difficult negotiating positions.

That indigenous people have also expressed concern to protect cultural integrity through intellectual property highlight the complicated agendas that are presented to the law for remedy. There is a tendency in the governmental responses to focus on one of these elements

at the expense of the other. There seems a reluctance to engage with the difficulties that both of these agenda generate, even though they have both been produced and phrased within the intellectual property discourse.

To better understand these difficulties, and how they impact on the ways in which indigenous knowledges are identified within the law and how difference is understood beyond abstract uniformity, it is imperative that we now explore these problems in the context of the case law. What I will now consider is the way that in the specific cultural and political circumstances that generates instances of case law, indigenous subjects are provided with the capacity to push the limits of legal expectation. In this way challenging the law to accept fundamental differences inherent in indigenous subject matter also recognises existing degrees of similarity. Thus the key concern in how indigenous knowledge has been produced as a category in intellectual property law is the way that this new subject matter challenges precepts and concepts inherent within legal regimes of logic and the seepage between governance via bureaucracy. This influences the courts, thus effecting how the subject is produced and legally secured.

Chapter Five

Legal judgment and the production of knowledge

Chapter Four argued that governmental agendas, articulated through two key reports, have consolidated the levels through which indigenous knowledge is positioned within legal discourse. This chapter will extend analysis of these dynamics directly examining the importance of case law in facilitating the production of such categories. Furthermore the chapter will illustrate how judicial attempts at reconciling legal categories and legal language with indigenous knowledge is an inevitable and pragmatic response of governance.

Case law provides a space where the theoretical considerations highlighted in previous chapters can be considered through the practice of the law, constituting in its clearest form, legal action. Legal decisions are an event formative to the law itself.[1] In determining what the law says it becomes possible to recognise the limits and expectations of intellectual property law in relation to indigenous knowledge. This approach inevitably reveals a hidden component that underpins copyright case law: the way in which the law seeks to determine (and even create) the essence of the intangible subject matter.[2] The unstable nature of intellectual property subject matter means that understanding the metaphysical nature of intangible property is still a key characteristic of intellectual property law. Presented with a concept of indigenous knowledge as the intangible subject matter and Aboriginal art as the product of tangible form, the law predominately determines the essence of indigenous knowledge through a paradigm of 'tradition'. Significantly this solidifies the modern law by pointing out a differentiation, but in

[1] M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law* Pluto Press: Chicago, London 1996 at 94.

doing so 'traditional'/indigenous knowledge remains unstable and uncertain subject matter. This alerts attention to where the disjuncture between recognising indigenous knowledge as 'new' subject matter occurs, and means that indigenous knowledge remains a subject difficult to manage.

The chapter will be divided into two sections both concerned with an examination of cases: *Milpurrurru & Ors v Indofurn Pty Ltd*[3] (hereafter the *carpets case*) and *Bulun Bulun & Ors v R and T Textiles Pty Ltd.*[4] While these cases involve the unauthorised reproduction of Aboriginal art each is distinctive owing to the differing elements of copyright law that constitute the focus of the case, and the extent to which recognition of cultural differences are incorporated into the law through the decisions made. The *carpets case* (1994) sets the precedent that enables *Bulun Bulun v R &T Textiles* (1998) to push the limits of the law with regards to 'difference'. Fundamentally exposed in this case law is how the function of the law is influenced by cultural expectations of how the law should react in specific circumstances of misappropriation of Aboriginal cultural imagery and products. The inability of intellectual property law to successfully secure the closure of the 'indigenous' as subject matter consequently reflects the power of knowledge to elude systems of organisation and management.

Milpurrurru and Others v Indofurn Pty Ltd

The *carpets case* and *Bulun Bulun* have much in common in terms of the application of copyright law, however they also have distinctive differences that underpin their significance as case law. The *carpets case* tested the extent to which intellectual property law could respond to and accommodate indigenous needs to secure forms of knowledge, especially with the increased infringement of Aboriginal art. The case informs the debate about the inclusion of indigenous difference in law. *Bulun Bulun v R&T Textiles* sought to extend the possibility for intellectual property law to encompass differing forms of ownership to that envisaged by the legislative

---

[2] This was discussed at length in Chapter Three.
[3] *Milpurrurru & Ors v Indofurn Pty Ltd & Ors* (1994) 30 IPR 209.
[4] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

scheme. In *Bulun Bulun v R&T Textiles* the cultural specificity of copyright was a key issue.[5] Both cases offer an opportunity to consider the practical response of law when managing a product of indigenous knowledge, namely Aboriginal art. The direction that law moved through these innovative cases was also facilitated because the same judge heard both cases: Justice von Doussa's voice has also been instructive in establishing a distinct indigenous narrative within intellectual property law.

The *carpets case* involved the unauthorised reproduction of the artwork of eight Aboriginal artists onto carpets. It was heard in the Federal Court of Australia, Northern Territory District Registry in 1994. There were four applicants. The first three were the Aboriginal artists George Milpurrurru,[6] Banduk Marika and Tim Payunka Tjapangati and the fourth applicant was the public trustee for the Northern Territory representing the estates of five deceased Aboriginal artists. The court document upheld Aboriginal customary tradition whereby the names of the deceased artists were not used; they were instead referred to by their skin names.[7] The only time the names appear is to identify artist to artwork. From the outset the judgment notes that all the artists have had their artwork exhibited in national and state galleries and that their artwork is "recognised nationally and internationally as exceptional."[8] This affirms both the status of the artists within the contemporary art world and the quality of the work infringed.

The respondents to the claim of copyright infringement were the company Indofurn Pty Ltd (formally Beechrow Pty Ltd) and its three directors: Brian Bethune, George King and Robert Rylands.

Predominately the case centered around two key elements. Firstly, the respondents were alleged to have infringed work under the *Copyright Act 1968* (Cth) when they reproduced Aboriginal artworks onto carpets without the artists' consent and imported the works into Australia for commercial sale. Secondly, they were sued for false and misleading advertising in

---

[5] K. Bowrey, "The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture" (2001) 12 *Law and Critique* 75 at 79.
[6] George Milpurrurru has since died and for this reason the case is also known as *Deceased Applicant v Indofurn.*
[7] In Aboriginal custom, skin names are those names given to the deceased and relate to family, kinship or moiety groupings.
[8] *Milpurrurru & Ors v Indofurn Pty Ltd* (1994) 30 IPR 209 at 212.

respect to the marketing of the carpets, thus breaching the *Trade Practices Act 1974* (Cth)[9] for wrongful attribution. In particular this part of the action related to the tags that were attached to the carpets stating that they were made by Aboriginal artists, and that the artists received royalties from each sale. Both statements were false.

The judicial interpretation offered in the case is significant and specifically relates to von Doussa's J response and mediation in terms of infringement and remedy. Infringement is a key issue in reading this case because in three of the works reproduced onto the carpets, the finding of infringement was debatable. Thus von Doussa J applied his own rationale and interpretation of the *Copyright Act 1968* (Cth) with regard to 'reproduction' in the context of the artwork. Determining infringement also provided a way to establish the originality of the subject matter, and thus confirm the legitimacy of its inclusion within the copyright framework.

In terms of remedy, von Doussa J awarded the damages communally to all the artists. In mediating the differences between the legal stipulations for individual damages and the indigenous claimants, His Honour recognised the disjuncture in awarding damages individually, owing to the claimants' differing perceptions of individual ownership. In addition, von Doussa J also awarded damages for 'cultural harm' herein acknowledging that the infringement had not only damaged the reputations or integrity of the artists in a western sense, but generated a 'cultural harm' that had no reference point in western law. This point was developed through the consideration that the infringement potentially had drastic repercussions for the artists within their community, where the responsibilities for safeguarding the use of the imagery differed significantly to those under western law. As von Doussa J observed within his judgment;

> This misuse of her (Banduk Marika) artwork has caused her great upset. If it had become widely known in her community at the time she believes that her family could have ordered her to stop producing any works of art; they might have outcast her, they may have sought recompense from her – nowadays in money terms ... I note in passing the observation in the paper "Aboriginal Designs and Copyright" ... that punishment of the Aboriginal law breaker may to a large extent be determined by the success or failure of action in the Anglo-Australian Courts.[10]

---

[9] ss.52, 53(c) and (d) and 55.

[10] *Milpurrurru & Ors v Indofurn Pty Ltd* (1994) 30 IPR 209 at 215.

In terms of remedy, von Doussa J showed relative innovation in developing the law to accommodate indigenous differences. The recognition of a 'cultural harm' speaks to the special status provided to the Aboriginal artists within the law but also the importance of judicial decisions in producing such a position. In addition, it highlights the capacity for liberal legal traditions to accommodate communal membership in certain instances. From a legal perspective, the damages represent an attempt to bridge a cultural gap, simultaneously reconciling and realising indigenous expectations about legal action and justice.

Infringement

In all but three of the carpet reproductions direct infringement, as defined through the *Copyright Act 1968* (Cth)[11], had taken place. Direct infringement involves a determination of substantial similarity between the two works; in this case comparing the artworks with the carpets. As explained by McKeough et al, "what amounts to a substantial part of a work must depend upon the nature of the work itself, and the characteristics or essential features which may *identify* the work."[12] However in three works, substantial reproduction was a difficult question to be judicially determined. Plates 1, 2 and 3 show examples of three of the eight paintings reproduced onto carpets where substantial infringement could not be made through a straight forward comparison. Plate 1 is 'Wititj' by Paddy Dhatangu; Plate 2 is 'Kangaroo and Shield People Dreaming' by Tim Payunka Tjapangati; and Plate 3 is 'Emu Dreaming' by Uta Uta Jangala. Plates 1.1, 2.1, 2.2 and 3.1 are the corresponding reproductions of these artworks onto carpet. These three examples presented more difficult questions with respect to identification and substantial reproduction and provide an apt example of how, faced with legal standards of identification, cultural factors are implicitly imbued within the judgment.

[11] Infringement of copyright may be direct as described in ss.13(2), 36(1), 101(1) *Copyright Act 1968* (Cth) or indirect as described in ss.37, 38, 39(1), 102, 103.
[12] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Material* (third edition) The Lawbook Company: Sydney, 2002, at 169 [emphasis mine].

Plate 1

Witij by Paddy Dhathangu

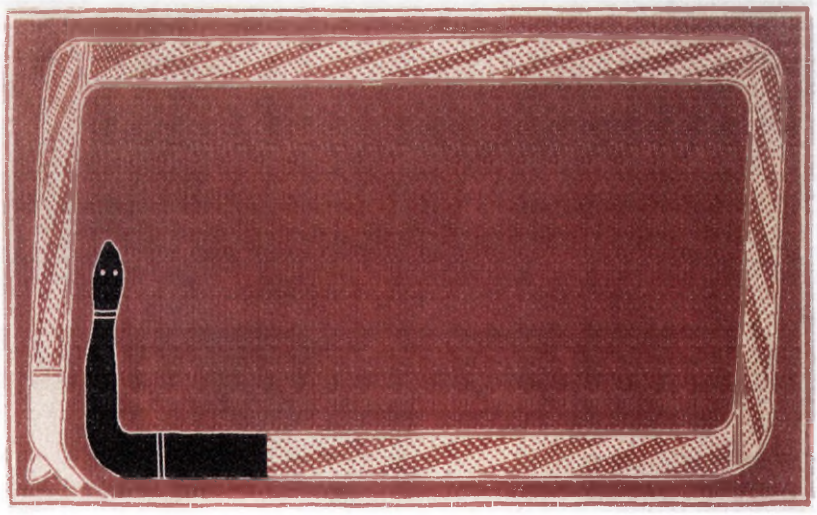


Plate 1.1

Snake Carpet

Plate 2

Kangaroo and Shield People Dreaming by Tim Payunka Tjapangati

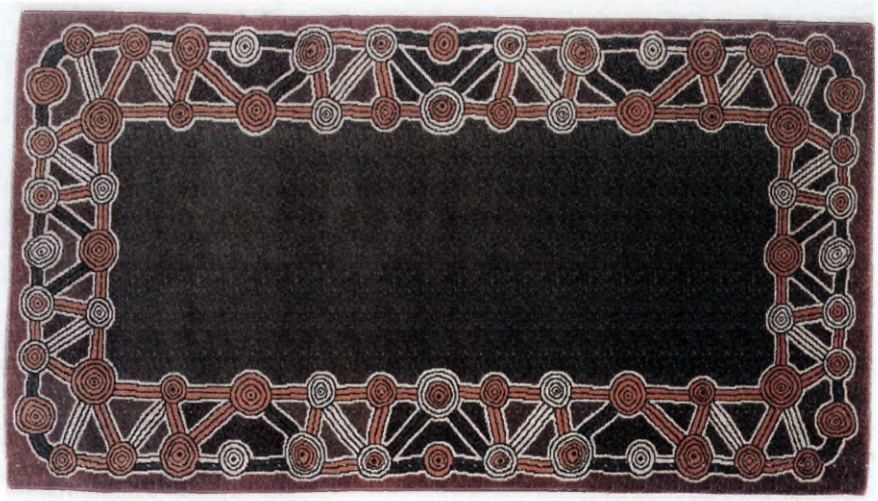


Plate 2.2

Green centre carpet

Plate 3

Emu Dreaming by Uta Uta Tjangala

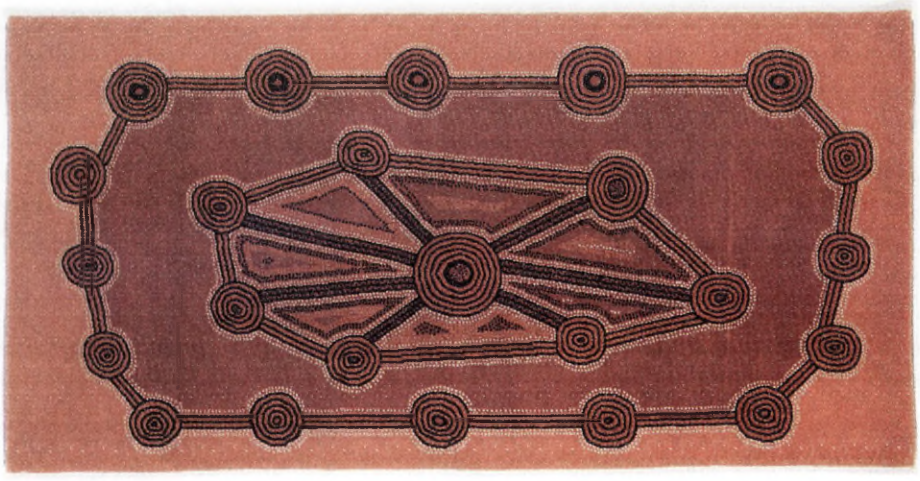


Plate 3.3

Waterholes carpet

To what extent an infringement constitutes a substantial reproduction relies upon a distinction between the taking of the concept and the copying of the form of the expression, as ideas themselves are not protected by copyright.[13] Thus determining the issue of substantiality has both qualitative and quantitative elements where both the quality and quantity of the reproduction inform decisions regarding substantial infringement. However, as Ricketson notes, the decisions are often made with "an emphasis on the qualitative, rather than quantitative considerations."[14] This is because greater weight is given to determining the copying of the concept itself rather than how much has been copied. Looking firstly at Wititj (Plate 1) and the Snake carpet (Plate 1.1) there are discernable differences between the two works, namely Wititj involves four coils of one large python enclosing two smaller pythons, whereas the carpet consists of one large python as a border feature. These differences led the defendants, Indofurn Pty Ltd, to argue that the carpet was "an adaptation".[15]

Von Doussa J rejected these claims. In interpreting the issue of substantiality he cited from *International Writing Institute Inc. v Rimila Pty Ltd* (1993):

> Reproduction in a material form of a substantial part of a work in which copyright exists is determined by applying the test of substantial use of the features of the applicants work in which copyright exists ... Though it is permissible to look at the quantity of what the respondent is alleged to have taken from the applicant's work, the test of substantial reproduction is essentially to look to the quality of what has been taken, although depending on the facts of the case, the two will often overlap.[16]

For von Doussa's J purpose, the application of the precedent informs the process of determining the principles to consider in deciding whether there has been any copying, and secondly whether the copying has been substantial. With Wititj and the Snake carpet he found it clear that copying occurred in the following elements: the shape and construction of the python; the similar position in the placement of the larger python on the carpet; the white border line; and, the detail within the body of the python (a style named as rarrk by both the artists and expert witnesses).[17] However, as is evident from comparing the artwork to the carpet, the copying is not necessarily substantial.

---

[13] Ibid. , at 168.
[14] S. Ricketson, *Intellectual Property: Cases, Materials and Commentary* Butterworths: Australia 1994, at 185.
[15] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 227.
[16] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 227-228.

In considering the question of substantiality, von Doussa J applied a qualitative judgment, deciding that "there are striking visual similarities on a comparison of the artwork and the carpet."[18] In this decision the quality of the copying rather than the quantity taken provided the means of identification, affirming that "quality is more important than quantity".[19] His Honour identified the depiction of the tail with rarrk as "original and distinctive" thereby rejecting the respondent's argument "that the particular depiction of the Wititj on the carpet is common to many Aboriginal artworks and involves no originality."[20]

The judgment of substantiality rests on an analysis of the plaintiff's work alone rather than looking at the defendant's to see what had been added to make it distinct from the original. In Chapter Three I explained how in the Nineteenth Century, the law shifted its form, so that determining substantial copying effectively became a means to identify the originality of the applicant's work. Originality in turn helps determine and identify to some extent, the process of individuating an idea and expressing it in a work. Thus by only looking at the applicant's work, sensitive questions regarding the status of Aboriginal art as 'original' are curiously resolved.

Similar issues to those above were involved in determining whether the Green centre carpet (Plate 2.2) was a substantial reproduction of 'Kangaroo and Shield People Dreaming' (Plate 2). Again there are striking differences between the artwork and the carpet, the carpet being a significantly simpler interpretation of the artwork. However, in terms of quality being the most important factor of identification, this simplicity is irrelevant. Initially von Doussa identifies the prominent shade of green both in the artwork and central to the carpet. He then sets about determining the extent to which the border feature of the carpet has been extracted from part of the original artwork and thus not "simply a repetition of an elementary or common design pattern."[21] Importantly His Honour notes that the copy comprises only 5-10% of the artwork, which has been repeated and modified. The judgment then incorporates the 'expert' evidence

---

[17] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 226.
[18] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 226.
[19] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 228 citing *Ravenscroft v Herbert and New English Library* (1998) RPC 193 at 203.
[20] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 226.
[21] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 230.

of Vivien Johnson who verified the uniqueness of the pattern; that it was not used by any other Aboriginal artist and that the design "adopts *common western desert symbols* as part of the design but that does not prevent the result having a *high degree of originality.*"[22] Johnson's evidence assists von Doussa's J decision that the carpet significantly copies the artwork, for the carpet replicates the work's most "striking feature."[23] In this regard, while the quantity reproduced may have only amounted to a proportion of 5-10% of the original work, nevertheless on a judgment of the quality of the copying, substantial reproduction was determined. Therefore copyright infringement (and originality) were affirmed.

In the case of Emu Dreaming (Plate 3) and the Waterholes carpet, the above principles were also applied. When considered concurrently, the Waterholes carpet is again a simpler modification of the artwork, yet reproducing the most significant feature of the original work. Thus von Doussa J also held that the "waterholes carpet is a copy of a significant part of the original work."[24]

In arriving at his decision with respect to these three artworks and the infringing carpets, von Doussa's J judgment drew upon both an appreciation of Aboriginal art and the flexibility inherent in the application of legal principles concerning infringement. Yet under similar circumstances, a different judge could have found that there wasn't an infringement in the case of these three artworks. This is precisely because such a judgment requires judicial interpretation, both in applying findings of quality, and understanding the cultural content of the original artworks. This is the space where cultural and social influences are incorporated.

One element demonstrating the cultural considerations imbued within von Doussa's J determination is the extent to which his judgment refers to the actual content of the artwork: what it depicts in terms of 'tracks', 'dreamings' and 'sites'.

---

[22] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 230. I have emphasised Johnson's comments by way of remembering Tony Davies concerns raised in Chapter Four at page 153 about the way in which the law demands particular structures from its participants, and that 'expert' evidence functions to highlight legal modes of identification, for instance – originality. In addition, for readings on the importance of expertise in liberalism see: N. Rose, "Government, authority and expertise in advanced liberalism" (1993) 22(3) *Economy and Society* 283; P. O'Malley, "Uncertain subjects: risks, liberalism and contract" (2000) 29(4) *Economy and Society* 460.
[23] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 230.
[24] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 231.

> The original artwork is a very complex painting which incorporates numerous important sites, represented by concentric circles, joined by dreaming or journey tracks in a multi-coloured dot-painting style, characteristic of some of the leading artists of the Pintupi tribe in the 1970s and 1980s. The detailed pattern represents, as it were, a topographical map, recording many important sites and events that impacted upon the life of the artist.[25]

Arguably von Doussa takes the disruption of these stories, owing to their significance to the artists and the artists' communities, as one of the significant elements in determining the quality of the copy. Thus cultural factors, seemingly sensitive to an indigenous reading of the works, are fundamental to determining the infringement.

The cultural sensitivity of the Judge was commented on by Colin Golvan, who suggested that his analysis was influenced by his "cultural appreciation ... of the artworks being reproduced."[26] Golvan explains that where the Judge utilised legal reasoning, to some extent he also "took some trouble to understand the content aspects and appreciate that what might appear to be simple artistry was more complicated. For example the parts that were copied included the idea of cross hatching which was part of the totemic imagery, and he wanted to deal with that."[27] As Golvan explains,

> I think that the most interesting work that he had to deal with was Kangaroo and Shield Dreaming by Tim Payunka and the problem he had in looking at the version that only had a border feature. It turned out that what appealed to him in respect to that kind of infringement was the lines and the circles rather followed the same order to that of the artwork and that was actually identified by Vivien Johnson who gave evidence.[28]

The cultural considerations imbued in the judicial reasoning reveals an instance of how the law treats cultural difference. While moderated through the legal categories, judicial discretion allows for cultural difference to be accepted and incorporated into categories of identification. Even though liberal law seeks to avoid 'cultural judgments',[29] with this case it must strategically engage with these. Thus 'culture' functions as an important means of understanding the infringement and also legitimising the subject matter. Embedding cultural considerations

---

[25] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) at 30 IPR 209 at 229. See also at 230-131 for a similar reading of the Waterholes carpet.
[26] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.
[27] Ibid.
[28] Ibid.
[29] See Chapter Two at page 50.

within the law also neutralises the implications. By this I mean that indigenous knowledge can be effectively targeted for techniques of management as it fits within the legal schema. Importantly the effort on behalf of von Doussa J to appreciate indigenous cultural difference is indicative of the judgment as a whole. This is further highlighted in the way in which von Doussa J developed the type and form of remedy to be awarded from the finding of substantial infringement.

Remedy

With the finding of the original quality of the Aboriginal artworks and copyright infringement of these elements, it then became necessary to determine the damages to be awarded. It is at this point that cultural considerations are perhaps most explicitly engaged even though it is contained within a framework of legal delivery such as 'remedy'. Significantly, damages were awarded communally to the artists, rather than on a *pro rata* basis to the number of carpets made. In reflecting his concern with cultural differences and demonstrating a willingness to imagine ways of incorporating these within intellectual property law, von Doussa J had informed himself about the previous cases involving Aboriginal art. His Honour was aware that following the previous case in 1989 *Bulun Bulun v Nejlam Pty Ltd* counsel for the applicants, Colin Golvan and Martin Hardie had held a meeting with the artists involved in the case in order to determine how they wanted the compensation monies to be divided.[30] The artists decided that such a division was to be done communally where no one artist or family received more than any other.[31] Citing the information provided by counsel for the applicants, von Doussa explains his decision.

> On express instructions from the applicants, counsel has informed the Court that Aboriginal law and custom would treat each of the applicants in a case like the present one equally so that the fruits of the action would be shared equally among the named parties ... Counsel for the applicants acknowledged that to treat the invasion of each artist on the basis of equality would not be in accordance with the principles of assessment of damages for infringement under the Copyright Act. Whilst not suggesting that the Court should address the liabilities of each respondent otherwise than according to those principles, counsel invited the Court to express its judgment in

[30] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.
[31] Ibid.

> terms which defined the aggregate liability of each respondent to the applicants as a group, rather than individual judgments in favour of each applicant.[32]

This argument demonstrates the way in which potential incommensurabilty was avoided thus maintaining the consistency of the law and also the direction of governmental involvement. Awarding communal damages recognised this as a form of remedy in the law for the first time. To this end, specific cultural differences distinguished through the awarding of damages communally function to codify these particular differences within the law. The codification of difference sets it out in spheres that can be managed – the field becomes knowable and contained: the direction of the narrative consistent.

Colin Golvan succinctly observes that von Doussa J "was very concerned that the case was being put at a cultural level."[33] This 'cultural level' thus becomes a key characteristic of the case, and confirms the capacity of the law to adapt to changing social circumstance. The judicial officer is thus the mediator between techniques managing the inclusion and identification of 'new' subject matter, and also pointing the law in directions where it could adequately treat cultural differences without explicitly being seen to do so.

The way in which the judgment appreciates cultural differences and then incorporates these into the current law, is striking. Thus law treats difference through absorbing it into already existing processes of identification and classification. While recognising the cultural differences presented to him in this case, von Doussa J also strategically limits how they can be interpreted through the law: the Court interprets the *Copyright Act 1968* (Cth) "in a sensitive but basically orthodox manner."[34] As the mediator, von Doussa, J reconciles indigenous knowledge 'to' *not* 'with' the law. As a consequence the story of indigenous intellectual property becomes part of the broader intellectual property narrative, but only as a sub-set: it is one of many incidences that constitute the grand intellectual property law narrative. As I argued in Chapter Three, the 'specialness' of indigenous concerns are absorbed into the intellectual property framework, where the production of the category of indigenous knowledge speaks more to the agenda of

---

[32] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 239-240.

[33] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

accommodating new intangible subject matter than accepting and appreciating the cultural circumstances and dynamics that result in the misuse of indigenous knowledge. Indigenous difference is not seen as particularly insurmountable – and it certainly does not challenge the legitimacy of the categories that identify copyright subject matter. This observation helps an appreciation of the manifold ways in which efforts are directed at managing copyright subject matter. Nevertheless, the uncertain nature of copyright subject matter is revealed because it cannot be securely captured through established forms of identification.

In order to expand upon this point it is illustrative to consider the development of an additional form of damages based on the notion of 'cultural harm'. What the development of this point illustrates is that in establishing a new reasoning for remedies in relation to the copyright infringement of Aboriginal art the issue of 'culture' was directly engaged and the 'specialness' of the category addressed.

Instrumental in positioning 'culture' within the law's eye, counsel for the artists, Colin Golvan, ran the argument that the harm sustained to the artists from the infringement of their work on carpets was more profound than could possibly be understood and recognised in western law. This was because it extended beyond the individual to the community. As the artists' affidavits explained, the damage caused by the infringement also affected the community where it potentially and significantly displaced the continuity and significance of the role and function of the artist.[35] Upon reflection Golvan explained this argument in the following way:

> To describe ... the harm, was that it was harm to the integrity of the image and was kind of quasi religious, so they were worried that ceremonies that surrounded the making of the particular artworks would be impeded, and also that their custodial functions were not being honoured, so that they might be seen by others in the clan group as not being proper custodians; that they can't manage. There is competition over these things, as the custodial rights brought with them status and all those things were terribly important.[36]

---

[34] G. Bird, "Koori Cultural Heritage: Reclaiming the Past?" Bird, G., G. Martin and J. Neilsen (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996, at 119.

[35] See the affidavits of Banduk Marika and Tim Payunka Tjapangati incorporated into *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 215 and 230. Also see B. Marika's comments in C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.

[36] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

Von Doussa J was sympathetic to these diverging perceptions of harm and community. He developed his notion of 'cultural harm' because he considered that the other remedial avenues offered through the law were inadequate. This is particularly clear where he states:

> The applicants contend that the unauthorised use of the artwork was in effect the pirating of cultural heritage. That is so, but under copyright law damages can only be awarded insofar as the 'pirating' causes a loss to the copyright owner resulting from infringement of copyright. Nevertheless, in the *cultural environment of the artists* the infringement of those rights has, or is likely to have, far reaching effects on the copyright owner. Anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering.[37]

To this end, von Doussa established a new form of damages and in doing so established precedent for the law to consider the cultural specificity of the harm caused to the artists and by extension, their families and communities. In finding a place for community, liberal expectations of justice are realised. However the specificity of the context, that the case derives from particular and unique locales of Arnhem Land in the Northern Territory and Pintupi in Central Australia, is overshadowed by the reliance and emphasis on the 'cultural'. The cultural becomes a universal explanatory tool for difference, curiously thin in detail about the unique and specific circumstances of the case at hand. For von Doussa reflected that the extent of damage constituted by the infringement to the communities to which the artists belonged was implicitly related to 'cultural environment' and cultural differences. Justifying these specific damages he referred to s115(4) (b) of the *Copyright Act 1968* (Cth), where remedies are to have "regard to all there relevant matters." Thus von Doussa J states that "it is upon this consideration that the cultural issues which are so important to the artists and their communities, assume great importance."[38] In short cultural issues are positioned as 'relevant matters'. Here 'culture' is called on to be present, but not to challenge the legitimacy of the framework. It is an explanatory mechanism but not a destabilising element.

The precedent created by von Doussa J for the notion of 'cultural harm' is significant. That he justifies this not only through the specific section of the Copyright Act with regard to all 'relevant matters' but also through a comparison to personal injury is worth noting. Referring to the personal injury case, *Williams v Settle* (1960)[39] von Doussa J cites the trial judge who

---

[37] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 244 [emphasis mine].
[38] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 246.
[39] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 244-245.

observed in that particular case that the degree of injury was so flagrant that "[I]t was an intrusion into his life, deeper and graver than an intrusion into a man's property."[40] Through this reasoning von Doussa J is able to juxtapose damage of a cultural nature to the harm experienced through personal injury whilst also extending cultural harm beyond property damage. The purpose to juxtapose otherwise differing associations between an individual and a community, is to actually stress the similarity. Understanding the cultural dimensions of harm for Aboriginal artists through the lens of personal injury presents a case where the law is able to accommodate difference through its own forms of rationalisation. Such rationalisation is contingent on the already existing construct, in this case personal injury, so that law can develop the notion of cultural harm. The positioning of cultural harm is dependent on the constructions around which it circulates wherein cultural harm is produced as akin to personal injury therefore circulating in a field of considerable case law and juridical consideration. It becomes a codified standard of identification.

The case reveals the practical possibility of law living up to expectations about its capacity to be inclusive and to an extent sympathetic to the differences posed by indigenous knowledge. The flexibility in the judgment for cultural difference endorses these appreciations of law. Importantly, bringing indigenous subject matter to the law demonstrates the adaptability of the law: the law is inclusive, 'universal' and capable. Thus indigenous subject matter circulates within the broader narrative structure promoting the coherence and legitimacy of intellectual property law, whilst also highlighting the diversity and complexity of indigenous knowledge as copyright subject matter. Even remedies that recognise legal limitations are only valid when exercised within the law. They dually provide a way to recognise difference, but also to manage and contain it within a regulatory framework. The irony is that while recognising Aboriginal art as an original work imbued with cultural considerations, the law also recognises that the work is not just a commodity.

---

[40] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 245 citing *Williams v Settle* [1960] 1 WLR 1072 at 1082.

Beyond Aboriginal art as tangible good

Chapter Four explained that the recognition and inclusion of indigenous subject matter within intellectual property law is due to the value of Aboriginal art as a commodity. Importantly the judgment in the *carpets case* implicitly emphasises and relies upon the value of Aboriginal art within a western art space, to the extent that this also underpins the case. The historical emergence of Aboriginal art into a global art market has meant that copyright law has logically been utilised to protect the art from infringement, again reaffirming continuity in how to treat 'new' subject matter. The circulation of Aboriginal art within an economic realm of value has contributed significantly to the impetus to use intellectual property law to protect indigenous art forms. It is the similarity of form that at first instance allows for Aboriginal art to be considered copyright subject matter at all. In this way, "legal practice supports a culture of commodification."[41] This is also where the politics of law become more transparent, however this point will be developed in more depth in the following chapter.

For the two Aboriginal communities represented in the *carpets case,* their art is understood as integral to the transference and reaffirmation of specific indigenous knowledges, traditions and heritage.[42] This nexus between art, land, heritage and spirituality serves to contextualise the practice and creation of Aboriginal art. Again art sits inside and astride the economic discourse because of its spiritual qualities, and clearly more so when 'traditional'.[43] However as cultural context is irrelevant to copyright law and not a factor for consideration, the fundamental differential for considering the methods of creativity between Aboriginal art and copyright material is relegated to the margins of the law. Aboriginal art remains incorporated because it is viewed through the same prism of western art – it is understood through the copyright criteria

---

[41] K. Bowrey, "The outer limits of copyright law – where law meets philosophy and culture" supra n.5 at 97.
[42] See for instance Marika's comments in C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997. Also F. Myers, *Painting Culture: The Making of an Aboriginal High Art* Duke University Press: Durham and London, 2002; J. Isaacs, *Spirit Country: Contemporary Australian Aboriginal Art* Hardie Grant Books: Australia, 1999.
[43] That is untainted by 'commercial' exposure or interference. This way of reading 'traditional' art is a constant in K. Puri's work. In particular see "Is traditional or cultural knowledge a form of intellectual property?" (2000) *Oxford Electronic Journal of Intellectual Property Rights* at www.oiprcox.ac.uk/EJWP0100.pdf. As Puri states, "traditional means untouched, untainted and pure. Traditional is entwined with primitive people who lacked materialism and were unimpressed by commodities and conveniences European societies had to offer." Puri is one of the writers in this area who consistently evokes an impossible dichotomy between indigenous (primitive) people and the western individual. I addressed the difficulty of this position in Chapter One and Chapter Two.

of property, value, art, authenticity and the individual artist. The commonality of economic incentive overrides the 'specialness' of the category: the economic becomes the normalising element.

The legislation requires no consideration of artistic merit – Aboriginal art qualifies for protection whether or not it has artistic merit; protection, as for any other subject matter, is contingent on the definitions supplied through the *Copyright Act 1968* (Cth). An artistic work defined in s10(1) is;

> (a) a painting, sculpture, drawing engraving or photograph, *whether the work is of artistic quality or not*;
> (b) a building or model of a building, whether the building or model is of artistic quality or not; or
> (c) a work of artistic craftsmanship to which neither of the last two preceeding paragraphs applies; but does not include a circuit layout within the meaning of the *Circuit Layouts Act* 1989. [Emphasis mine]

Further, as McKeough et al point out, "works of artistic craftsmanship are treated as 'artistic' only if they have aesthetic appeal, whereas works encompassed within paragraphs (a) and (b) have only to exhibit the originality and substance generally required in order for copyright to exist."[44] Hence issues that I considered in depth in Chapter Three regarding markers that identify copyright subject matter, (the markers being originality and authorship), return to inform not only the inclusion of indigenous subject matter but also its production (and subsequent regulation) as a specific legal category. However, the greatest irony of the *carpets case* is that while all these elements are functioning, the judgment recognises through remedy, specifically 'cultural harm', that Aboriginal art is not just a tangible good. It is both cultural commodity and cultural product. The possibility for allowing a greater recognition of cultural difference and for the economic value of creating and using indigenous cultural products was precisely what that the following case *Bulun Bulun v R & T Textiles* explored.

[44] J. McKeough, K. Bowrey, and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.12 at 100.

Bulun Bulun v R & T Textiles Pty Ltd

While the *carpets case* (1994) confirmed the practical extent to which the law could respond to the infringement of Aboriginal art, *Bulun Bulun v R&T Textiles* (1998) sought to extend the way in which communal ownership was recognised within the law. At first instance proceedings where initiated by the artist Mr John Bulun Bulun, and also Mr George Milpurrurru, acting on behalf of his and Bulun Bulun's community, the Ganalbingu people. *Bulun Bulun v R&T Textiles* can be seen as a kind of test case, which was only possible through the expectations of legal response generated through the earlier *carpets case.*

In similar circumstances to the *carpets case,* the *Bulun Bulun v R&T Textiles* case arose after fabric printed in Indonesia was imported into Australia. The fabric infringed the copyright of John Bulun Bulun's work 'Magpie Geese and Water Lilies at the Waterhole'. This particular work of Bulun Bulun's had been sold to a public museum in the Northern Territory and also reproduced, with the artist's consent, in a significant book on Aboriginal art.[45] It was also the painting that was at the centre of the earlier 1989 case *Bulun Bulun v Nejlam Pty Ltd.*[46]

Initially the proceedings issued by Mr Bulun Bulun and Mr Milpurrurru were against R & T Textiles and its three directors. However soon after proceedings were issued the fabric company went into administration. An amended statement of claim was filed and the respondent company consented to final declarations and orders in relation to Bulun Bulun's claim. Copyright infringement was admitted before proceedings began with arrangements made between the parties for damages.[47]

With the approach of the date that had been set for the trial, it became apparent that no-one would be appearing on the respondent's behalf. Under such circumstances, the applicants brought the proceedings to the attention of Minister for Aboriginal and Torres Strait Islander Affairs.[48] Consequently the Federal Government was granted leave to intervene against the applicant's claims. In addition, the Attorney General for the Northern Territory was granted

---

[45] J. Isaacs, *Arts of the Dreaming: Australia's Living Heritage* Lansdowne Press: Sydney, 1994.
[46] *Bulun Bulun v Nejlam Pty Ltd*, (1989) Federal Court, unreported.
[47] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 516.

leave to make a submission, as *amicus curiae.*[49] Specifically this was with respect to the "power of the Court to make a determination as to the existence of native title rights."[50] The submission by the Attorney General was in response to the claim, advanced by counsel on behalf of Milpurrurru, that communal ownership of the painting arose by incidence of native title rights in the land that the painting represented. As is recorded in the judgment,

> The Minister and the Attorney General were concerned with the pleadings claimed that: 1) the intellectual property rights in the artistic work were an incidence of native title; 2) being an incidence of native title the intellectual property rights constituted an interest in land; and 3) the Ganalbingu people were entitled to a determination in these proceedings that they were the native title holders of the Ganalbingu country. The outline of submissions presented by the applicants at the start of the trial appeared to support this interpretation of their claim.[51]

In general terms the intervention by the Government meant that the case could proceed. As stated above, the Government was concerned specifically about the potential associations that could be drawn between intellectual property rights in the artistic works as arising out of native title. In this regard, the Government sought to limit such arguments, in itself indicating the unease felt owing to the possibly that, considering the leeway provided in the *carpets case* for cultural difference, such arguments could be accepted. Moreover this unease highlights a tension between, on the one hand, recognising the rights of indigenous people and the difficulty of the law acquiescing to such rights, while on the other, that the recognition of such rights potentially could destabilise the coherence and stability of both bodies of law (intellectual property law and native title). In this sense, with the coherence of the law threatened, there was a pressing obligation to limit and curtail such possibility. The central argument made by the Government relied upon s213 (1) of *Native Title Act 1993* (Cth) wherein states:

> If for the purpose of any matter or proceeding before the Federal Court, it is necessary to make a determination of native title, *that determination must be made in accordance with the procedures in this Act.* [Emphasis mine]

The argument here was that no determination of native title could be made outside the *Native Title Act 1993* (Cth). Locating the problem as one within the statute secured the closure of each

---

[48] J. McKeough, K. Bowrey, and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.12 at 132.
[49] *Amicus curae* means friend of the court and allows a party to make a submission on one point that is raised by the applicant. *Amicus curae* can only be granted by the presiding judge.
[50] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 522.

body of law, assisting to reify the object of focus and maintain the distinction between 'real' property and species of intangible property. Such a position was endorsed by von Doussa J where he stated that native title could only be determined through the *Native Title Act 1993* (Cth) alone, not the *Copyright Act 1968* (Cth). "This Court has no jurisdiction to make a determination in respect of the claimed native title rights."[52] This reaffirmed that the judiciary does not make changes in the law: judges merely apply the law rather than creating it.[53] Citing Brennan J in *Mabo* [No.2] von Doussa J continued his justification for excluding consideration of native title rights arising out of copyright in the artistic work, where;

> [i]n order to be successful, the applicants' foreshadowed argument that a right of ownership arises in artistic works and copyright attaching to them as an aspect of native title would appear to require that the Court accept that the inseparable nature of ownership in land and ownership in artistic works by Aboriginal people is recognised by the common law. The principle that ownership of land and ownership or [sic] artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as 'skeletal' and stand in the road of acceptance of the foreshadowed argument.[54]

Thus von Doussa J was able to uphold the governmental concerns through the justification of judicial interpretation that stressed the importance of separate categories of law and the impossibility of crossing these boundaries owing to a (mythical) division between law and politics. Governmental intervention sought to have the distinct legal boundary between intellectual property law and native title law upheld. This speaks to the relationship between the law and governmental rationality, whereby such arguments displace the context and are pared back to the basic principles of law; asserting legal power and control through perpetuating an effective narrative of the law where each body of law functions separately and independently. Through von Doussa's reasoning the law retreats to a position of coherence and stability rather than addressing the fuzziness in the margins, which is precisely where the indigenous claim was directed, where the law is not clear and definitive. Further debate around

---

[51] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 523. In their final form, the applicants' submissions did not seek to have the Court declare that the Ganalbingu people had native title in their land.
[52] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 523. For a critique of this approach see K. Howden, "Indigenous Traditional Knowledge and Native Title" (2001) 24(1) *UNSW Law Journal* 60; S. Gray, "Peeking into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art" (2000) 9(2) *Griffith Law Review* 227. For an interesting reversal of this argument, see the discussion of 'cultural knowledge' in the native title High Court decision *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002).
[53] See: M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law* supra n.1. Creating a new form of remedy (for example 'cultural' harm in the *carpets case*) was entirely different to a process of challenging and changing the statute.
[54] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.

this issue of margins and separate legal jurisdictions was limited as counsel for the applicants chose not to vigorously pursue this claim. Instead they attempted a different tactic, testing the limits of the law in another way.

As already stated, George Milpurrurru pursued his claim on behalf of himself and in his capacity as a representative of the Ganalbingu people. Through his affidavit, he claimed that as the traditional Aboriginal inhabitants of a specific part of Arnhem Land, the Ganalbingu people have an equitable ownership of copyright in Bulun Bulun's painting and that the artist owed a fiduciary duty to the Ganalbingu people in relation to the copyright.[55] In essence, what was argued was that the ownership of the imagery depicted by Bulun Bulun was not 'owned' in the western sense solely (or individually) by Bulun Bulun, but that it was held in trust for all the members of the Ganalbingu people. In such circumstances as an infringement arose, the Ganalbingu people could claim copyright in the work if the artist failed to act. The argument was one where the court was directed to how the copyright infringements affected interests beyond that of the copyright owner. This directly flowed from the acknowledgement in the *carpets case* that the community had a legitimate position in relation to the infringement of an artwork. The Court was asked to recognise the rights of the Ganalbingu people in the artwork – disrupting the notion of individual authorship and ownership – owing to the effects upon the community caused by the infringement.[56]

The case presented an opportunity for the presiding Judge to expand upon his previous judicial reasoning where the damage to the community was reflected through the notion of 'cultural harm'. Von Doussa J was encouraged to consider a more sustained recognition of communal rights as a category that helped identify indigenous rights in intellectual property. Thus in this case, the significant element for intellectual property law to absorb circled back to the issue of 'culture', in particular the cultural differences extant within the Ganalbingu community and the reproduction of cultural imagery and how this presented a 'special' case for law to absorb.

---

[55] These legal categories and legal language functioned as a strategic way of framing Milpurrurru's claims. In Chapter Four I considered the importance of legal language in imposing an identifiable logic and argument to the Court. It is unlikely that Milpurrurru spoke in such terms. As Colin Golvan readily accepts, "the process of drafting affidavits is tricky because it is a classic case of the reduction of knowledge." See C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A. Milpurrurru's claims were translated into legal categories of thought and speak to the law's own parameters of logic.

The shape that the case took determining the copyright infringement became a secondary element of the case: for this was already admitted and Bulun Bulun was no longer a party.[57] Instead the case focused on the way that copyright law conceived of an owner and importantly the different constructions of ownership that could arise from the different cultural positions held by indigenous people, represented by Milpurrurru and the Ganalbingu people. Thus the case essentially revolved around the issue of determining the extent to which cultural difference could be absorbed into the schema of copyright law by pushing the classification of 'joint-ownership' to incorporate 'community-ownership'.

Joint Ownership and Communal Ownership

As part of the case, and an effort to come to terms with the different notions of ownership proffered by the applicants, von Doussa J heard extensive evidence about the importance of Ganalbingu law and custom and included a site visit in the hearing.[58] These aspects suggest that von Doussa J was concerned to provide a space within the case and by association within the law, for the hearing and speaking of cultural differences. The potentially troubling legal questions regarding the admissibility of oral evidence were resolved early by von Doussa J through direction to precedent in other Australian cases, specifically native title, but also the Canadian case *Delgamuukw*.[59] His Honour decided that evidence of customary laws was a crucial element for determining damages and appreciating the manifold cultural effects of infringement. However customary laws could not disrupt the linearity of legal determinations, or the objects that constitute such judgments.

The Court was unable to entertain the possibility of communal title existing within the Copyright Act. Von Doussa J noted that,

---

[56] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 516.
[57] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 516.
[58] *Bulun Bulun & Others v R & T Textiles Pty Ltd.* (1998) 41 IPR 513 at 521.
[59] The Canadian case cited is *Delgamuukw v British Colombia* (1997) 153 DLR (4th) 193. The Australian cases cited include: *Mabo v Queensland* [No.2] (1992) 175 CLR 1; *Walker v New South Wales* (1994) 182 CLR 45; *Coe v Commonwealth* (1993) 118 ALR 193; *Wik Peoples v Queensland* (1996) 187 CLR 1. His Honour concludes that "Australian Courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law. Evidence of customary law may be used as a basis for the foundation of the rights

> Whilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so.[60]

Specifically he explained that while there may have been scope for continued recognition of indigenous intellectual property law from the time of European occupation of Australia in 1788 until at least the codification of copyright law in the *Copyright Act 1912* (Cth), copyright is now entirely a creature of statute.[61] In this sense then, "[t]he exclusive domain of the *Copyright Act 1968* (Cth) in Australia is expressed in section 8 ... namely that 'copyright does not subsist otherwise than virtue of this Act'."[62] At this point mainstream jurisprudential arguments about copyright law return to inform von Doussa's decision. By relying on the authority of the common law jurisprudence, the possibility of accepting an alternative appreciation of title was foreclosed. Kathy Bowrey has argued that the reference to copyright being a creature of statute "affirms the sovereignty of the Commonwealth Parliament and the authority of positive law over common law and customary law."[63] Bowrey continues by noting that,

> Our positivised copyright law is presented as rational and coherent, (potentially) culturally inclusive, open and impartial. In this sense copyright is not just a body of law dealing with the intellectual property rights of authors, artists and alike. Copyright is also constructed as symbolic of all liberal law.[64]

The possibility for minority rights to be addressed is foreclosed. The reluctance of the law to recognise the capacity to endorse minority rights highlights precisely what a major shift would be required and that quite possibly, the security and stability of the law would be undermined. This illustrates how the push for recognition of communal ownership not only destabilised traditional jurisprudence, but also the liberal traditions of governance.

Insofar as the current *Copyright Act 1968* (Cth) is concerned, s35(2) states that what subsists by virtue of that Act is that the *author* of an artistic work is the *owner* of the copyright – the two are imbricated in each other. It follows that a work of 'joint-authorship' is where a work has been produced by the collaboration of two or more authors where "the contribution of each author

---

recognised within the Australian legal system. Native title is a clear example." *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 517.

[60] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.

[61] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513, at 525, citing J. McKeough and A. Stewart, *Intellectual Property in Australia* Butterworths: Sydney, 1991 at [504].

[62] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.

[63] K. Bowrey, "The outer limits of copyright law – where law meets philosophy and culture" supra n.5 at 83.

is not separate from the contribution of the other author or the contributions of the other authors."[65] Citing the case *Kenrick & Co v Lawrence & Co*[66] where "a person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist"[67] von Doussa J explained that therefore the *Copyright Act 1968* (Cth) effectively precluded any notion of group ownership in a work unless it was within the meaning of joint-ownership as defined in the Act. Herein the Copyright Act, as an arm of government, regulates the inclusion of new meanings: the responsibility of judicial discretion and its effects are hidden behind the seamless regulation of the Act.

Hence, in two ways the difference and subsequent difficulty of applying intellectual property laws to indigenous knowledge is realised. For while it is generally assumed in intellectual property that the material form is the idea expressed and that the idea has come from a space or domain where ideas freely flow, within Yolngu and Ganalbingu community cultural practice, the realm where the idea has come from is strictly controlled by customary law. Bulun Bulun explains this complex relationship in his affidavit,

> Barnda not only created the place we call Djulibinuyamurr but it populated the country as well. Barnda gave the place its name, created the people who follow him and named those people. Barnda gave us our language and our law. Barnda gave to my ancestors the country and the ceremony and paintings associated with the country. My ancestors had a responsibility given to them by Barnda to perform the ceremony and to do the paintings that were granted to them. This is part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation...The continuity of our traditions and ways including our traditional Aboriginal ownership depends upon us respecting and honouring the things entrusted to us by Barnda.[68]

The art at the centre of the Bulun Bulun case is not just art, and therefore the same judicial principles have difficulty in application and transference. Primary assumptions are shown to be culturally contingent. For example in the context of Yolngu cultural practice, there can not be assumed to be an 'intellectual commons' where ideas are freely chosen and then expressed.[69]

---

[64] Ibid. , at 83.
[65] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.
[66] *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99.
[67] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.
[68] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 518.
[69] This is not only restricted to expressions of knowledge in art but also in music and dance. Matthew Rimmer has explored these inter-relations in the context of the Bangarra Dance Company and Manyarrun Clan. Bangarra Dance Company is based on the artistic collaboration of David and Stephen Page and the Manyarrun Clan. As he explains, "Bangarra Dance Theatre must be faithful to the particular experiences of Indigenous peoples, and yet at

Instead, and this highlights the different elements that are taken to be indigenous property in cultural expression, the intangible produced into tangible form comes from a space that is strictly patrolled and regulated according to community traditions and status.[70] For example only John Bulun Bulun could paint 'At the waterhole' even though the imagery existed for the whole community:

> [t]he creation of artworks such as 'At the waterhole' is part of my responsibility in fulfilling the obligations I have as a traditional Aboriginal owner of Djulibinyamurr. I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such works, as part of my traditional Aboriginal land obligation."[71]

The argument for communal ownership derived from the distinct cultural position held by the Ganalbingu people – that the community had group ownership in the work precisely because Bulun Bulun was permitted through customary law and obligation to reproduce the imagery to a material form. In dismissing these claims it is evident that the capacity of the law to include such significant differences must initially begin by destabilising the fundamental premise upon which intellectual property law functions – that intangible subject matter is freely available and only requires one's labour to make it into a thing of property. Thus the indigenous position put through the Bulun Bulun case is an untenable position for the law not least because, as has been illustrated in other areas,[72] it is quite disinterested in (re)addressing cultural bias. The mythologising process of the law is perpetuated through a refusal to acknowledge the culturally contingent nature of categories and premises. The law retreats to a position of uniformity.

Thus the difficulty and applicability of definitions from the Copyright Act regarding joint authorship under these conditions is exposed. It is the construction of Bulun Bulun as the 'author' in the copyright sense that gives rise to these problems. For if Bulun Bulun painted the work and is the 'executor' of the work, it is his contribution in the 'action' of painting that makes him the author. To be a contributor to the work, in any way besides an action of

---

the same time reach a universal audience. It seeks to avoid the twin traps of being trapped in the ghetto, and being totally absorbed into an international commodity culture. Bangarra Dance Theatre has a prodigious task in educating people about Indigenous heritage, about retaining the languages, the stories and the lands." M. Rimmer, *The Pirates' Bizarre* PhD Dissertation UNSW, 2001 unpublished at 296. See also: M. Rimmer, "Bangarra Dance Theatre: Copyright Law and Indigenous Culture" (2000) 9(2) *Griffith Law Review* 275.

[70] Importantly these are changeable.

[71] J. Bulun Bulun, affidavit evidence presented in the case and reprinted in the judgment, *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 518-520.

painting, precludes the possibility of ownership. The stringent controls and regulations in the Ganalbingu community intrinsically affect the action of the painting: painting is only possible through the direct sanction of the community. It is precisely this perspective of ownership that provides the difficulty in reconciling the form of ownership directed by the Copyright Act. However in the circumstances of the case, and recognising these considerable and insurmountable issues of difference, counsel attempted to weave another way around the obstacle presented by definitions of joint-ownership in the Copyright Act. The subsequent position presented was that the Ganalbingu community had an equitable interest arising out of Bulun Bulun's copyright. The challenge was phrased in the law's own language.

Equitable interest

To this end, the central concern in the case then moved to the claim for equitable interest in Bulun Bulun's copyright where equitable interest was argued to arise incidentally to the Ganalbingu people's traditional use and occupation of the land. Specifically the equitable claim pursued was that an artist comes under a fiduciary obligation to the community or its senior members when an artist reduces part of its ritual knowledge to a material form. As such the property that is created as soon as the ritual knowledge is expressed in material form is not solely the responsibility of the person who made it into that form, but rather the whole community. As von Doussa J explains, "That the claim was ultimately confined to one for recognition of an equitable interest in the legal copyright of Mr Bulun Bulun is an acknowledgement that no other possible avenue had emerged from the researches of counsel."[73] With the argument pushed to equity no rupture in the coherence of intellectual property's positivist narrative occurred: the centrality of notions of ownership and authorship remained intact and 'stable'.

In order to consider whether the Ganalbingu people had an equitable interest in Bulun Bulun's copyright, von Doussa J first considered whether an express trust could be found and secondly whether Bulun Bulun held the copyright as a fiduciary. Bulun Bulun's claim is positioned

---

[72] The most obvious example being the legal fiction of *terra nullius* that still underpins Australian law in regards to assertions of indigenous sovereignty.
[73] *Bulun Bulun & Others v R & T Textiles Pty Ltd.* (1998) 41 IPR 513 at 524.

centrally within legalese. An express trust is an express obligation in legal terms evidenced by an agreement in writing or by practice dealing with economic proceeds.[74] The existence of an express trust depends upon the intention of the creator and this functions in certain circumstances, for instance when the work is a commodity. An obligation is made in contractual or economic terms and linked to western notions of property. Consequently von Doussa J found that there was no express trust because "[n]otions of copyright ownership have not developed under Ganalbingu law."[75] This explicitly illustrates a position of incommensurability – the standard cannot be applied. In addition, von Doussa J points to the different ways in which the work could be used in an economic sense without community approval thus excluding the possibility of an express trust, for;

> [t]here is no usual or customary practice whereby artworks are held in trust for the Ganalbingu people. In the present case neither Mr Bulun Bulun's djungaye or Mr Milpurrurru suggest that the commercial sale of the artwork by Mr Bulun Bulun was contrary to customary law, or to the terms of the permission which was given to him to produce the artwork. In these circumstances that fact of the sale and the retention of the proceeds for his own use is inconsistent with their being an intention on the part of Mr Bulun Bulun to create an express trust. Further the fact that the artwork was sold commercially, and has been the subject of reproduction with the apparent permission of those who control its reproduction, in *Arts of the Dreaming: Australian Living Heritage* forecloses any possibility of arguing that the imagery in the artwork is of a secret or sacred nature that it could be inferred that the artist must have had the intention in accordance with customary law to hold the artwork or the benefit of the Ganalbingu people.[76]

Subsequently, His Honour considered the existence of a fiduciary relationship arising from the nature of the ownership of artistic works among Ganalbingu people.[77] In doing so he explained "the factors and relationships giving rise to a fiduciary relationship are nowhere exhaustively defined."[78] His Honour, citing Mason J in *Hospital Products*[79]and Toohey J in *Mabo*[80] set the parameters for how his interpretation of a fiduciary duty within the specifics of the case could be understood. Toohey J in *Mabo* notes;

---

[74] The existence of an express depends upon the intentions of the creator. *Registrar, Accident Compensation Tribunal v FCT* (1993) 178 CLR 145 at 166. See also: J. Gibson, "Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property" (2001) 6(1) *Australian Indigenous Law Reporter* 1.
[75] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 527.
[76] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 527.
[77] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 527-530.
[78] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 528.
[79] *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41.
[80] *Mabo v Queensland* [No.2] (1992) 175 CLR 1.

> Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position. [81]

Within such parameters, von Doussa J explains that the complexity of the relationship arises out of Bulun Bulun's use of a corpus of ritual knowledge. He states;

> The relationship between Mr Bulun Bulun as the author and legal title holder of the artistic work and the Ganalbingu people is unique. The 'transaction' between them out of which a fiduciary relationship is said to arise is the use with permission by Mr Bulun Bulun of ritual knowledge of the Ganalbingu people, and the embodiment of that knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu people.[82]

In this instance, it is clear that von Doussa J reflects upon the customary evidence provided where "customary evidence may be used as a foundation of rights, interests and obligations."[83] Therefore his Honour finds that a fiduciary relationship between Bulun Bulun and the Ganalbingu people existed whereby;

> the artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture and ritual knowledge. However this fiduciary relationship does not vest any equitable interest in the copyright in the Ganalbingu people. Rather their right, in the event of a breach of obligation by the fiduciary is a right in personam to bring action against the fiduciary to enforce the obligation.[84]

Directing further attention to precedent in relevant case law and an African decision concerning tribal property,[85] His Honour found other members of the group may be able to initiate proceedings to preserve the property where the head of the group fails to act.

Importantly, the turn to the legal conception of constructive trust maintains the coherence of intellectual property law as a whole. The concern for developing a solution is shifted away from intellectual property law to trust. Constructive trust is a body of law developed to have more fluidity so as to provide remedial relief in the interest of mitigating against the 'harsh'

---

[81] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 528 citing Toohey J in *Mabo v Queensland* [No.2] (1992) 175 CLR 1 at 200.
[82] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 530.
[83] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 529.
[84] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 530.
[85] The case concerning tribal property was from Ghana, *Kwan v Nyieni* (1959) 1 GLR 67, "where the Court of Appeal of Ghana held that members of the tribal group were entitled to initiate proceedings for the purpose of preserving family property in the event of the failure of the head of the tribal group to do so." *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 529.

outcomes of property transactions.[86] That other legal jurisdictions have used trust to reconcile indigenous people interests recognises a more general failing in formal law for the recognition of indigenous rights. Such problems stimulate law to take action and in this regard equity is a body of law that can provide some solace and in doing so save face, legally and politically, as law is seen as responsive rather than inactive. In this way law recognises the problem and produces the solutions. This is achieved through the governable space that directs attention and intervention making the challenge legally knowable and workable. Thus the solutions are articulated at the legal level, because the problem has already been composed as legal in scope. What remains unclear however is whether law created the problem through the categorising of issues itself. The governable space however allows for a displacement of the responsibility of the law in general instead positing a consideration for how the individual categories include and characterise indigenous issues. Paradoxically, everyone and no-one is to blame in law for the problem, and the solution of 'constructive trust' shifts the view to the productive action of the law to develop a solution – the effectivity of the law through the function and action of governmental programmes to garner solutions to complicated cultural issues is affirmed.

Consequently, von Doussa J found that an artist's fiduciary obligation existed and it had two features. Firstly there was an obligation not to exploit the work contrary to Ganalbingu law and custom. Secondly, where a third party infringes Ganalbingu law, the fiduciary must take action to restrain and remedy any infringement. As already stated, this does not grant the community any direct equitable interest in the copyright, rather the community's primary remedy is to force the fiduciary to act. However von Doussa J noted the following where he recognised that in some cases the artist may not be able to act;

> In other circumstances if ... an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remediation through the courts by the clan.[87]

Von Doussa J leaves open what such circumstances may include for the community to act.

---

[86] See: *Muschinki v Dodds* (1985) 160 CLR 583 at 614 (per Dean J). See also: M. Cope, *Constructive Trusts* The Law Book Company: Sydney, 1992; J. Dodds, "The New Constructive Trust: An Analysis of its Nature and Scope" (1988) 16 *Melbourne University Law Review* 482; P. O'Connor, "Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust" (1996) 30 *Melbourne University Law Review* 735; D. Wright, *The Remedial Constructive Trust* Butterworths: Chatswood, 1998.

[87] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 532.

Judicial discretion and legal boundaries

The Bulun Bulun case demonstrates the extent to which the power and authority to maintain the legal boundaries of copyright remain within the limits of judicial discretion. Thus the cultural specificity of copyright can be contained to the sphere where it speaks to itself rather than recognising the significance of indigenous claims in broader areas of law. Certainly von Doussa J was sensitive to the cultural differences to which he was exposed, but ultimately he only viewed these through the prism of copyright law. In doing so von Doussa J was active in maintaining consistency in the borders of copyright law. While he recognised cultural difference, for instance in the form of fiduciary duty of the copyright owner, he foreclosed the discussions that would have extended the recognition of the cultural specificity of copyright law. Instead he moved the discussion to other areas of law such as equity and constructive trust, effectively maintaining the coherence of intellectual property law, for its core categories remained unchallenged.[88]

That said, it is worth being mindful of the way in which through this case copyright does, to an extent, take on board the reality of Aboriginal art as greater than a commodity. This however only functions at the margins of the law. The fuzziness at the margins provides for the possibility of both accepting and dismissing elements of cultural difference, and this is determined both by degree and judicial discretion. For example, von Doussa recognises that the material expression of ritual knowledge and the responsibility of the community is beyond the jurisdiction of copyright.[89] Thus he understands the art as more than a commodity but limits how this can be understood in the law, primarily because the law minimises issues of cultural difference when these potentially expose the contingency of its own categories and processes of identification. This is similarly the case when von Doussa J observes that;

> customary Aboriginal laws relating to ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal people did not cease to observe their *sui generis* system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown. The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant

[88] It is worth noting that von Doussa J may have done this to protect his 'innovations', securing them from the probability of appeal – if not in this case, perhaps in a later one.
[89] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.

> Aboriginal community, either by recognition of those laws by the common law, or by their capacity to found equitable rights in rem.[90]

The possible existence and continued function of a system of indigenous collective ownership of artistic works remains an abstract problem to be considered through the common law. However, and it is here that such recognition is relegated to the margins of copyright law, the statute governing the Copyright Act precludes such possibility – "If the common law had not been amended in the meantime by statute an interesting question would arise as to whether Aboriginal customs and laws could be incorporated into the common law."[91] Thus the reality of Aboriginal responsibility in art is acknowledged but cannot be formally recognised through copyright. The creature that is 'statute' effectively consolidates and confirms the limits of the law and the legal values that identify intangible subject matter.

Conclusion

So it is in the margins that the law grapples with appreciating cultural differences. However these are brought into the judgment as 'background' rather than 'facts' of the case.[92] This provides a way of managing what is centrally within the purview of the law. In the same way that, "law and facts are not separate because what counts as a fact is made so by the law"[93] what is made background material is similarly relegated so by the law. However, categories that function to identify and classify indigenous subject matter maintain their function and the questions that remain are ones about the metaphysical dimensions of property.

At this stage it is worth further developing a consideration of how Aboriginal art circulates within a commodity discourse: for it is the historical emergence of Aboriginal art into western art spaces that has effectively produced Aboriginal art as a commodity replete with markers of value. Deriving an economic value enables Aboriginal art to be presented as a legitimate form to be protected through intellectual property law. The production of Aboriginal art as a commodity however, complicates the cultural context of the art and consequently means that the cultural differences are only engaged in any legitimate form at the margins of the law.

---

[90] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 524.
[91] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 525.
[92] See for instance my discussion in Chapter Three at page 137.

Moreover, concepts such as 'tradition' are emboldened as they help identify and locate the key feature of the intangible subject matter. Underlying the protection of Aboriginal art through copyright is its economic value, which has been culturally and historically produced. Appreciating the varying intersections that inform this position of Aboriginal art as a commodity enables both an understanding of bureaucratic unwillingness to engage fully with the extent of cultural differences in indigenous knowledge as intangible property and the anxiety for the law that this inevitably generates. It is to these further considerations that we will now turn.

[93] M. Davies, *Delimiting the law: Postmodernism and the Politics of the Law* supra n.1 at 45.

Chapter Six

Economic Value and the Making of Aboriginal High Art

Developing a means for calculating the value of the intangible property is a crucial feature that underpins the identification of categories for intellectual property protection. *Milpurrurru v Indofurn* (1994)[1] (hereafter the *carpets case*) and *Bulun Bulun v R&T Textiles* (1998)[2] provide illustration of the economic values implicit within the legal identification of Aboriginal art, justifying its admission within this body of law. In a significant way Aboriginal art is measured through the western lens of the market. Judicial reasoning relies upon and replicates this process of valuation. Interestingly it is the increased commodification of Aboriginal art, culminating in instances of infringement that highlights its economic value and significant circulation within the market. As Edwin Hettinger explains;

> the market value is a socially created phenomenon, depending on the activity (or non activity) of other producers, the monetary demand of producers and the kinds of property rights, contracts and markets the state has established and enforced. The market value of some fruits of labour will differ greatly with variations in these social factors.[3]

Thus, even when the law depends on the economic as a mode of valuing intangible subject matter, it is still culturally and socially produced. Clearly the market value of Aboriginal art has changed over time and it is this change that affected a shift in seeing Aboriginal art in a context of intellectual property protection.

---

[1] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209.
[2] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513.
[3] E. Hettinger "Justifying Intellectual Property" (1989) 18(1) *Philosophy and Public Affairs* 31 at 38.

This chapter is divided into two sections. The first will consider the position of Aboriginal art within a contemporary art space and the economic implications of this location. The two judgments, considered in the previous chapter, expose how an implicit economic valuation functions to help justify the incorporation of Aboriginal art into a copyright regime. This economic rationale provides a means for appreciating the way in which copyright law identifies and embraces 'new' forms of subject matter. It also forms a point by which strategies to contest inappropriate use of Aboriginal art in the market place are imagined. Remembering the utility of the economy in providing logic and influence to governmental rationale,[4] the first section of this chapter will illustrate the effects of commercial considerations, both in how indigenous subject matter is incorporated into the law as a cultural commodity, and also how alternative strategies for its protection are consequently developed, for instance through the Labels of Authenticity.

The second section will explore the politics of law revealed through the instances of case law. In particular it will consider how cultural difference is positioned, and how it is absorbed and treated within legal regimes. The terms of inclusion are rendered visible, even if they remains at the margins. Judicial decisions reveal gaps in the law that also constitute limits. However, the limits of the law are political in construct as they are dually informed and established by specific networks of power.[5] In this way the law does not function in isolation but produces and is produced by cultural values and perspectives.[6] Thus understanding copyright law requires an "interpretation of case law in view of many possible social and cultural influences and prejudices."[7]

Measuring economic value: the art market and the optic of tradition

As I noted in Chapter Three, an important development in the making of modern intellectual property law was in establishing distinct categories for intellectual property protection – for

---

[4] This was considered in Chapter Two at page 71.
[5] M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law* Pluto Press: Chicago, London 1996 at 57
[6] See this discussion in Chapter Two from page 50. See also: R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Durham and London, 1998.
[7] J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Material* (third edition) The Lawbook Company: Sydney, 2002 at 23.

example copyright for artistic expression – where closed and bounded definitions of these categories facilitated their abstraction. Additionally, instead of focusing on the subject matter in the form of the intangible property or the idea because of the difficulty this presented in justifying the right in the property, the law shifted its gaze to consider the object that the subject matter created, such as the book or the machine, in other words the tangible expression. If we consider indigenous knowledge as the intangible subject matter and Aboriginal art as the object produced through this subject matter, it is the object, the expression of indigenous knowledge in a material form of art, that is the key focus for copyright law.[8] This shifts the process of identification to characteristics of the tangible object, nevertheless determining the metaphysical dimensions of the property right still influence the composition of categories despite the fact that this remains an implicit component.

Central to the making of modern intellectual property law was the development of a means to measure the value of the tangible object produced by the intangible subject matter. This was due to the closure of the intangible property owing to the displacement of mental labour in the second half of the Nineteenth Century.[9] As Sherman and Bently explain such a closure brought a shift from the "doctrine of intellectual property law towards questions of political economy and policy."[10] The identification of the unique properties of mental labour affected both the categories of intellectual property law and how these categories were explained.[11] On one hand this meant that qualitative judgments about the boundary between categories was rendered ineffective, and for example, the law could no longer sustain an inherent identification process of what characterised a literary process and consequently what properly belonged as copyright and what didn't.[12] This difficulty, arising from the displacement of mental labour, also impacted on how the separate categories were explained. Intangible property remained a pivotal consideration in organising the categories as they retained

---

[8] There is no indigenous case law beyond art (artistic works) to date.
[9] B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999 at 194. Importantly, the displacement of mental labour and hence creativity was not an exclusion from intellectual property law. They both return to inform the identification of subject matter such as 'originality' discussed in Chapter Two, and novelty in the case of patents. In this way, creativity is repositioned within the law and exerts its influence in subtle forms.
[10] Ibid. , at 194.
[11] Ibid. , at 194-195
[12] Ibid. , at 194. Sherman and Bently illustrate this point with reference to patents.

distinction through their relative 'value'.[13] The point to emphasise is that there was a modification in how to measure this relative value, that is, through the "macro-economic value of property rather than, as had been the case previously, the quantity of the mental labour embodied in the property in question."[14] It was possible through this understanding to measure value based on the contribution that the intangible property offered to society, a quality increasingly measured through commercial considerations.

This change meant that what was to become important to modern intellectual property law was not the creativity (remembering its displacement) contained within the work, but rather the contribution the work made within society. This was judged through the language and logic of the economy. Thus value became a term associated and circulated within a quasi-natural realm called 'economic'.[15] To this end, the value of the object was rendered into a form that was calculable through the language and logic of the economy. Value was determined through economic frameworks wherein the relative value of the object is the contribution that it makes to the market. Following these thoughts then, the value of Aboriginal art becomes calculable through its position within the marketplace and consequently takes on a commodifiable form where its movement within the market can be readily traced.

The dependence upon the market for valuing and quantifying intellectual property protection is succinctly demonstrated through the way in which damages were awarded in the *carpets case*. In awarding damages, von Doussa J responded directly to the value of the infringement within the market. As His Honour states "[t]he design of the carpet is a major component in the value of the carpet ... There is no suggestion that the value of the carpets have gone down in value since they entered Australia."[16] Despite his other cultural concerns the mode he chose in determining damages was nevertheless directly related to the value of the work, and the infringement, within the market place. Economic value provided the clearest (and objective) way of determining the relative value of the artwork and infringing carpets. Von Doussa J decided that the conversion damages should be assessed "at an average sum of $190 per square

---

[13] Ibid. , at 195.
[14] Ibid. , at 195.
[15] See the earlier consideration of N. Rose and P. Miller on the emergence of the economy in Chapter Four at page 148.

metre across the board for all carpets."[17] These damages were expressly calculated through market value and provided the base from which the additional 'cultural' damages were assessed.

The emergence of Aboriginal art into the market is part of a process of social construction and production wherein the increase in the demand and popularity of indigenous cultural products is a direct effect. Significantly, as Aboriginal art emerged into a western art space two important things occurred. Firstly the value of Aboriginal art became calculable, that is, part of an engagement with the market. Secondly, the notion of an 'artist' or 'creator' identifiable in relation to a work was developed. These two factors influenced later arguments for Aboriginal art, as artistic work, to be eligible for copyright. Namely the market provided a necessary means of measuring the value of the work and within such a market, Aboriginal art could be classified according to categories of intellectual property law where there was an artistic work and an identifiable artist. As Shelley Wright explains however, this has been at the expense of an appreciation of indigenous subjectivity and experience – for the marketing of indigenous cultural products relies heavily upon imaginary constructions of Aboriginality.[18]

Aboriginal art has increasingly become marked as a *cultural* commodity. However the intangible subject matter of indigenous knowledge remains pivotal in the organisation of the tangible product, Aboriginal art, through categories of copyright. The influence of the intangible is dually exerted in the making of the 'cultural' commodity relying upon a resonance of tradition. Following from Wright, the economic production of Aboriginal art is dependent upon a complicated, abstract and romanticised relationship between indigenous people to their cultural products, where indigenous people are present, but experience, context and subjectivity are reimagined within the market providing complimentary markers of 'authentic' and 'traditional' Aboriginal culture. The economic potential of indigenous cultural products provides the means for regulation and increased ways of governing the production of these cultural products and their circulation within a market. However the irony is that with the

---

[16] *Milpurrurru & Others v Indofurn Pty Ltd.* [1994] 30 IPR 209 at 242.
[17] *Milpurrurru & Others v Indofurn Pty Ltd.* [1994] 30 IPR 209 at 242.
[18] S. Wright, "Intellectual Property and the 'Imaginary Aboriginal'" Bird, G., G. Martin and J. Neilsen (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996.

emergence of Aboriginal art within a market, there remained initially no clear or identifiable artist/author. This was peculiar to the Australian circumstance whereby economic value was generated before the other categories governing the legitimacy of the subject matter, could be developed and applied.

The emergence of an Aboriginal art market

The location of Aboriginal art within a marketplace has been a relatively recent inscription.[19] Prior to this transformation indigenous artistry was constructed by anthropological and ethnographic knowledges as 'objects' of culture, constituted as non-art captured through the term 'folklore'.[20] These historical markers however are still powerfully active and have been absorbed into a popular market indirectly influencing the current value of Aboriginal art.[21]

Colonisation in Australia, like in other areas of the Empire, engaged in the active collection of ethnographic and anthropologic 'data' that documented what was then perceived to be 'primitive' cultures and lifestyles thought to be on the wane. While much art was collected throughout this early colonial period it is notable that in 1910, anthropologist (and later Special Commissioner and Chief Protector of Aborigines) Baldwin Spencer began collecting Aboriginal bark paintings predominately from Arnhem Land.[22] Over the course of the next ten years, he had accumulated over two hundred paintings collected on behalf of the National

---

[19] Elizabeth Coleman has argued that 'Aboriginal art' is itself a western construction. By this she suggests that there may be variant ranges of ontological understandings of painting and art held by indigenous peoples in Australia – ranging from art produced for a market to art as part of traditional interpretative cultural practice. See E. Coleman, "Aboriginal Painting: Identity and Authenticity" (2001) 59(4) *The Journal of Aesthetics and Art Criticism* 385.

[20] See also the observation that "the new human sciences were as crucial in establishing colonial rule as force of arms and trade, rendering understandable, tractable and governable 'native' populations. Archaeology played its part, fitting 'native' peoples into the lower end of often fanciful evolutionary schema, which relegated them to the third division of conquered races." L. Smith and G. Campbell, "Governing Material Culture" Hindess, B., and M. Dean (eds), *Governing Australia: Studies in contemporary rationalities of government* Cambridge University Press: Australia 1998 at 173.

[21] Comments by Marcia Langton extend this observation: "In sharp contrast to the 'typical Australian' as the blue eyed surfie, popular images of Indigenous Australians tend to be negative, but also essentialised. These negative stereotypes are based on a belief that there are inelectable features of 'Aboriginality' based on the tradition of 'primitivism'. M. Langton, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* [prepared for the Council for Aboriginal Reconciliation] Australian Government Printing Service: Canberra, 1994 at 8.

[22] N. Thomas, *Possessions: Indigenous Art/ Colonial Culture* Thames and Hudson: London, 1999 at 114.

Museum of Victoria.[23] Spencer actively encouraged art and craft workers in Victoria to visit the museum and "copy some of the designs of the Australian aborigine [sic]."[24] In part this was to encourage the generation of a distinctive Australian art style that differentiated Australia from Britain.[25] By the 1930s, indigenous styles were apparent in graphic design, fabrics, murals, ceramics and rubber floors. In this period Aboriginal art accompanied by art that copied Aboriginal styles and forms began to appear in cultural spaces other than the museum.

The history of Aboriginal art illustrates that the process of copying Aboriginal styles and designs has been governmentally and socially endorsed for nearly a century. In 1941, an exhibition was prepared by the Museum of Victoria that sought to demonstrate the application that could be achieved by artists using inspiration from Aboriginal art. The exhibition *Aboriginal Art and its Applications* began with Aboriginal bark paintings and concluded with examples of the application of these styles including work by Margaret Preston and many ceramicists.[26] The art by Preston and others was referred to as 'new' Aboriginal art which was juxtaposed to 'old' Aboriginal art, that is, art done by Aboriginal people. There was a notable distinction between the 'new' author/artist and the communal Aboriginal group featuring little differentiation. As 'old' Aboriginal art was perceived to be timeless and ahistorical a construction of 'traditional' Aboriginal culture became embodied in Aboriginal art. Significantly this also became an important marker of its commercial value.

In the mid to late 1940's, Albert Namatjira from the Hermannsburg mission Central Australia gained recognition as a talented artist. Through his style of watercolour landscapes, Namatjira was individuated from his community.[27] To this end, Namatjira was positioned as an identifiable artist and significantly, an 'author' of his 'artistic' work.[28]

---

[23] Ibid. , at 115.
[24] Ibid. , at 116.
[25] This is Nicholas Thomas' general argument in *Possessions: Indigenous Art / Colonial Culture* supra n.22.
[26] Ibid. , at 121-123.
[27] The complex position that Albert Namatjira occupied within Australian society and his own community has been commented on elsewhere. See: J. Isaacs, *Spirit Country: Contemporary Australian Aboriginal Art* Hardie Grant Books: Australia, 1999 at 23.
[28] For an account of the recent retrospective of his work at the National Gallery, *Seeing the Centre: The art of Albert Namatjira (1902-1959)* curated by Alison French. Also see: M. Rimmer, "Albert Namatjira: copyright estates and traditional knowledge" (2003) 24 *Incite* 6; and a recent discussion of this problem by Brenda L. Croft, "Roundtable Discussion" AIATSIS Seminar Series, *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* 16 June 2002.

In the 1950s the State Gallery of New South Wales began to buy Aboriginal artwork, and in the 1960s Aboriginal art and design appeared on stamps and banknotes. Ironically, while Aboriginal art was beginning to become representative of 'Australianess', indigenous people were still not citizens of the country.[29] Nick Thomas' observations are pertinent as he observes that cultural colonisation perpetuates itself,

> not by the theft of motifs or art styles that are reproduced ... but through forging national narratives that situate indigenous people firmly in the past, or in a process of waning; while settlers are identified with what is new and flourishing and promising.[30]

Thus the use of Aboriginal motifs on stamps[31] and banknotes[32] points to an unstable disjuncture. Indigenous artwork is used to create and establish a unique cultural identity, which at the same time denies contemporary indigenous subjectivity precisely because the indigenous subject is constructed as 'traditional' or in the past, unidentifiable from the homogenized group or community.[33] As Marcia Langton explains:

> Although ideas about Aboriginal culture are constantly recirculated and renegotiated in Australian society, many non-indigenous Australians continue to hold to the trope of a 'Stone Age' Aboriginal culture frozen in time. Aboriginal society had been deemed throughout colonial and much of post-Federation Australia to be limited, inflexible,

---

[29] The 1967 Referendum established Aboriginal and Torres Strait Islander people as citizens of Australia. For an insightful account of this process see: B. Attwood and A. Markus, "Representation Matters: The 1967 Referendum and Citizenship" Peterson, N., and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* Cambridge University Press: Cambridge, 1998.

[30] N. Thomas, *Possessions: Indigenous Art / Colonial Culture* supra n.22 at 109.

[31] The Albert Namitjira commemorative stamps released June 2002 highlight this juxtaposition, for they simultaneously establish the a sense of cultural identity through motifs but minimise the position Indigenous subjectivity: in this case the disturbing reality of Albert Namitjira's 'acceptance' and rejection within Australian settler society.

[32] In 1966, with the introduction of decimal currency, the new one dollar note incorporated an Aboriginal theme in its design. The 'Aboriginal theme' was the work of the artist, David Malangi. The copyright case, *Yumbulul v Reserve Bank* (1991) 21 IPR 481 involved the unauthorised use of Yumbulul's 'Morning Star pole' on the bicentennial ten dollar note. See also: R. Sackville, "Legal Protection of Indigenous Culture in Australia" (2003) 11 *Cardozo J. Int'l & Comp. L.* 711.

[33] One of the artworks in the *carpets case*, George Milpurrurru's 'Goose Egg Hunt' was reproduced as stamps. "As part of the program for the 1993 International Year for the World's Indigenous People, Goose Egg Hunt was adopted as the design for the 85 cent Australian stamp issued on 4 February 1993. A large number of these stamps were put into circulation, perhaps as many as two to three million" *Milpurrurru & Ors v Indofurn Pty Ltd* 30 IPR 209 at 213. Also consider the following comments: "The present array of Australian coins produced by the Australian Mint displays an interesting collection of icons which can be read, amongst other possible readings, as the colonial positioning of Aboriginal and Torres Strait Islander peoples as 'primitives' and wildlife – a species of fauna along with the kangaroo and emu, the echidna, the lyrebird and the platypus. On all Australian coins, as would be expected, the 'head' sign depicts the Queen, while on the 'tail' side all the coins exhibit fauna. Except, that is, the two dollar coin, which carries a commemorative image of an Indigenous Australian male, which was intended to celebrate the bicentenary of Australia's 'settlement'." M. Langton, *Valuing Cultures* supra n.21 at 8.

> utilitarian, animist and above all, a primitive way of life inexorably doomed to extinction.[34]

The 1970s marked a period of distinct change in the desirability of Aboriginal artwork. This was paralleled by a change in governmental policy: from assimilation to self-determination. The change specifically saw an increased market for Aboriginal artwork by indigenous people as opposed to the style of Aboriginal artwork done by non-indigenous people.[35] With the interest generated out of the Papunya art movement, indigenous artists began to be associated with their own works and emerged as the faces behind the perpetually constructed 'timeless' genre of Aboriginal art.[36] What was also important about this period of Aboriginal art was that the economic value of Aboriginal artworks began to change.[37] As Tim Johnson notes in an interview regarding his interest in Aboriginal art in the seventies "...I started collecting them the following year. I used to buy as many as I could. They were cheap then – really cheap. For $50 or $100 you could get a really good small painting."[38]

In his book, *The Predicament of Culture: Twentieth Century Ethnography Literature and Art*, James Clifford makes pertinent observations about the way in which non-western objects have moved from the space of ethnographic specimens to that of major art creations. [39] Clifford's comments provide insight into the processes that have enabled indigenous artistry to be produced as culturally and economically valuable. Clifford aptly notes:

---

[34] M. Langton, "Introduction: culture wars" Grossman, M. (ed), *Blacklines: Contemporary Critical Writing by Indigenous Australians* Melbourne University Press: Melbourne, 2003 at 81.

[35] In particular, this art movement is contemporarily understood as beginning at Papunya, where in the 1960's the art teacher Geoffrey Bardon encouraged members of the Papunya community to depict their imagery and 'sand stories' on canvas using acrylic paints. The Papunya settlement was set up in 1959 and comprised of at least 6 different western desert communities that were governmentally 'moved' to the one location at Papunya. This was part of the broader assimilationist policy at the time. In 1972, the artists at Papunya formed a company, Papunya Tula Artists Pty Ltd. See: J. Isaacs, *Spirit Country: Contemporary Australian Aboriginal Art* Hardie Grant Books: Australia, 1999 at 24-25.

[36] Even though there was an initial outcry about the 'corruption' of 'traditional' Aboriginal ways by painting on boards or canvas – and even using non-traditional colours, Coleman reiterates Howard Morphy's observations that "Western desert art missed out on the stage of being primitive art altogether." E. Coleman, "Aboriginal Painting: Identity and Authenticity" supra n.19 at 387.

[37] In June 2002, the auction house Sotheby's held an auction of Aboriginal art where several of the artworks by the artists Kumuntjayi Tjapaltjarri and Rover Thomas sold for over $400,000.

[38] See: T. Johnson, "the hypnotist collector" *The Painted Dream: Contemporary Aboriginal Paintings from the Tim and Vivien Johnson collection* Auckland City Art Gallery: Auckland, New Zealand, 1990 at 21.

[39] J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* Harvard University Press: Cambridge, 1988.

> The 'beauty' of non-western art is a recent discovery. Before the twentieth century many of the same elements were collected and valued for different reasons. In the early modern period, their rarity and strangeness were prized ... the value of exotic objects was their ability to testify to the concrete reality of an earlier stage of human culture, a common past confirming Europe's triumphant present.[40]

Herein lies a central point crucial to understanding the transformation of indigenous objects from ethnographic specimens to works of artistic merit, facilitating their incorporation as objects of intellectual property protection. This is the shift in the value of such works: from anthropological and ethnographic specimens to an economic value as a commodity. Arguably however, the former is displaced only to return and exert influence in the market where the exotic representation of 'otherness' becomes integral to the economic value of such cultural products. In this light, it could be posited that one of the initial reasons for the increased value of 'traditional' Aboriginal art is that it embodies a perception of otherness, that is it conveys significant mythologised and romanticised features of Aboriginal culture to 'outsiders' through an indefinable *essence* of 'tradition'. Wally Caruana points to this factor stating,

> [t]he art of Aboriginal Australia is the *last great tradition* of art to be appreciated by the world at large. Despite being one of the longest traditions of art in the world, *dating back to at least fifty millennia, it remained relatively unknown* until the second half of the twentieth century.[41]

Aboriginal art is valued on one level for its representation of cultural difference. That is Aboriginal art is art in the western sense, but simultaneously more than art because it is, at least within the market, represented as inherently connected in its context to a religious and spiritual domain. The centrality that Aboriginal art has to Aboriginal life, land and spirituality contributes to how the 'beauty' of the art is produced for the western gaze. A complex interplay exists here, wherein the distinction between the 'aesthetic' value and the anthropological value of Aboriginal art actively contributes to the production of indigenous art in the market. Cultural institutions such as art galleries transformed indigenous 'objects' into artworks, displayed for their aesthetic qualities; by contrast, in museums the same indigenous objects were exhibited in their cultural contexts, maintaining the construction of 'exotic' or 'primitive' peoples. Notably in art galleries explicit cultural background and context is not

---

[40] Ibid. , at 227.

[41] W. Caruana, *Aboriginal Art* Thames and Hudson: Singapore, 1993 at 7 [emphasis mine]. This book by Caruana, is the most popular title in the Thames and Hudson catalogue and has been translated into six languages.

essential to aesthetic appreciation.[42] It would be a mistake however, to assume that this cultural context is irrelevant to such aesthetic appreciation. Rather it has an implicit function; for the value of Aboriginal art is in its powerful evocation of the religious or Dreaming, a sense of spirituality unknown and difficult to translate. While in museums such an association may have been achieved through the positioning with other 'artifacts' and ethnographic specimens, in art galleries however, the accompanying 'story' or narrative fulfills such a role by lending an 'authenticity' to the product.

All commodities have markers of value. These markers of value are explicitly linked to western economic markets and importantly to popular demand. Once something becomes popularised, its economic value increases which can be demonstrated through the price. Thus over the last twenty years, Aboriginal art has increased in value both nationally and internationally. Initially the value of Aboriginal art could be linked to romantic notions of 'primitive' art and also understanding that the art was representative of Aboriginal traditions existing for 'over a thousand years'. Subsequently the value of the art increased, partly due to production in colonial discourse of markers of Aboriginal art such as its representation of 'tradition'. In this way then Aboriginal art was perceived as authentic if it replicated notions of the 'traditional' artistry and community, and assumed a position that was predominately ahistorical, abstract and imaginary.

Importantly governmental intervention has been integral to facilitating the continuity of Aboriginal art conforming to that stereotype within the art market. Marcia Langton points out that there is a high degree of governmental funding and support for the involvement of indigenous Australians in the art market. This is because the Aboriginal art market is totally dependent upon Aboriginal and Torres Strait Islander producers. Quoting from the 1989 Aboriginal Arts and Crafts Industry Review Committee, that explains that,

> [t]he economic rationale for public funding of the industry is based on two assumptions. First, that Aboriginal art is a merit good; that is it is intrinsically valuable and meritous and its support is in the public interest; and second that market failure occurs in the Aboriginal [and Torres Strait Islander] arts and crafts industry. The

[42] Vivien Johnson notes, "Andrew Crocker who ran the painting company for two years at the beginning of the '80s...repeatedly advocated that 'the paintings should be allowed to exercise their own aesthetic appeal and that explanations of content should be kept to a minimum." *The Painted Dream: Contemporary Aboriginal Paintings from the Tim and Vivien Johnson collection* supra n.38at 16.

> second assumption is of particular significance. It is widely recognised that without public sector support, little Aboriginal art would reach the market.[43]

Once an object becomes a commodity however, it is standardised to the market. The object, in this case Aboriginal art, enters a realm of economics where it is abstracted from the cultural and physical associations of people and place. Ironically these physical associations sustain the abstraction. In this way, the marker of value reflecting the 'cultural significance' of the art or the cultural differences that it embodies, function to maintain it as a commodity but separated from the context and indeed the actual life of the creative artists themselves. To some extent this explains the striking absence of a speaking voice of the indigenous artists. The creators of the very objects deemed 'powerful' are located outside the discussion; subjectivity is put at the margins as the art is extracted from its social context. This is a perpetuation of what Thomas observed about early use of Aboriginal art where the "natives were called upon to be present on the walls through their artifacts, but required to be absent in their persons."[44]

The imaginary Aboriginal

The positioning of art in western society as highly valued cultural artifact is important to the historical emergence and appreciation of Aboriginal artwork as 'good' art.[45] It should be remembered that underlying such a transition for 'traditional' Aboriginal art is the trope of the 'primitive'.[46] Furthermore in the movement from ethnographic specimens to aesthetic form, the trope is reconstructed and repositioned so that the term continues to exert power in art spaces, primarily through an essence of tradition. As George Marcus and Fred Myers observe,

> the art world has largely gone on constructing the 'primitive' even in its postmodern dislocations. At least part of the appeal of Aboriginal acrylic paintings continue to rely on the sense of Aborigines as 'primitives'. [47]

---

[43] M. Langton, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* supra n.21t 15.
[44] N. Thomas, *Possessions: Indigenous Art/ Colonial Culture* supra n.22 at 210.
[45] See also: E. Michaels, "Bad Aboriginal Art" (1988) 28 *Art and Text* 59. Also the collection of Michael's work published posthumously *Bad Aboriginal Art: Tradition, Media and Technological Horizons* Allen and Unwin: Australia, 1994.
[46] As Juan Davila has argued, the copying (or appropriation) of Aboriginal themes by non-Aboriginal artists assumes a connection to the 'primitive'. "[Tim] Johnson paints in the manner of an Aborigine, but feels the need to master...the cultures outside the dominant model ... he relies on a rapport with an intuitive primitivism (naturalism?), an affinity with the 'savage' mind." J. Davila, "Aboriginality: A lugubrious Game?" (1987) 23(4) *Art and Text* 53.
[47] G. Marcus and F. Meyers, *The Traffic in Culture: Refiguring Art and Anthropology* University of California Press: Berkeley, 1995, at 20.

The trope of the 'primitive' denotes difference and otherness. Indeed it is the unique cultural differences presented as underpinning Aboriginal art that contributes to the value of indigenous artwork within the art world.[48] This is necessarily helped by the remote locations that many indigenous people occupy.[49] The production of indigenous people as occupying the spaces similar to those in anthropological texts supports an interpretation of indigenous people, as a generic group, that is timeless and ahistorical.[50] In short, Aboriginal art is produced in an economic market for non-indigenous consumers.[51]

The fetishisation of 'traditional' Aboriginal art within the art market has had consequences for urban Aboriginal artists. The 1990s were characterised by the struggle for the recognition of the work of urban artists beyond the paradigm of 'tradition'.[52] Influenced by postmodernism, artists like Tracey Moffatt and Gordon Bennett were concerned with questions of identity, hybridity and inter-cultural engagement.[53] As Bennett has explained:

> I didn't go to art college to graduate as an 'Aboriginal Artist'. I did want to explore my Aboriginality, however, and it is a subject of my work as much as colonialism and the narratives and language that frame it, and the language that has consistently framed me. Acutely aware of the frame, I graduated as a straight honours student ... to find myself positioned and contained by the language of 'primitivism' as an 'Urban Aboriginal Artist'.[54]

---

[48] One notable demonstration in the value of the 'otherness' of indigenous art in the western discourse on art, is found in the 1984, Museum of Modern Art in New York exhibition, *'Primitivism ' in 20th Century Art: Affinity of the Tribal and the Modern.* In one of the many critiques written about the exhibition, Marianna Torgovnick explains that the exhibition, "proved that primitive objects exerted great power in the imagination of modern artists and that their forms, themes, and media coincided in interesting ways or were inspirational to one of the great flowerings of the visual arts in Western civilisation. The exhibition's demonstration of how modernism absorbed the primitive was broad, dramatic and stirring." M. Torgovnick, *Gone Primitive: Savage Intellects Modern Lives* The University of Chicago Press: Chicago, 1990 at 120.

[49] "According to Djon Mundine, the 'spot the primitive' syndrome of some gallery owners and curators has led to their refusal to see classical indigenous art, such as bark paintings, sculpture and dot paintings, in a contemporary sense. Non classical, urban based contemporary art has not been accepted as true or authentic art." M. Langton *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* supra n.21 at 14. See also a discussion on the estimated number of 'traditionally orientated' artists living on outstations or other communities as read from the 1991 census: D. Ellison, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17(2) *UNSW Law Journal* 327.

[50] J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* supra n.39 at 202.

[51] S. Wright, "Intellectual Property and the 'Imaginary Aboriginal'" supra n.18 at 129.

[52] See for instance N. Thomas, "Hierarchies: From Traditional to Contemporary" *Possessions: Indigenous Art/Colonial Culture* supra n.22. See also: N. Thomas, "Cold Fusion" (1996) 98 (1) *American Anthropologist* 9.

[53] For instance see Tracey Moffatt's films *Night Cries – A Rural Tragedy* (1989) and *Nice Coloured Girls* (1987). See Gordon Bennett's work, *The Nine Ricochets (Fall Down Black Fella, Jump Up White Fella)* (1990) and *Myth of Western Man (White Man's Burden)* (1992).

[54] G. Bennett, "The Manifest Toe" McLean, I., and G. Bennett, *The Art of Gordon Bennett* Craftsman House: Australia, 1996 at 58.

The work also challenged colonial images and histories often functioning as clear postcolonial texts.[55] Urban artists brought into view the hierarchy that valued 'traditional' Aboriginal art, whilst also raising key questions about identity and the construction of Aboriginality.

It is these discussions prompted by urban Aboriginal artists that Shelley Wright draws upon to argue that discussions of Aboriginal art seldom engage in a discussion of the meaning of the term Aboriginal. Wright's point is that there is a significant disjuncture between the concept of an Aboriginal person constructed for "white Australian manufacture, and the reality of Indigenous peoples lives."[56] This disjuncture results in an 'imaginary Aboriginality' that bares little resemblance to indigenous subjectivity, but powerfully supplies the market with its key symbol of value – tradition. Wright's concern is that the construction of the 'imaginary Aboriginal' within Australia effects how Australian indigenous people then relate, interrelate and maintain a level of management over their cultural traditions.[57]

Wright identifies intellectual property law as the key legal mechanism in the production of a framework that creates and maintains a "society which sees culture as the object of commodification, alienation and sale."[58] This echoes the concerns of Martin Nakata raised in Chapter One in reference to the ways in which the increasing discussions of indigenous knowledge remake this subject as "a commodity, something of value, something that can be value added, something that can be exchanged, traded, appropriated, preserved, something that can be excavated and mined."[59] In this context Nakata suggests that the indigenous knowledge enterprise, of which Aboriginal art is part, has everything and nothing to do with indigenous people.[60] Thus Wright and Nakata share a general concern regarding the ways in which indigenous subjectivity, and indigenous knowledges are produced and effectively managed, for instance through legal regimes of intellectual property. Wright takes this one step further in

---

[55] See: K. Neville, "Art and Colonial Consciousness: Deconstructing the Colonial Imagination" (2000) 1(2) *Balayi: Culture, Law and Colonialism* 39; D. Palmer and D. Groves, "A Dialogue on Identity, Intersubjectivity and Ambivalence" (2000) 1(2) *Balayi: Culture, Law and Colonialism* 19.
[56] S. Wright, "Intellectual Property and the 'Imaginary Aboriginal'" supra n.18.
[57] Ibid. , at 133
[58] Ibid. , at 147.
[59] M. Nakata, "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" (2002) 28 *International Federation of Libraries Association Journal* 281 at 283.
[60] Ibid. , at 282. This concern was also echoed by the winner of the Twentieth National Aboriginal and Torres Strait Islander Art Award, Richard Bell. His artwork was entitled "Aboriginal art. It's a white thing."

suggesting that the way in which indigenous subjectivity is constructed directly effects the way in which indigenous people see themselves, and manage themselves, both in regards to their collective identity but also their individual identity.

Wright is directly interested in the way in which the law further facilitates the construction of the 'imaginary Aboriginal'. By minimising indigenous experience, the law, presented with legal questions regarding 'infringement' and 'copyright' is able to respond because the concern is located and identified as within the capacity of the law. The commonality of indigenous experience is positioned within a market place of relations, and as an effect of exploitative market forces. But following Wright's line of inquiry, if the 'Aboriginal' positioned before the law is imaginary to begin with why is there surprise that the law is unable to accommodate indigenous difference except as 'imaginary Aboriginals'? Under such circumstances, the confining and redefining of Aboriginal culture to fit within legal categories of identification is inevitable and predictable. What is remarkable, and this is exposed through the case law just considered, is that the law does seek to accommodate indigenous difference and it does this through looking at its points of inclusion. That this is tied to concepts of indigeneity that emphasises 'traditional' and 'authentic' culture where indigenous people reside in remote communities is a result of multiple factors, not least being the trouble that the Aboriginal artists in the copyright cases did reside in remote communities and emphasised the tradition embodied within the paintings in affidavits. The case law inevitably played right into the stereotypes that deny indigenous diversity. This reveals that the factors of influence at play here are more complicated than are first thought. For whilst it may appear that the law is the primary agent consolidating the 'traditional' and timelessness of indigenous art and cultural traditions, certain institutional initiatives, picked up and advocated by Aboriginal people as much as the white bureaucrats, have also contributed to the reification of 'original' and 'authentic' Aboriginal culture, that is at once real as it is false. The character of governance is exposed wherein law both conforms to standards of identification and breaks these. This illustrates the tension between agencies and the potential for action and change.

The Labels of Authenticity

Stephen Gray has written extensively about the pervasive emphasis on the 'authentic' elements of indigenous art and culture to the detriment of contemporary indigenous art practice.[61] However, there are a variety of models of authenticity that circulate contemporary debate.[62] As Gray explains, "Non-Aboriginal law's fixation upon 'traditionality' as the condition for determining which Aboriginal laws are capable of recognition is merely one symptom of a wider societal fixation upon the 'traditional or 'authentic' Aboriginal person."[63] Importantly authenticity circulates with reference to individual, community and culture. It is thus curious, that the Labels of Authenticity,[64] the key innovative idea to protect indigenous artistry within the market, and as an additional legal tool to copyright, were not exposed to sustained critique.[65] This speaks to two key factors. Firstly, the power of the law to maintain a normative standard and secondly, that indigenous people are also responsible advocates for notions of tradition and 'authenticity' as they too can be responsive to market demands. This is because indigenous people realistically have an interest in the market as it provides an economic base and means of livelihood.[66] Thus the levels of complexity engaged in producing an imaginary indigenous culture cannot be solely located at the foot of the coloniser. Colonial realities are ambiguous, and so too are the manifold ways in which indigenous identity is established, promoted and managed from indigenous communities to the state.[67]

---

[61] S. Gray, "Wheeling Dealing and Deconstruction: Aboriginal Art and the Land" (1993) 3(63) *Aboriginal Law Bulletin* 10; S. Gray, "Squatting in the Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14(2) *Law in Context* 29; S. Gray, "In Black and White or Beyond the Pale? The 'Authenticity' Debate and Protection for Aboriginal Culture" (2001) 15 *The Australian Feminist Law Journal* 104. See also S. Gray *The Artist is a Thief* Allen and Unwin: Sydney, 2001 a work of fiction that explores the issue of authenticity from that literary vantage point.

[62] For a different reading of authenticity see: E. Coleman, "Aboriginal painting: identity and authenticity" supra n.19.

[63] S. Gray, "Squatting in the Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" supra n.61 at 32.

[64] Established under the *Trade Marks Act 1995* (Cth).

[65] However, the governmental levels at which the Labels were advocated and the indigenous support for this action made critiques difficult.

[66] This complexity has been discussed in different contexts. See J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* Yale University Press: New Haven and London, 1998; and also A. Agrawal, "The Regulatory Community: Decontralization and the Environment in the Van Panchayats (Forest Councils) of Kumaon, India (2001) 21(3) *Mountain Research and Development* 208.

[67] For a recent and detailed consideration of this complexity see, E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* Duke University Press: Durham and London, 2002.

The Labels of Authenticity were suggested as a legislative response in regards to the growing level of copying of Aboriginal style motifs and designs and the notable increase in reproductions of Aboriginal art circulating in tourist shops and markets, popularly described as the x-ray koala trade.[68] As a differential to copyright, concerned with issues of production, the Labels of Authenticity were suggested as certification marks utilising trademark law. Trademark law is the marketing end of intellectual property law and consists of a sign or logo which is used to distinguish the commercial 'origin' of goods and services.

The Labels of Authenticity were specifically suggested as a labeling system "to promote and market the *origin* and *authorship* of indigenous cultural products."[69] As the Report *Our Culture: Our Future* explains,

> A proposal raised in the early 1980s was to develop a national Indigenous 'authenticity trademark'. The idea is that an authentication mark would be reproduced on labels attached to *authentically produced Indigenous arts and cultural products.* The labels would help consumers identify genuine Indigenous arts and cultural products. This would hopefully encourage retailers to stock the products which have the labels, which would in turn benefit Indigenous artists.[70]

Trademarks require registration and as such, the meanings of words used to certify the purpose of the marks needed clarification. In this case, the primary word requiring definitional certainty would be 'authentic': there needed to be a clear sense of what an 'authentic' cultural product was, and how it could be identified. This subsequently led to the National Indigenous Arts Advocacy Association (NIAAA) conducting research into how to define and identify such

---

[68] See: S. Gray, "Wheeling Dealing and Deconstruction: Aboriginal Art and the Land" supra n.61. Also see comments by B. Bancroft and T. Janke in the documentary by C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.

[69] M. Annas, "The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin" (1997) 3(90) *Aboriginal Law Bulletin* 4 at 6 [emphasis mine]. The plan was for two labels: one for indigenous artists and another for works produced collaboratively. See: L. Wiseman, "The Labels of Authenticity: An Overview" (2000) 1 *Media and Culture Review* 3.

[70] T. Janke, *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* [produced for Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission] Michael Frankel and Company Solicitors: Surry Hills, 1998 at 197 [emphasis mine].

products.[71] Research conducted by Wells suggested that for indigenous communities, 'authenticity' related to indigenous identity, belonging, knowledge, respect and responsibility.[72]

The key problems with the Labels of Authenticity that ultimately contributed to their demise as an idea and a practical tool, relate to three areas. Firstly, in defining authenticity, it was difficult to escape historically informing perceptions of 'Aboriginality'. The term 'authentic' resonated with a past construction of indigenous people that remained at odds with contemporary practice. This was most evident in the way that other artists, often urban, refused to be part of a national Aboriginal labeling system. Secondly, the Labels offered an overarching umbrella term that would refer to indigenous peoples' cultural products nation wide. As a consequence there was little room for an appreciation of indigenous community and cultural diversity within the Labels. There was a perception that the Labels further homogenised indigenous cultural identity into a position of sameness. As Brenda Croft, curator at the National Gallery of Australia explained:

> With the greatest respect for NIAAA's intentions, I feel that an aspect of the Label of Authenticity is reminiscent of the old 'Dog Tag' system ... As it currently stands, NIAAA's position on the Label is that the entire Indigenous visual arts/cultural industry requires a blanket approach.[73]

In addition to this concern articulated by Croft, certain indigenous communities already had their own identification marks, indicating the regional specificity of the cultural products. These communities, for instance those on both Melville and Bathurst Islands (the Tiwi Islands), and the Ngaantjatjara, Pitjantjatjara, Yankantjatjara Women's Cooperative, Central

---

[71] This research was undertaken by Kathryn Wells. See K. Wells, "Authenticity-Promotion and Protection of Aboriginal and Torres Strait Islander Art" Paper on Research and Development – preliminary advice to NIAAA, 15 June 1995; K. Wells, *Draft Discussion Paper on the Proposed Authenticity Trade Mark*, NIAAA, October 1996. Also see: K. Wells, "The cosmic irony of intellectual property and indigenous authenticity" (1996) 7(3) *Culture and Policy* 45.

[72] M. Annas, "The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin" supra n.69 at 5. Also see: T. Janke, *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* supra n.70 at 202.

[73] B. Croft, cited in D. Mellor and T. Janke, *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector* National Association for the Visual Arts: Sydney, 2001 at 46. The 'dog tag' system that Croft refers, functioned between 1943-1964 in NSW. Aboriginal people who were deemed to be 'deserving and superior' by the Aborigine Welfare Board were awarded exception certificates, otherwise known as 'dog tags' – which ostensibly afforded these select Aboriginal people similar citizenship rights to that of other Australians. Mark McKenna has described this as "yet another bureaucratic devise aimed at exerting control over the behavior of Aboriginal people and depriving those who failed to meet the Welfare Board's standards of their basic human rights. In the eyes of the government, Aboriginal people could only be accepted as equal citizens if

Australia already had their own unique style of labeling. There was a sense that the push for the Label came from Canberra, without involvement or input from the diverse northern Australian indigenous communities. The third problem was practical – who was to certify and distribute the Labels? In other words, would the administration of the Labels be left to the bureaucrats or the communities, and if it was the communities which ones would be given the responsibility?[74]

In an article explaining the purpose of the Labels, Leanne Wiseman identified in part, the implicit complexities that remained as serious hurdles to overcome;

> The attempt to define authenticity with respect to Indigenous goods and services raises a number of complex issues. One issue that arises is how the notion of authenticity will relate to 'traditional' Indigenous art. Here the concern is that there is a tendency to see Aboriginal art that employs traditional techniques, materials and imagery, such as well known dot paintings, as if it alone were authentically Aboriginal. To see Aboriginal art in these terms does many artists a disservice and also reinforces public misconceptions about Aboriginal art. For urban and non-traditional artists, the way authenticity is defined raises the problem that they may be stigmatized for not being 'real' or 'authentic' Aboriginal artists.[75]

Despite identifying these key concerns, Wiseman uses the article to advocate the utility of the Labels. At one level her approach is a pragmatic one that emphasises the need for 'something'. However, the complexities that she identifies fundamentally undermine the capacity for success and practical engagement through this form. Significantly, and perhaps most subtly, the Labels of Authenticity also effectively functioned to consolidate indigenous knowledge within the rubric of intellectual property. Codifying 'authentic' cultural products through processes of trademark classification and generating a system to manage the interface between indigenous cultural practice and the market is an effective way of making a complex subject more manageable.

---

they shed their culture." M. McKenna, *Looking for Blackfella's Point: An Australian History of Place* University of New South Wales Press: Sydney 2002 at 168.

[74] The implied self-governance of communities in relation to the administration of the Label raises the issue of biopolitics that was discussed in Chapter Two. For instance, if the onus was to be on indigenous communities to distribute and manage the Labels, who would be policing who within each community and between each community? This question reveals the disparate ways in which biopolitics functions.

[75] L. Wiseman, "The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity" (2001) 23(1) *European Intellectual Property Review* 14 at 20.

It could be argued that ultimately the complexity and fluidity of indigenous subjectivity was a key element that undermined the success of the Labels – as they are no longer in operation.[76] At one level, the Labels endorsed a particular and partial version of Aboriginality that complimented the market and the styles of Aboriginal art that dominated the market – for instance bark paintings from Arnhem Land and 'dot' style art from Central Australia. Urban Aboriginal artists had nothing to gain by using the Labels, as they predominately sat astride the 'traditionalised' and marketable constructions of Aboriginal art.[77] Questions were also raised about 'quality control': who was judging and overseeing the quality of the art (and the Aboriginality of the artists) being granted Labels. An additional bureaucratic problem, which signaled the demise of the Labels practically, was that the body designed to oversee the administration of the Labels, the National Indigenous Arts Advocacy Association (NIAAA), was stripped of funding by both the Department of Communication, Information Technology and the Arts and the Aboriginal and Torres Strait Islander Commission (ATSIC) because of questions relating to significant misappropriated funds.

However, the ultimate demise of the Labels is not seen as a failure of the law – it is more a cultural and funding problem. The Labels of Authenticity provide a further means for the law to be seen as capable and responsive. Indigenous difference, in this instance within and between communities and individuals, emerges as the feature characterising the failure of the Labels: an ironic twist given that effort to provide practical legal mechanisms rendered silent the diversity of indigenous interests and positions. Whilst the intention is to be applauded, the failure of the tactic should be also understood for what it is, and that these same problems could be an inhibition of the future attempt to find lateral solutions in law by using the fuzzy margins.

The failure of the Labels illustrates an instance in the function of programmes of governance.[78] The bureaucratic failure makes way for a new approach: one that is directly tied to the reason for the failure – the implicit cultural elements that could not be accounted for practically within

---

[76] See: D. Jopson, "Aboriginal seal of approval loses its seal of approval" *Sydney Morning Herald*, 14-15 June, 2002.
[77] Consider for instance the inter-textual work by photographer and filmmaker Tracey Moffat, and the postcolonial work by Gordon Bennett. Both artists also challenge notions of Aboriginality within their art.
[78] As discussed in Chapter Two.

the actual Labels. The current emphasis in Australia on 'cultural protocols' highlights the strategic shift in constructing responses to the category of indigenous intellectual property.[79] Again it places the onus on the actual 'users' of indigenous material but in a more pronounced way. These protocols directly signal how the issues remain concerned with treating cultural difference. It also conveniently explains the absence, due to failure, of legal bureaucracy. As the protocols are unenforceable, they instead aim to moderate individual behaviour (through repetitive use of terms like 'respect'). The emphasis is placed on the 'user' owing to the inability of the law to directly regulate individual use. But the protocols remain an attempt to remedy a symptom of the problem instead of the problem itself. They can only be effective if individuals choose to use them. The protocols still fail to address a key point: that those who do misuse Aboriginal art still will – there is no way of regulating the behaviour of 'users' who don't even register a problem to start with. Additionally there can be no presumption that an individual's ethical assumptions about 'how to act properly' will overshadow a potential economic gain.

The 'imaginary Aboriginal' is produced for western consumption, but it is both a product of indigenous and non-indigenous interests. Indigenous people also consume indigenous cultural products and are subject (to a greater or lesser degree) to the pressure of the mass cultural movements of our time. Trademarks, as an aspect of intellectual property law, consolidate the economic potential of Aboriginal art so that its momentum within the art market is sustained. Protocols maintain an engaged relationship with this economic component, but more explicitly than trademarks, emphasise the 'cultural' elements at play – and thus the need for self regulation when using indigenous products. But the legal recognition of Aboriginal art as 'more than a commodity' produces a form of commodity fetishism that helps further consolidate its economic value. The outcome returns us to where we began this discussion: that it is the economic value of Aboriginal cultural products that justifies the inclusion of indigenous

---

[79] See the emphasis on 'cultural protocols' in the Australia Council and the National Association for the Visual Arts (NAVA). See: D. Mellor and T. Janke, *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector* National Association for the Visual Arts: Sydney, 2001; T. Janke, *Writing cultures: protocols for producing Indigenous literature* The Australia Council: Sydney 2002; T. Janke, *New Media Cultures: protocols for producing Indigenous Australian new media* The Australia Council: Sydney 2002; T. Janke, *Visual Cultures: protocols for producing Indigenous Australian visual arts and crafts* The Australia Council: Sydney 2002. See also: Copyright Agency Limited Media Release, "CAL Board endorses Indigenous intellectual property protocols" 29 April 2003.

subject matter within intellectual property law. It is at this point that we turn our gaze to the politics of law – how these elements function within the aforementioned case law, and to what extent they represent a governing strategy that normalises and regulates the inclusion of indigenous intangible subject matter within the primary domain charged with managing and privatising knowledge.

The Politics of Law

In the last chapter I argued that the importance of undertaking a reading of case law is that it provides an instance of legal action where it becomes possible to recognise certain limits and expectations. This is because legal decisions are formative to the law itself. Considering the identification and inclusion of Aboriginal art as copyright subject matter through the judicial interpretation provided by Justice von Doussa, the cases can be seen as representative of assumptions made in copyright law.

Both the *carpets case* and *Bulun Bulun v R & T Textiles* are important cases in the landscape of copyright law as they spur debate about the terms of inclusion – for instance how authorship and ownership of indigenous works were to be identified. The judicial interpretation offered illustrates the cultural life of copyright law, and how values of liberal jurisprudence and legal positivism exert pressure that ranges from identifying intangible subject matter to securing the closure of copyright law wherein limitations of inclusion are explained in reference to the legislation rather than matters of judicial interpretation. The point is that politics, philosophy and cultural values underpin case law, and these factors duly exert influence in how subject matter is incorporated and the extent to which cultural difference is treated. Legal instrumentality plays down the 'specialness' of indigenous difference, and the law is able to maintain management over the identification of markers that constitute a property right in Aboriginal art in keeping with the principles and categories of copyright law.

As I illustrated earlier, Justice von Doussa was aware of the cultural dimensions presented in each case. To some extent, von Doussa J was positioned as a direct interpreter of indigenous

culture.[80] The *carpets case* required an appreciation of difference within the law in terms of including Aboriginal art as a product that satisfied the categories and markers of property and exclusive possession. In *Bulun Bulun* the cultural specificity of the law was directly in question. This was in terms of authorship and ownership, where both the traditional western concept of authorship and the philosophical valuation of the 'indigenous' relied upon possessive individualism. Importantly as an interpreter of indigenous culture, von Doussa's J position necessarily became one of translator. Von Doussa's commitment to upholding the integrity of copyright law meant that indigenous cultural values were interpreted within the paradigm of copyright law. In this way, as Bowrey explains, the "*Bulun Bulun* decision can be confidently claimed as representative of copyright law in general. It is not just a 'special' case where the law has to manage the consequences of the invasion."[81]

In hearing extensive evidence from Bulun Bulun regarding the creation of the artwork, and incorporating his affidavit within the body of the judgment, the unstable nature of the intangible subject matter that intellectual property law is set to mediate, is perhaps most explicitly revealed. In this sense, the artwork 'Magpie Geese at the Waterhole' is not just the product of an expression of ritual knowledge, it is ritual knowledge, and therefore Bulun Bulun cannot only be seen as the individual author or creator of the work. Von Doussa J however, perhaps makes a tenuous parallel between Bulun Bulun as the custodian of the work (in the context of trust law), and Bulun Bulun as the executor and 'owner' of the work (as per copyright law). This is a clear instance of the role of the judge in translating indigenous conceptions into the legal framework and policing those legal boundaries. In doing so difference is subsumed within the broader intellectual property narrative, but the real point of the translation displaces the unstable nature of the intangible subject matter.

The two key ways in which the volatility of the subject matter is displaced is in the construction of identifiable artists, and emphasising the value of Aboriginal art as a cultural product. In both instances judicial interpretation is integral in establishing and normalising authorship and also endorsing the culture of commodification. Both elements draw attention

---

[80] K. Bowrey, "The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture" (2001) 12 *Law and Critique* 75 at 79.
[81] Ibid. , at 79.

away from the intangible subject matter, and more to the familiar features of engagement as 'art' in tangible form. Arguably it is the cultural differences in knowledge management and ownership unique to the Ganalbingu people that really threatens to reveal the erratic nature of copyright subject matter as a whole. The law retreats to a position where judicial interpretation consolidates and confirms the legitimacy of property rights in intangible subject matter, and normalises such modes of identification and classification. Copyright law naturalises various forms of social discrimination through endorsing a culture of commodification. How the law treats difference is on its own terms. Presented with complications in identifying intangible subject matter, for instance in the disruption of the category of authorship, the law is pressed to determine the essence of the metaphysical property. In the case of Aboriginal art, this is achieved through the paradigm/prism of 'tradition'.

Treating cultural difference

Extensive evidence reflecting the importance of Aboriginal art to indigenous people is incorporated into both judgments. The judicial interpretation offered in the *carpets case* shifts between recognising the value of the art in a western sense, through the western art spaces it occupies, to the statements by the artists about the importance not only of the art at the centre of the case, but more broadly the importance of the art as a 'traditional' form of expression tied to the identity and existence of the particular Aboriginal community. Yet, concerns for the commodity form that the art takes are centrally engaged whereas accounting for the cultural difference in expression and even knowledge circulation are temporal issues engaged at the margins. The space provided for translating cultural differences facilitates a means for authorising that knowledge through the legal discourse. This is due, in part, to the way in which the artist's claims have initially been framed, both in affidavits and expert evidence, which support the methods of classification utilised within the law.

Arguably however, judicial decisions function both as a strategy for governing difference, and providing a portal – a means for opening space for appreciating difference. By this I mean that whilst law, presented with difference, minimises these through applying certain frameworks of classification, nevertheless the account of difference remains. To the extent that Bulun Bulun's statement regarding the association with his community, land and responsibility is incorporated

into the judgment, it remains a record of a different way of viewing Aboriginal art, community and management of knowledge. Although attempts at making Bulun Bulun's account knowable and functional within a legal sense, it maintains and conveys a differing cultural heritage and intellectual tradition.

> 'At the Waterhole' is the number one item of Madayin (corpus of ritual knowledge) for Djulibinyamurr – it is number one Madayin for Ganalbingu – Gurrumba Gurrumba people. It has all the inside meaning of our ceremony, law and custom encoded in it. 'At the Waterhole' has inside meaning encoded in it. Only an initiate knows that meaning and how to produce the artwork. It is produced in an outside form with encoded meaning inside. It must be produced according to the specific laws of the Ganalbingu people ... Paintings, for example, are a manifestation of our ancestral past. They were first made, in my case by Barnda. Barnda handed the painting to my human ancestors. They have been handed from generation to generation ever since.[82]

The location of Bulun Bulun's statement invites an appreciation of its power within this text. This cultural difference remains fundamental to the law, and informs how other identifications are to be made and assumed. Thus Bulun Bulun's statement exerts a dynamic whereby it fulfils a role in identifying how the metaphyisical dimensions of the intangible property are determined as 'traditional', but also a recognition of the differential cultural values engaged within the law.

It is significant that the cases exist as a response to infringement within the art market and that this context has provided leverage for 'justice' issues to be framed. The cases arise from problems within the market. The remedy in the *carpets case* reflects the problem of marketplace origins, as does the additional award of 'cultural harm.' The problem here is not that the indigenous artists are outside the market, only to be incorporated in cases of infringement, for they are engaged with the market, by providing consumers with cultural products, and also in their engagement with each other. What is lacking is a recognition of this and the intrinsic power that this position holds. Amongst other elements, Fred Myers has recently considered the competition for art sales from the western desert region.

> With so many communities turning to the popular medium of dot paintings, there is a competitive struggle as the objects take on the formal properties of commodities: "Everybody's trying to promote their community and get a little bit ahead, you know. Come up with an idea that is going to get a slightly higher profile for their community,

[82] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 518.

> to promote those artists ... I don't think that the market is so big that it can cope with such a huge number of players in it."[83]

This highlights some of the growing issues, including competitiveness and the danger of saturating the market that characterises contemporary engagement in the art market by artists, communities and consumers with implications at both local and international levels.

In *Bulun Bulun* von Doussa J states;

> The artistic work was painted by Mr Bulun Bulun in 1978 with permission of senior members of the Ganalbingu people. He sold it to the Maningrida Arts and Craft Centre. At that time Mr Peter Cooke was the arts advisor at the Centre. Mr Cooke then arranged the sale of the artistic work to the Northern Territory Museum of Arts and Sciences. It was reproduced with Mr Bulun Bulun's consent in the book "Arts of the Dreaming – Australia's Living Heritage" by Jennifer Isaacs at page 198.[84]

Here von Doussa emphasises both the cultural origins and the commercial transaction associated with how the artworks circulated within the market and as such transferred into commodities to be bought or sold. The 'aesthetic' value of the work produces it as an artistic activity that is always-already a product in the market and a category of law. Indeed it is the 'aesthetic' quality of the work that is strongly evoked through von Doussa's J description of the spaces that the art occupies in the *carpets case.* For example:

> The first four artists are from Central Arnhem Land. The artworks in question are bark paintings. The first three paintings are presently owned by the Australian National Gallery, ('the NGA"). In 1993 in recognition of the International Year for the World's Indigenous People, the NGA held the first solo exhibition of the works of an Aboriginal artist. The exhibition was a retrospective look at the works of Mr Milpurrurru, and included the art work 'Goose Egg Hunt' and was also featured in the publication The Art of George Milpurrurru' which was published by the NGA at the same time.[85]

and;

> The first three paintings, together with the work of Ms Marika were included in a portfolio of 12 Aboriginal artworks which was published by the NGA in 1988 under the auspices of the NGA's education staff ... The artwork of Wamut is in the National Museum of Australia collection, and was reproduced in a portfolio of Aboriginal art published for the Australian Information Service ("AIS") by the Australian Government Printer. It was also reproduced in a calendar for the month of June 1982.[86]

---

[83] F. Myers, *Painting Culture: The Making of an Aboriginal High Art Market* Duke University Press: Durham and London, 2002 at 217. Quoting from an interview with Christine Lennard from Warlukurlangu Arts at Yuendumu.
[84] *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 520.
[85] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 212-213.
[86] *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 213.

and;

> The remaining three artists are from the western desert areas of Central Australia. The artworks are 'Papunya' style paintings in acrylic paint on canvas. Each work is recognised as one of the major works of a very important artist. The works have been exhibited nationally and internationally and have also been reproduced in a portfolio of Aboriginal art by the AIS, and in a calendar produced by that body for the months of January, March and November of 1986.[87]

These comments confirm both the recognition of the creative endeavor implicit in the work and establish that a measure of the value of the artworks as works of art is that they appear or have appeared in the National Gallery of Australia and other important national and international cultural institutions. Their value is thereby justified through the western art spaces that they occupy and the abstraction of the subject from the cultural context facilitates the economic worth. Edelman's comments cited in Chapter Four that the "aesthetic is subordinated to commerce"[88] demonstrates the appreciation of the power of the abstract aesthetic to generate value. In this sense, the market demand for the aesthetic value of Aboriginal art means that it necessarily functions as a commodity, the cultural context is repositioned as a marker of value and the subject of the law is abstracted. Tradition becomes central to the worth in the market but only for its transactional value, and is consequently generated as the key 'essence' that determines the philosophical dimensions of metaphysical property. In this sense the market helps regulate the way an identification of indigenous knowledge can be made.

In endorsing the works, von Doussa J also generates consequences through privileging good and worthy artwork for protection. With the shift from the aesthetic to the economic a further justice expectation is created. This is because the beneficiaries of the 'good' and 'worthy' artworks are not necessarily the artists themselves. The increased arguments for resale royalties (droit de suite) demonstrate the extent that indigenous people are still disadvantaged the art market.[89] Growing louder each year,[90] the arguments for this change in copyright law seek to remedy the disparity of economic return where Aboriginal works that sold for paltry amounts

---

[87] *Milpurrurru & Others v Indofurn Pty Ltd.* (1994) 30 IPR 209 at 213.

[88] B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. Kingdom. E.) Routledge and Keegan Paul: London, 1979 at 57.

[89] Droit de suite or resale royalties provides that visual artists or their estates receive the royalties on the resale of the artworks. The royalty is usually between 3% and 5% of the price of the artwork.

thirty, twenty, even ten years ago now command prices in the hundreds of thousands of dollars.[91] That the artists tend to receive little financial benefit illustrates the inequity within the market and thus fuels the debate for the introduction of resale royalties.[92] The significant amount of money being paid for the artwork is a direct effect of the exponential growth and success of the Aboriginal art industry. However, as one indigenous commentator, who prominently critiqued the industry in an award winning painting stated, 'Aboriginal art is a white thing': the statement suggesting that the real beneficiaries of Aboriginal art industry are not indigenous.[93] Bell provides a highly political and challenging critique of the Aboriginal art industry. Yet this is at the expense of recognising there are real beneficiaries.[94] It is these real beneficiaries, Aboriginal artists and communities that do raise justice claims for the equitable distribution of economic benefits – a claim that is not beyond the scope of intellectual property law.

Here the challenge for the law is set within its own framework. For instance to remedy the economic balance to some degree, it is not a new law that is required, but instead a yet to be established intellectual property category. There is potential for this category because it exists elsewhere within intellectual property regimes.[95] Resale royalties are picked up as a real possibility because Aboriginal concerns compliment the greater intellectual property narrative. Resale royalties are far more likely to be introduced in Australia than a special *sui generis* system. This is because the law is already intrinsically engaged in managing the economic capital generated by the Aboriginal art market.

Yet the difficulty for accounting for the discrepancy in claims for commercial value and gain and that of communal ownership and preservation of cultural integrity are ironically also

---

[90] Usually coinciding with the annual Sotheby's auction of Aboriginal and Torres Strait Islander art.
[91] "Aboriginal artwork bought for $20 sells at $120,000" *The Advertsier*, 1 August 2003; "Royalties for art's sake" *Sydney Morning Herald*, 6 September 2002.
[92] See: Australian Copyright Council, *The Art of Resale Royalty and its Implications for Australia* February 1989; Fourth National Aboriginal and Torres Strait Islander Visual Arts Conference *Conference Report*: March 2002 at 32.
[93] See Richard Bell's manifesto: *Bell's Theorem - Aboriginal Art: It's a White Thing* at www.kooriweb.org/foley/news/bell.html.
[94] Bell himself being one -- walking away with $40,000 prize money for his artwork in the Twentieth National Aboriginal and Torres Strait Islander Art Award.
[95] It was raised in the *Berne Convention on the Protection of Literary and Artistic Works* (1886) and remained voluntary. It was adopted in France in the 1920's and the European Union now has the *EU Resale Royalty Directive* which harmonises legislation in the various EU states.

played out in the proposed moral rights legislation. The law is involved in juggling the dualing interests of economic value on one hand and cultural integrity on the other. The legislation (touted as an 'election promise' by the Federal Government) proposes the incorporation of special 'communal rights' within the existing (and relatively new) moral rights legislation.[96] In the moral rights debate, as opposed to that of resale royalties, the issues are segmented into that of 'protection of integrity' and communal ownership.[97] That the moral rights debate mimics claims for 'communal ownership' helps retain a separation between the aesthetic and the economic. However, the danger is that it distances the significant changes and effects of the copyright cases where Aboriginal artists were recognised as individual owners with private property rights. The divide in strategies suggests a reluctance to fully acknowledge the diverse range of subjectivities involved and produced in an engagement with the market. The communal moral rights amendment rests on an image of 'community' and a sense it that it is possible to codify this concept within legislation.[98] The problem, like that that faced the Labels of Authenticity, remains who decides what an Aboriginal community is and should look like?

Von Doussa J is motivated to put a positive spin on the consequences of the Aboriginal art market and thereby to make the most of that for indigenous owners. However, his efforts feed back into and support that dynamic whereby copyright and intellectual property law facilitates and legitimises further appropriation and commodification. Von Doussa J presents his task as simply dealing with the end of commodification and rectifying injustices related to that – but at the same time his stance is reinvigorating and re-legitimising the 'indigenous' capital threatened by 'offensive misappropriation and insensitive commodification'.

The cases present the law with the challenge of recognising indigenous rights deriving from differences in cultural knowledge but also require a recognition of the relations of power that have historically positioned indigenous people's claims for recognition of full rights of self-determination at the margins of the law. In this sense, the cases can be read as directly

---

[96] *Copyright Amendment (Moral Rights) Bill 1999* (Cth). At the time of this amendment, Senator Aden Ridgeway introduced to the Senate a proposed 'communal rights' amendment that would benefit indigenous artists. It was rejected because it was introduced too late in the moral rights debate for thoughtful consideration by the Senate.
[97] For instance see: T. Janke, "Berne, baby, Berne: the Berne Convention, moral rights and Indigenous peoples cultural rights" (2001) 5(6) *Indigenous Law Bulletin* 14.
[98] In addition the proposed legislation has engaged with no community consultation.

managing the 'excesses' of colonial dispossession. Pressed with this difficulty von Doussa J resorts to an engagement with standard jurisprudential concerns central to copyright. He understands that he has pushed the law as far as it can go, and he is sympathetic to indigenous claims, but in his position these can only be reconciled within the limits of the Copyright Act. He does not want, nor cannot necessarily engage in broader philosophical concerns about protecting cultural identity, power imbalances nor effects of Empire. The danger in doing so would be that such recognition would require intellectual property law to acknowledge its own cultural specificity. As Bowrey explains:

> Von Doussa's acknowledgement that the law has limitations in reckoning with significant cultural differences was potentially radical. It could have led the judge to expressly formulate the values of copyright law in cultural terms. Once these values were articulated, they could have been more broadly examined and their contemporary relevance debated. However this path was precluded by the jurisprudential choices he made. Von Doussa hints at the cultural particularity of the law but fails to address the privileged cultural values at stake ... Ultimately he prevents the hearing of a debate that could lead to a challenge to the presumed neutrality, generality and universality of copyright law.[99]

In this way, the arguments that test the limits of copyright law also appear in the broader intellectual property discourse because they raise an awareness of the cultural contingency of laws categories of identification. These limits are political as they are set up and informed by a specific system of power.[100] Certainly there is recognition of indigenous cultural difference, but such considerations do not challenge the coherence of the body of law to deal with indigenous knowledges. Rather the cases consolidate the position of indigenous knowledge within an intellectual property discourse: a point consolidated through the debate for resale royalties and even moral rights legislation. These points of inclusion reaffirms the power of the law to sustain itself and perpetuate its abstracted categories. The problem is thus phrased as one that indigenous people have with copyright law, not the problem that copyright law has with the intangibility of indigenous knowledge. The onus is on indigenous people to accommodate the difficulties of the law. These decisions provide an instance of producing an account of the interaction between the cultural specificity of copyright and an understanding that difference can be managed through legally informing parameters. In providing an account of this

---

[99] K. Bowrey, "The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture" supra n.80 at 82.

[100] M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law* supra n.5 at 57.

interaction, a position for indigenous knowledge within the law is produced that is as complete as it is temporary and partial.

Conclusion

In reading case law it is possible to discern the many social and cultural elements that duly influence the way in which copyright law engages with new subject matter. It also reveals the manifold ways in which indigenous differences are treated within the law. On one hand, indigenous perceptions of ownership, communal or custodial, are reduced to standard interpretations – there is a uniformity of approach that maintains the consistency and cohesion of classifications and categories. However below the surface of mainstream jurisprudential concerns, indigenous difference is left to speak for itself and in so doing exerts an influence that helps the law come to terms with a key problem: the determination of the dimensions of the property right in this new subject matter.

Case law is an important instance for facilitating the production of categories that influence and identify exclusive possession within a commodity discourse. Legal decisions provide an account of legal action, they help us understand what happens in the practice of the law: where the limitations are, and how expectations are generated. It is nevertheless ironic that these instances of legal practice also reveal the instability of copyright subject matter, (re)exposing contingencies that have remained relatively hidden. In de-emphasising the 'special' case of indigenous art, the law unwittingly exposes the inconsistency of its modes of identification. For if the law had admitted the 'special' status of indigenous subject matter, it would have been able to shift the problem from the inability to secure the closure of the subject matter to the 'specialness' of the indigenous demands within the case. Instead, in disavowing any particular problem with indigenous subject matter, the issue of unstable subject matter is revealed as a fundamental element of intellectual property as a whole. Thus the politics of law are rendered visible.

This case law exposes how the function of the law is influenced by expectations of how the law should react in specific circumstances. This is a pragmatic response to strategies of

governing that seek to set out certain social relations for further management. The inclusion of indigenous art within copyright law is related to the project of reconciliation. By this I mean that it evolved from a specific time in Australian political history where indigenous culture and the effects of colonisation through the dispossession of indigenous people were increasingly recognised and finding their way into legal jurisdiction. Within all this rethinking and re-contextualisation of concerns regarding the interface between 'western' systems of regulation and indigenous ways of knowing, it is important to remember the influence of individuals. The question remains to what extent do individuals affect the way in which particular forms of knowing and thinking are structured within the law. Can individuals really effect a change in the way in which the law imagines solutions for particular problems? Is there room for individual resistance to legal and social codes of classification? If legal decisions function as an event formative to the law itself, what is the effect of individual agency, both in how a case is put for determination, and the way in which a claim before the law is set? It is these concerns, where the position of individuals as key players securing the ambitions of governance, that will now be considered.

Chapter Seven

Individual Agency and the Limits of Law

This chapter directs attention to the role of individual agency in consolidating the category of 'indigenous intellectual property'. Specifically it will illustrate how individual engagement is integral to developing possibilities for the practical function of the law and effecting particular strategies of governance. Individuals are explicitly engaged in negotiating and reaffirming the position of indigenous knowledge within law through responses that engage legal expectation. In pursuing a particular argument in a copyright case, explaining the difficulty of reconciling western and indigenous forms of artistry and ownership or writing a significant report that details both intellectual property laws and practical reform proposals, individuals do directly affect the shape that the law takes. This is because certain subject positions enable the governmentalisation of particular problems: local and individuated responses to social and political events direct attention to better systems of management because they are already imagined within a structured framework of action.

In developing an appreciation of individual action within fields of legal and governmental management of knowledge, this chapter argues that individuals employ approaches for intervention and contestation that inform governmental strategies. Strategies and ambitions of governance are rendered ineffectual when only existing within an abstract space: for governmental objectives and systems of management to be modified, acted and engaged, individuals must be involved. Thus the contests in the field of intellectual property and indigenous knowledge would be negligible if individuals had not acted to raise the issue, present arguments in a court or write reports that spur further debate. Individuals are engaged

in providing the precedent that can make a profound and lasting social change. In *Information Feudalism: Who Owns the Knowledge Economy?* Drahos with Braithewaite explain how they were informed about the number of individuals responsible for the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs): "Less than 50 individuals had managed to globalise a set of regulatory norms for the conduct of all those doing business or aspiring to do business in the information age."[1] This remarkable point illustrates the power of individuals to generate discursive spaces and propel debates informing their usage and future directions. This is precisely the point of the chapter.

Notably intellectual property law remains the discursive field where debates about the protection of indigenous knowledge are engaged. This is because intellectual property is a powerful domain that has demonstrated its effectivity in constraining, limiting and regulating knowledge use. Indigenous people want to position their claims within this domain as it potentially provides lasting obligations on all stakeholders. Further, intellectual property law potentially provides a key tool to deliver indigenous people the control over the dissemination of knowledge that forms a key element of self-determination claims. In Australia, there are perhaps a dozen individuals responsible for the emergence of indigenous knowledge into an intellectual property regime. This chapter is however limited to three individual responses to the concept 'indigenous intellectual property'. What characterises these is that individually and collectively they work as a dynamic that consolidates the position of indigenous knowledge and the legitimacy of legal modes of classification used to demarcate and justify property rights in information. Motivated by limitations of law that have been exposed through case law and governmental reports, the responses also fundamentally intersect with other political elements that test the extent of legal possibility. Through a reading of individual agency it is possible to develop an appreciation of the ways in which individuals enhance legal positions.

In revealing the uneasy and contested position of indigenous knowledge within law, individuals responding to the category of 'indigenous intellectual property' highlight the contradictory and complimentary efforts tied to strategies of governing knowledge and information. A key

---

[1] P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications: London, 2002 at 73

element in developing new possibilities for managing knowledge rests with the way individuals can and will voluntarily take up a political cause and in doing so inevitably change the way in which a particular problem can be understood and directed. Not only does this complex of relations produce new legal and governmental alternatives, it also reveals the concomitant of factors that are directly and indirectly working through the law.

The first section of the chapter considers the instrumental role of Colin Golvan. Golvan, leading counsel for the Aboriginal artists in the early copyright cases, was influential in his use of copyright in *Bulun Bulun v Nejlam* (1989).[2] The arguments Golvan presented to the court subsequently became a motivating force behind the recognition of Aboriginal art as copyright subject matter. Though the case was not reported, he drew attention to the development by writing up the case as an article in the *European Intellectual Property Review*.[3] Reporting widely on the copyright cases in legal and governmental spheres and advocating the positive role the law could play in responding to Aboriginal calls to legally secure rights to cultural knowledge expression, Golvan played a significant role in the legal recognition of intangible indigenous subject matter, both in Australia and internationally. Through emphasising the commonality of the complaint Golvan effectively justified the inclusion of indigenous subject matter as a category of intellectual property law.

The second section examines the influence of Banduk Marika, a litigant in *Milpurrurru & Ors v Indofurn Pty Ltd*[4] (hereafter the *carpets case*). While Marika is not popularly associated with the development of legal recognition in indigenous cultural subject matter, it was through Marika's affidavit to the Court in the above case that the concept of a 'cultural harm' was developed as a means of copyright remedy. It is significant that Marika translated the cultural effects of the infringement to a form intelligible to the Court. This process of translation enabled the Judge to respond directly to different cultural concerns whilst also maintaining the economic value of indigenous knowledge as a key consideration. Marika's affidavit affected the way indigenous intangible subject matter was identified and the extent that the legal classificatory forms were

---

[2] *Bulun Bulun v Nejlam Pty Ltd*, unreported, Federal Court, 1989.
[3] C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 10 *European Intellectual Property Review* 346.
[4] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209.

extended to encompass cultural difference in the form of remedy. Marika's position within the western art world allowed her to express claims of ownership and authorship in the form demanded by legal subject positions. However she maintained an articulate explanation about the relationship between Aboriginal artistry in Arnhem Land and what the effects of the misuse of the art actually were within her community. Insofar as Marika exceeds the contemporary legal framework by emphasising the differing notions of ownership and property held by her community, she also pragmatically recognises the utility of the law in advancing indigenous interests. Thus Marika is not only a translator of indigenous difference into the legal framework, but also a mediator between legal expectation and indigenous cultural practice. Marika legitimises the inclusion of Aboriginal art as copyright subject matter, both for her community and for those seeking to advance such arguments.

The final section considers the pioneering work of Terri Janke. The report *Our Culture: Our Future* commissioned by AIATSIS and ATSIC and written by Janke has been instrumental in positioning the concept of 'indigenous intellectual property' in bureaucratic, legal and political institutions.[5] The Report was an important contribution to the ongoing discussions concerning indigenous knowledge and intellectual property as it provided a summary of intellectual property law in relation to differing forms of indigenous knowledge expression including, but not exclusively, art, dance, designs and biodiversity from an indigenous legal perspective. The Report provided policy and protocol suggestions for developing better legal frameworks that facilitated the protection of indigenous knowledge. The influence of Janke's work is evidenced through the recent phraseology 'indigenous intellectual and cultural property rights' or 'ICIP'.[6] Recognised nationally and internationally for representing innovative alternatives within this field, Janke's work remains legally grounded. While gently pushing at the fuzzy margins of the law, her work consolidates the position of indigenous knowledge within intellectual property law that emphasises its 'traditionality'. Paradoxically the key element that haunts the effectivity

---

[5] T. Janke, *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* (produced for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and the Aboriginal and Torres Strait Islander Commission [ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, 1998.

[6] This phrase was initially coined by Ms Erica Irene Daes, United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Janke has been instrumental in adopting the term, and propelling its usage in an Australian context.

of Janke's work is the anxiety of 'culture' within the politics of law and the fixity ascribed to indigenous knowledge.

The chapter will illustrate the extent to which the subject, indigenous intellectual property is justified, legitimised and consolidated by individuals as much as legal and bureaucratic institutions. Property rights in intangible indigenous subject matter have been normalised as a 'natural right' and, more recently in the instance of indigenous interests, assume a position as a 'human right'.[7] This points to the complexity of demands, contests and subject positions that function within the construction of the category of indigenous intellectual property.

Critiques of intellectual property law as an unworkable option for protecting forms of indigenous knowledge misunderstand the commonality of circumstances where the law does work and where indigenous people actively engage and consequently moderate the legal frameworks. However the argument that intellectual property law should be adapted to protect indigenous heritage and cultural integrity disrupts a fundamental component of intellectual property law dependent upon an economic logic and rationale. Importantly, such arguments do not advocate an abandonment of the intellectual property framework, arguably recognising the framework's power in managing access to knowledge and information. This hints at the contradiction at the heart of developing a consensus for the future direction of policy and legislation in regards to indigenous intellectual property.

The argument made throughout this chapter emphasises the importance of considering the role of individuals in transforming and even directing modes of governance. For while successful governing depends upon bureaucratic institutions and legal frameworks, by underplaying the utility and influence of individual agency, one fails to fully engage with the complex and subtle interplay of mechanisms that produce categories of knowledge. In this respect at least, individual practice, experience and subjectivity must also be considered as complimentary yet unpredictable elements of governmental rationality.

---

[7] This is an international development. See in particular the United Nations Working Group on Indigenous Populations, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, 1993; *The Mataatua Declaration* (1993); *Julayinbul Statement on Indigenous Intellectual Property Rights* (1993); *United Nations Draft Declaration on the Rights of Indigenous Peoples* (1994).

Colin Golvan: exerting influence through legal innovation

In the previous two chapters, legal decisions assumed an important role formative to the law itself. In this way I argued that legal decisions shape the direction and possibility of future legal engagement. In the context of the two copyright cases previously discussed, the shape the law took was facilitated because the same judge heard both cases. In this way Justice von Doussa established a distinct indigenous narrative within copyright law that naturalised property rights in Aboriginal art and affirmed the legitimacy of categories of identification. But to take a step back from the moment of legal decision, I will now consider the influence of Colin Golvan, barrister and leading counsel for the Aboriginal artists and responsible for arguing that copyright was a suitable framework to protect indigenous interests in art.

One feature of the political environment in the 1980s was that it was informed by two decades of activism regarding land rights and self-determination, securing Aboriginal and Torres Strait Islander interests in law. The 1971 Gove land rights case, *Milpirrum v Nabalco*[8] had instrumentally positioned Aboriginal rights to land and sovereignty within the legal framework. Despite the finding that land rights did not exist, the political debate did not subside. In 1976 the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was passed, 1981 saw the *Pitjanjatjarra Land Rights Act 1981* (SA) and in 1982 Eddie Mabo commenced significant land rights proceedings in the High Court of Australia. In this period, arguments for the protection of knowledge and information through the law was evolving through both indigenous advocacy and sympathetic lawyers. "In 1989 [John] Bulun Bulun took the apparently unprecedented step of bringing an action for infringement of copyright and breaches of the *Trade Practices Act 1974* (Cth) in the Federal Court in Darwin."[9]

---

[8] *Milpirrum v Nabalco* (1971) 17 FLR 141.
[9] C. Golvan, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" supra n.3 at 347.

One of the first cases that Golvan ever undertook on appointment to the Melbourne Bar was this case involving the infringement of John Bulun Bulun's artwork in *Bulun Bulun v Nejlam* (1989). In an interview Golvan explained how he became involved in the case;

> I got involved with Aboriginal copyright through a contact I had with Lin Onus. Before that I had nothing to do with Aboriginal matters at all. I was starting my career at the Bar and wasn't sure how I was going to get by and heard a report on AM Radio National in 1988. It was about the problem of copying T-shirts. Lin was quite prominent then with these types of matters and said that what Aboriginal people needed to clarify this particular problem was specific legislation. I happened to hear this and thought to myself why wouldn't copyright answer the problem? I rang AM, which I haven't done prior to or since, and said I heard someone being interviewed and there might be a simpler solution to the problem than they had identified.
>
> The instinctive response as an interpreter was for dispossessed people to think of a new law. That is that there is no law in the current regime that would work. The people at AM said, 'if you're so clever you can speak to him'. So they put him in contact with me.[10]

That Golvan happened to hear the report to which he actively responded with a potential solution highlights much of the importance and serendipity of individual action. Owing to his knowledge of the law Golvan identified a possible solution within the current legal framework for the problem of the copying and 'infringement' of Aboriginal art. His initiative, the place and the time, and the political culture of appreciating social injustice and Aboriginal rights provoked his action. Whether or not Golvan was aware of the earlier case *Wunungmurra v Stipes* (1983),[11] he nevertheless became an instrumental figure in producing a space that prominently considered the inclusion of indigenous knowledge within intellectual property law. For Golvan the case involved a legally distinct category of problems, and thus he set about justifying the identification and inclusion of this new subject matter.

During the late seventies and early eighties, especially following the release of the *Report of the Working Party on the Protection of Folklore*[12] the predominant thinking was that because Aboriginal art was a traditional art form it was not original in the sense required for copyright subject matter. As I argued in Chapter Three, these thoughts were informed by thinking that

---

[10] C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

[11] *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported. See: N. Stevenson, "Case Note: Infringement in Copyright in Aboriginal Artworks" (1983) 17 *Aboriginal Law Bulletin* 5.

[12] Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*. Canberra, December 1981.

positioned indigenous people as traditional, ahistorical and replicated 'primitivist' discourses assuming the irrelevance, impossibility and incommensurability of applying legal standards to indigenous interests, (even though the standard determining originality was substantially low). Golvan recalls that "one of the principle issues in the case was that of whether the works were original for the purposes of copyright protection."[13] For Golvan the disjuncture between western concepts of art and authorship and Aboriginal concepts posed the initial hurdle in arguing copyright in Aboriginal art. However, he did not see these as particularly insurmountable and continued to advocate the possibility of the law moving beyond such limitations. To this end Golvan (with solicitor Martin Hardie) filmed Johnny Bulun Bulun working.[14]

> This probably seems a strange thing to say today, but at the time there was quite a lively discussion in copyright circles about whether Aboriginal artists could claim to be original authors of traditional artworks. There was some thinking that because it was a traditional art form – a kind of anthropological kind of thinking – that the artist couldn't claim copyright in it as all they were doing was simply copying an age old image. We ascertained quickly that there was a lot of authorial content in what otherwise appeared to the untrained eye as simply being traditional art. [15]

This clarified for Golvan that for Bulun Bulun's work, what was described as a 'traditional' act was in fact quite contemporary.

Owing to the 'new' subject matter central to the case, Golvan spent time justifying both the inclusion of the problem within frameworks of intellectual property, but also that indigenous interests were best served through this strategy. In terms of reconciling the terms of the legal frameworks for the Aboriginal artists, Golvan has explained that while he introduced the concept of copyright as a possible solution to the problem of the unauthorised reproduction of Bulun Bulun's work, the other artists readily understood it. This was because it "squares with concepts in Aboriginal culture that only certain people have the right to reproduce certain images."[16] The parallel between indigenous concepts and intellectual property concepts significantly substantiated Golvan's approach. Other writers also emphasised the parallel. For example Kenneth Maddock articulated that;

---

[13] C. Golvan, "Aboriginal Art and Copyright: A Case for Johnny Bulun Bulun" supra n.3 at 349.
[14] The video was submitted as evidence in the hearing however it was not used. Originality in the art was assumed.
[15] C. Golvan, interview by author, supra n.10.
[16] Ibid.

> It would be surprising if traditional Aboriginal societies had developed copyright rules resembling those of contemporary Australian law. Yet rights to what we have come to call 'intellectual' or 'cultural property' are not only present in these societies but have often been worked out in complex ways. The anthropological literature alone is full of information about regulated access to places, ceremonies and knowledge or lore. Through such regulation, which is expressed in terms of sex, moiety, initiatory status and the like, Aborigines are differentiated in their awareness of elements of the local culture and in the use they may make of those elements.[17]

Instead of emphasising the differences in cultural appreciation of access and use of knowledge, Golvan like Maddock emphasised the thread of commonality between indigenous concepts of information access and use to those found in intellectual property. This helped justify his approach to the case. At first instance the problem for Golvan was not seen as irreconcilable because of difference, but on the contrary reconcilable because of similarity. Focusing on the similarity of notions of access and use made the position of protecting Aboriginal art through the western law of intellectual property workable. Paralleling indigenous concepts governing knowledge use and access with concepts of exclusive possession Golvan insists on the legitimacy of similarity as a key strategy in recognising indigenous knowledge as copyright subject matter. "Copyright provides a means for protecting the work of Aboriginal artists, through prohibiting unauthorised reproductions, and thus plays a vital role in promoting the social, religious and economic interests associated with the creation of Aboriginal artworks."[18]

While explaining that the notion of copyright was understood by the Aboriginal artists through a similar cultural model of authority and control of imagery, Golvan also justified his approach in that the artists were also concerned to know more about intellectual property law. "Each of [the artists] were senior people, so they were very receptive to a legal solution. They were very interested to know about it, and also interested in the idea of winning protection and confirming both respect and integrity."[19] The law provided an avenue for Aboriginal artists and indigenous imagery to be recognised and protected. Through copyright, the artists generated an expectation that the law could be modified to accommodate their interests. Golvan actively initiated and responded to this expectation.

---

[17] K. Maddock, "Copyright and Traditional Designs: An Aboriginal Dilemma" (1988) 34 *Aboriginal Law Bulletin* 8 at 8.

[18] C. Golvan, "Aboriginal Art and Copyright: A Case for Johnny Bulun Bulun" supra n.3 at 346.

[19] C. Golvan, interview by author, supra n.10.

Legal commonality and cultural difference

Despite the potential problem of originality, it was Golvan's view that the current system of copyright provided the most obvious means for remedy, as copyright afforded protection to artistic works, which was certainly a way of identifying Aboriginal art. In turning to copyright Golvan emphasised the commonality of complaint between reproducing Aboriginal art and reproducing non-indigenous art – a commonality that had been emphasised by Wandjuk Marika in the 1970s.[20]

However for intellectual property law to accept indigenous subject matter, certain characteristics that functioned to identify the intangible property had to be produced. The emphasis on similarity provided a means of displacing cultural difference in favour of the law's own categories of identification. In justifying the inclusion of the indigenous claims two common factors were highlighted: Aboriginal art was like western 'art' therefore conveying the same legal protection; and, not only did the work have an economic value within the market place, but the inappropriate use had the potential of detrimental economic effects for the artists. In identifying Aboriginal art as the tangible product that conveyed copyright protection, economic rationale was implicit. As Golvan explains,

> The interest in Aboriginal artwork has provided Aboriginal communities with a source of income previously unknown. While individual artists sell works, and receive fees in their own right, the money they receive is often shared around among families and within tribal groups. It is used to purchase vehicles and communications equipment for tribes in remote areas, not to speak of basic commodities.
>
> An economic infrastructure has built up around the growing art market. Communities have set up their own craft centers to supervise the marketing of artworks. Many communities have arts advisors, a growing number of whom are Aboriginal. Galleries exist in Melbourne and Sydney displaying Aboriginal artwork almost exclusively.[21]

The economic currency of Aboriginal art to communities in Arnhem Land was not a foreign concept, as an engagement with the market had provided a means of self-determination in setting up outstations and sustaining these. Arguably the market had provided more in terms of self-determination than had been forthcoming from the various federal and state governments.

---

[20] In Chapter Three I explained the influence of Wandjuk Marika in arguing at least since 1976 for copyright protection in Aboriginal art. See Chapter Three at page 128.

At first instance then, points of similarity enabled the legal space to entertain the possibility of including indigenous subject matter. In an interview I asked Golvan if there was any point where he thought that arguing copyright infringement might not work?

> No I was pretty pragmatic about it, for all the underlying interests in the cases they were still copyright cases and we were running pretty well established copyright principles. It was more in the last case that I did, *Bulun Bulun v R&T Textiles* that we were faced with a few problems and were trying to address entitlements of traditional owners as beneficiaries. We constructed Bulun Bulun as a kind of trustee and tried to link in the copyright concept of equitable ownership ... I know that it has been said by lots of commentators that copyright is an inadequate remedy, but an inadequate remedy for what? I mean you have to ask yourself what was the problem that the court sought to have solved and I myself am a bit critical of solutions to problems that don't have an obvious purpose to me at least, you know you can be a bit pristine about Aboriginal culture in some contexts, try and pack it in cotton wool.[22]

However as the initial case progressed, the differences in derivation of the intangible subject matter registered as important features in how copyright was to be recognised and effected what remedies were applicable. For instance the boundaries in the 'ownership' of indigenous knowledge remained unclear. Nevertheless, Golvan's action justified legal standards of classification and these consolidated the perception of cohesion and effectivity of the law.

Significantly, Golvan understood the Aboriginal artists as 'clients' and in this way again emphasised their sameness in the law and justified legal action. Golvan explained that he had a responsibility to his clients to establish workable remedies that they were also happy with.

> There are people who say that the cases were incorrectly reduced to western legal positions, concepts that are much more complex and ought not be reduced and that copyright was a compromise and shouldn't have been tried in the first place. But I mean I considered the artists as clients and they were looking for a result and it was a result and in my attempts to address what was going on, no one in the camp of the clients was critical or took the political position that we had misunderstood something, the people were satisfied with what we were doing ... It is easy by way of comment or review to say that the people doing this have completely misunderstood what they should be doing and I've not taken that criticism seriously ... I never thought it was anything other than an interesting observation about what was going on. At the end of the day, my brief was to take a legal point of view and we've only got the legal system to deal with. It's not perfect, and maybe it was less than perfect in this case.[23]

---

[21] C. Golvan, "Aboriginal Art and Copyright: A Case for Johnny Bulun Bulun" supra n.3 at 346.
[22] C. Golvan, interview by author, supra n.10.
[23] C. Golvan, interview by author, supra n.10.

Thus a significant element of Golvan's appreciation of the case at hand was that essentially he would treat it as he would with any other. Pragmatically, the law provided the only remedial relief and thus the claim had to be structured in a particular way to achieve a result. Significantly Golvan did not see cultural differences as insurmountable or irreconcilable. He mediated the levels of disjuncture producing a result that sat well with the clients, and didn't destabilise the law. What this meant was that in producing a unique space, other cases were provided room in the law to test the extent of legal possibility. In this way, Golvan was influential in structuring a field of action for future cases, even though these were always to be measured and identified through classificatory frameworks of copyright law.

Structuring the field of action

Tony Davies has argued that the process of protecting indigenous imagery through copyright "imposes specific demands upon participants."[24] As copyright is not a neutral form, Davies questions the way in which indigenous people are expected to perform in relation to the structures of the law that demand particular responses and frames of identification. The key point of his thesis is that within the constraints of copyright legislation, indigenous claimants have had to modify their forms of authority and imagery to suit the legal framework and in doing so establish a particular narrative that is incorporated into the law without any recognition of the hidden differences within the narrative.[25] Two key elements that Davies identifies include the individuation of the Aboriginal artist within the copyright claim, and the requirement of "a victim and a perpetrator; the copyright holder must have been harmed in some way by the wrongful copying of their work by another."[26] These points illustrate critiques regarding the location of indigenous concerns within the domain of intellectual property. They directly challenge Golvan's emphasis on similarity as a justification for legal response. Whilst these points provide a legitimate critique I would instead argue that Golvan pragmatically employs the law as a very particular tool through which he can feasibly achieve a result for the artists, as he says, "I perceived the artists as clients".[27] For instance, there was little other option available for protecting Aboriginal art. Despite advocacy since the 1970s,

---

[24] T. Davies, "Aboriginal Cultural Property?" (1996) 14 (2) *Law in Context* 1 at 3.
[25] Ibid. , at 3-5.
[26] Ibid. , at 5.
[27] C. Golvan, interview by author, supra n.10.

there had been little bureaucratic activity in initiating new and distinct *sui generis* legislation for indigenous interests. I tend to follow Golvan's line of thinking, that as inadequate as the protection through the *Copyright Act 1968* (Cth) was, at least it provided some form of protection. In these matters one has to think pragmatically as much as anything else, and similar comments by Noel Pearson have highlighted this point.[28]

When asked about what the achievements garnered through the cases are, Golvan explains;

> Certainly recogntion. One of the achievements is reflected by the fact that I do very little of this work now. I regard that as an achievement. The level of public awareness is such that people won't do these things anymore, at least not within my hearing ... I haven't heard of any major infringements for quite some years, so it has put in train a kind of warning to not do it. Although in recent years I have been involved in other cases involving Aboriginal art; forgery and fakes. It might even show the development of the art form itself from one that could easily be copied by making cheap tourist items for sale to one now of replication for sale in the environment of the fine art market but giving the impression that a particular artist has made the work when they haven't. That has come up a few times with artists like Clifford Possum and Rover Thomas and Ginger Riley. That is also a problem that effects western artists as well ... So I think that has been something worthwhile out of all this – raising consciousness. I also think finding a way of marrying two different ways of thinking was of lasting value because from a western legal point of view we were thinking very differently from the way our clients were thinking. So somewhere in all of that we had to meet one another, and by and large I think we developed a strategy for doing that.[29]

These comments and the critiques identified by Davies also serve to highlight the influence of Golvan. In particular Davies is interested in a particular article written by Golvan and published in the *European Intellectual Property Review* for the way that it structures the field of action. Davies explains Golvan's article as one that "outlines the process by which the successful narrative is created" where "the purpose of the article is to solidify the structure of the narrative; that is to establish a 'practical framework for the bringing of such cases in the future.'"[30] In the article Golvan details significant information regarding the inner mechanisms of a case like *Bulun Bulun v Nejlam* (1989). This includes for instance: how the argument was mounted; and, how particular difficulties in identifying indigenous subject matter could be resolved through the strategic use of expert witnesses. Golvan's article provides an instance that reveals the inner machinations of the law consequent in the production of a particular narrative.

---

[28] See Chapter Two at page 65.
[29] C. Golvan, interview by author, supra n.10.

Golvan's article purposefully explains the multiple levels required to establish Bulun Bulun as an individual creative artist. Remembering that Golvan had the weight of historically informing discourses of 'primitivism' to overcome, the function of Bulun Bulun's affidavit directly sought to challenge the presumed anonymity of Aboriginal artists. In his affidavit Bulun Bulun explained that,

> This reproduction has caused me great embarrassment and shame, and I strongly feel that I have been the victim of the theft of an important birthright. I have not painted since I learned about the reproduction of my artworks, and attribute my inactivity as an artist directly to my annoyance and frustration with the action of the respondent with this matter ... I am just starting to paint again, although I am doing so in anticipation that this problem will be resolved in the near future. If it is not resolved satisfactorily, I have considered never painting again.[31]

The framework of the affidavit makes Bulun Bulun's claim intelligible to the court. It also makes the grievance felt intelligible to others through utilising phrases and concepts readily identified by non-indigenous people, for instance 'theft'. Davies point that the copyright framework demands particular responses from indigenous claimants mistakes the way in which the specificity of copyright demands have been socially and culturally produced, and thus the demands made to articulate the problem of infringement by indigenous people means translating the concerns into legal frameworks, that allow for political and social agendas. The ideas expressed in Bulun Bulun's affidavit point to the spaces that are mediated both by social and legal demands, and individuals who want to translate a key point of similarity. Arguably this is therefore a negotiated space, where interests are engaged and managed.

Golvan recognises the problem of affidavits, but they provide a means to an end. As he explains,

> The business of preparing affidavits is tricky too because that is a classic example of the reduction of knowledge. Clearly the affidavits were drafted by western lawyers. If you left the Aboriginal people to explain their story you'd get a totally different style of analysis about what is being said. I mean assuming that you could directly translate what was being said. You would have a whole different content which would be totally unusable for legal proceedings. But that is part of the nature of clashes in cultures, problems with integrating one system of knowledge with another.
>
> Question: And because it is going through the law, that then influences its structure.

---

[30] C. Golvan, interview by author, supra n.10.
[31] C. Golvan, "Aboriginal Art and Copyright: A Case for Johnny Bulun Bulun" supra n.3 at 348.

> Law isn't very forgiving, you know it has its own parameters and you have to come into our parameter...So all this is to do with the compromise that goes into the process. When cases get criticised because copyright is not the 'right' mechanism I say welcome to the real world...[32]

Golvan provided the means for the law to identify and subsequently protect Aboriginal artwork. In this regard, he pushed the limits of the law to recognise Aboriginal art as original, that Aboriginal artists could be authors and that Aboriginal art was valuable beyond the market place.

Golvan realised the limitations of the legal framework, and that indigenous interests exceeded the recognition capacity of the law. Nevertheless he still advocated for the use of copyright law as a means to protect Aboriginal art. To an extent, this was because it existed as the one effective legal tool that could be used to protect indigenous interests in art. Realistically, Golvan considered it unlikely that the law could be changed to appreciate and protect the complex levels of indigenous cultural significance within their artwork. However, he successfully generated a sense of legal expectation and that, despite its limitations, copyright functioned as another legal tool to protect indigenous interests.[33]

Overall Golvan is relatively positive about the dialogue generated between indigenous cultural conceptions and legal institutions following the copyright cases. He has explained that:

> The cases provide something of a case study for the protection of copyright of groups readily thought to be helpless, such as visual artists generally. Some say that the cases have put people off wanting to deal with Aboriginal art. This does not seem to be made out by the huge market demand for products reproducing Aboriginal arts and by the buoyant Aboriginal art market generally. Hopefully the cases have helped to give strength to the market, which represents a unique avenue for financial independence for a good number of Aboriginal people.[34]

Herein lies a key factor – that copyright provided a feasible means of effecting equitable relations between Aboriginal artists and art markets. Therefore economic relations are integral

---

[32] C. Golvan, interview by author, supra n.10.

[33] See: C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 2(56) *Aboriginal Law Bulletn* 5; C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 *European Intellectual Property Review* 227; C. Golvan, "Court provides strong protection for Aboriginal artwork" (1995) 8(1) *Australian intellectual Property Law Bulletin* 6; C. Golvan, "Aboriginal Art and Copyright Infringement" Altman, J., and L. Taylor (eds), *Marketing Aboriginal Art in the 1990s* Aboriginal Studies Press: Canberra, 1996.

to legal inclusivity and the development of legal remedy. It also provides a basis for indigenous expectation of legal action. Thus Golvan justifies the utility of the law, and in doing so helps produce indigenous interests in protecting their art within a legal framework of action. But Golvan recognised that whilst certain limitations were cultural in nature, protecting Aboriginal art was important because it was about business.

> Part of this is about business, I mean it is not often the joyous part of it, but this keeps people going, at the business level it is the only industry that actually worked. You know you can go to Arnhem Land and see all sorts of attempts to set up factories to make things and this comes from within. It needed some infrastructure and the arts scene has always been problematic for infrastructure you know, the people who are going out and managing art centers had no experience as managers of art. They often came from an anthropological type background then sometimes have problematic relationships with the artists and the artists would clash with the art centers and all those things would happen, then you would observe easily enough the sales occurring in the cities for vastly larger amounts than was ever going back to the bush and how was that going to be solved ... It all became problems of the market. Now attempts to try and get a unified approach to the problem ostensibly failed.[35]

Thus the art market industry played an important part in the need to have Aboriginal artists' rights recognised. In this sense copyright provided a relatively straightforward approach.

> Well you see copyright has been a relatively easy thing in one way for the courts to deal with because it is so attractive and in terms of copyright, who speaks against Aboriginal art? No one ... we all wanted to foster and aid Aboriginal art, visual arts and dance, theatre culture, we wanted it to grow and develop. And that's why the courts, putting von Doussa to the side as he was a special person, the courts are generally very receptive. I couldn't think of one judgment which would not be greeted with enthusiasm and interest a claim of Aboriginal copyright and problems of infringement.[36]

Individual action refigures the problem of indigenous subjects within the law, and confirms the legitimacy of the structure, and the governing technologies of legal ambition. The law does demand particular responses from subjects but these are modified and adapted to the distinct needs of each participant. For while the response may be structured within the framework of intellectual property, there is no reason to assume uniformity of action. Individuals will make sense and interpret the demands of legal structure within their own terms. This paradoxically enhances legal positions, as well as disrupting their uniformity. For "individuals personalise discourses within their own discrete purposes in life, using them to make and express a

---

[34] C. Golvan, "Copyright in Aboriginal Art: An Overview" Paper delivered at the Australasian Intellectual Property Teachers Conference, University of Melbourne, 2001.
[35] C. Golvan, interview by author, supra n.10.

personal construction of the world ... a sense particular to them at a particular time."[37] As I considered in Chapter Two, this makes for an unpredictable engagement with disparate relays of power enhancing the haphazard rationalities of governing. Whilst this observation is important to understanding the ways in which a legally trained individual develops particular strategies that introduce and accommodate certain differences, ongoing struggles over meanings and values become all the more telling as we turn to a consideration of the agency of an Aboriginal artist in the *carpets case.*

Banduk Marika: an exceptional litigant?

Banduk Mamburra Wananamba Marika was born at Yirrkala Mission in north-east Arnhem Land. She is a Yolngu woman of the Rirratjingu clan. Marika is a very successful artist, recently winning the 2001 Red Ochre Award for her commitment to the Australian arts industry.[38] Yirrkala is now a well-established artists community with a successful arts industry. Marika is one artist in a long line of family artists. As she explains;

> Sometimes it is very difficult to try and translate what comes from a family's traditional art, which started off as body paintings to do with ceremonies and on totem poles and stuff like that. And then in the early twenties bark was introduced for the painters, using stringy bark. These were artwork applied to barks for sale. My father Mawalan, was one of the old men of this generation ... who became the bark painters and were well known through Australia, mainly to researchers and anthropologists and institutions.[39]

In 1975, Banduk's brother, Wandjuk Marika came across tea-towels that reproduced his work.[40] Spurred into action, Wandjuk lobbied Government and the Australia Council for ways of countering the increasing copying of Aboriginal art, designs and styles.[41] The outcome was the first conference on Aboriginal Arts in Australia which provided the impetus for the bureaucratic initiative *Report of the Working Party on the Protection of Folklore.*[42]

---

[36] C. Golvan, interview by author, supra n.10.
[37] N. Rapport and J. Overing, *Social and Cultural Anthropology: The Key Concepts* Routledge: London, 2000 at 124.
[38] "A Tribute to Banduk Marika" *Arts Yarn Up*, Aboriginal and Torres Strait Islander Arts Board of the Australia Council at 2.
[39] B. Marika, "Surviving as Printmaker" Smith, T., and S. Anderson (eds), *Getting into Prints: A symposium of Aboriginal Printmaking* Association of Northern and Central Australian Aboriginal Artists: Darwin, 1993 at 34.
[40] See also *Four Corners*, Australian Broadcasting Commission, 1975.
[41] Following the infringement Wandjuk Marika stopped painting, only resuming several years before his death in 1987.
[42] See Chapter Two page 66.

Prior to the infringement of her own work, through the advocacy of her brother, Banduk Marika was aware of the potential capacity for copyright to protect Aboriginal artwork. As she explains,

> my brother and I were known to the family as the outcasts because we moved outside of our boundary and went out to an unknown territory that was known as the balanda world, white man's world. And he (Wandjuk) initiated the whole debate about copyright that is still being fought twenty years on.[43]

With this background, Banduk Marika was relatively familiar with the possibility of the framework of copyright to provide protection for Aboriginal artistry. Similarly Marika was also aware of the limitations of the framework in terms of the individual artists and notions of authorship. Nevertheless this background afforded Marika a unique position, as she was able to understand the utility of copyright and also appreciate its limitations. In this way Marika legitimised the use of copyright for her community where 'copyright' now exists as a familiar term.[44] Significantly, Marika was also able to incorporate and make the court appreciate aspects of cultural practice that were beyond the legal jurisdiction.

Copyright and cultural harm

> Taking the art of an artist, taking it to suit yourself as a design, transferring it onto material and calling it an 'Aboriginal art' is an infringement. Not only in the actual transferring of the artwork but also in the infringement and false acknowledgment of intellectual rights.[45]

In 1993, Banduk Marika discovered that her artwork, 'Djanda and the Sacred Waterhole' had been reproduced onto a carpet without her consent. The work had been commissioned by the Australian National University for its bicentenary.[46] She was one of nine artists whose work had similarly been reproduced. As I considered in the previous two chapters, the case was a watershed in regards to confirming Aboriginal art constituted copyright subject matter. The Judge was sympathetic to the artists, and in awarding the damages, established precedent for an additional remedy based on the concept of 'cultural harm'.

---

[43] B. Marika quoted in C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.
[44] At the Yirrkala Arts Centre there is a display section dedicated to the copyright cases. The display includes the carpet with Marika's "Djanda and the Secret Waterhole" and the material containing Bulun Bulun's painting "Magpie Geese and Water Lilies at the Waterhole".
[45] B. Marika quoted in C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.

In affidavits presented to the court, Marika explained her rights in the artwork. These rights were juxtaposed to copyright.

> As an artist, whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story.[47]

The affidavit made Marika's claims intelligible to the court, and also suggested the different cultural underpinnings of ownership and trust. Justice von Doussa took time to understand both Marika's conception of ownership and trust, but also the effect that the reproduction had both on Marika and in her community. As the judgment records,

> Ms Marika has endeavored to conceal the unauthorised reproduction on carpets of Djanda and the Sacred Waterhole from her community as she will be held responsible. Her artwork expresses pictorially the creation when her ancestral creator Djang' Kawu and his two sisters, the Wagilag sisters at the end of their journey from Burralku, landed at Yelangbara, south of Port Bradshaw, the site of their first journey. The image which she utilised in this artwork is associated with this place. Her rights to use the image arise by virtue of her membership of the land owner group in that area, and is an incident arising out of land ownership ... Her creation of the artwork contemplated that it would be displayed with appropriate sensitivity in art galleries and for education purposes to help bring about greater awareness of Aboriginal culture. The reproduction of the artwork in circumstances where the dreaming would be walked on is totally opposed to the cultural use of the imagery employed in her artwork.
>
> This misuse of her artwork has caused her great upset. If it had become widely known in her community at the time she believes that her family could have ordered her to stop producing any works of art; they might have stopped her participating in ceremonies; they might have outcast her; and they might have sought recompense from her – nowadays in money terms. So far these possibilities have not eventuated – and now that she has taken action to prevent further misuse and to seek a public recognition of the past misuse through the courts, she is hopeful that the community reaction when it learns what has happened will be more forgiving.[48]

Concern for Marika's position within the community and the affects of the infringement are apparent in this excerpt from the judgment. Importantly they underpin the finding of additional damages for 'cultural harm'. In this way von Doussa J seeks to recompense the artists for harm sustained and in doing so he allows the law to accommodate differing cultural

---

[46] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209 at 213.
[47] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209 at 215.

effects. Significantly it is through Marika's advocacy that such a recognition within the law is made. Thus in the context of this case, Marika stands as an exceptional litigant, who is able to translate cultural differences into the legal form, and significantly, translate these back to her community.

Yolngu culture and legal expectation

Marika has returned to Arnhem Land, where she continues to paint and advocate for the recognition of indigenous copyright. In a 1997 documentary made on the *carpets case*,[49] Marika explains her cultural obligations and the importance of developing better ways to protect indigenous rights in what she identifies as cultural property. She explains that her community, the Yolngu (which includes approximately 18 different clans and language groups) is interconnected by songlines and that "if anywhere along that line, one of these peoples' artwork is abused or misused, it doesn't just affect one family, one artist, it affects all people across that landscape."[50] Thus, the importance of developing means to protect stories, art and cultural practice is to maintain the continuity of the connections between differing families and communities. There is an implicit expectation that the law is the vehicle through which such interests can be secured.

The value of the interviews conducted in Yirrkala and Gangan with Marika is that they provide an opportunity to contextualise Aboriginal artistry highlighting the interconnection to land and how the works convey ancestoral connection. In many ways the film gives the practice of the law life, where the complexity of individual subject positions is revealed. In legal decisions, the structure produces particular images of legal subjects. To an extent, Marika is centrally engaged within the judgment, but the dynamism of her position and the engagement with the law and her community cannot be conveyed. But it is these elements that bring law to life. Through the interview these interconnections no longer remain abstracted but are contextualised, even to the extent that other members of Marika's community adopt particular phrases and terms to convey problems that are understood as legally remedied. Whilst the film is narrated by Marika,

---

[48] *Milpurrurru & Ors v Indofurn Pty Ltd and Ors* (1994) 30 IPR 209 at 215.
[49] C. Eatock and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.
[50] B. Marika quoted in *Copyrites*, Australian Film Finance Corporation Limited, 1997.

it also provides voice to elders in her community and thus allows for an appreciation of how these senior men understand and translate the copying of their designs. As an instance of understanding the dilemma and effect of finding a copied work, one senior man Gawirrin Gumana, on the discovery of a reproduction of his family's ancestral and totemic artwork onto a calico dress, explains to the camera;

> Someone was lots of painting like this, been stealing, robbing, stealing and put it into calico. I don't know who they are. They came and take a picture and put it into calico like, and make it up into a dress without knowing and without asking the owner or the artist. This is my father. They don't ask me or him, as the grandson about this calico. That mean I call robbing, stealing. I can't steal your painting, your artist, otherwise you put me in the jail. You put me in the court because that is your property. But this one and this painting is my property, my clan's property, not for everybody. This one comic I say. Take away from my bark, real bark, put it into the calico. That means that you are copycats. Copyright. Make it up. Please stop there. The world, anywhere in the world, Australia government please talk to them and tell them.[51]

Yanggarrny Wunungmurra, another elder, continues;

> They've taken our design without our knowing. They've got no right to do that. The person that has done this is not from here. It is not his belonging. He has no right. This is my knowledge, my land, my painting. It has been given to me by my grandfather. My grandfather said 'This is where you belong.' The memories of his knowledge will never end. It will be passed on. I know the stories of the painting of Gangan. I am responsible for it all, the land, the painting, the waters of Gangan and for seeing the land and the paintings are safe.[52]

For the broader Yolngu community the inappropriate reproduction of their work causes deep distress. However, the copyright cases have provided a language, a way of translating this distress into an intelligible form that non-indigenous people, balanda, may understand and act upon. This hints at the power of language as discussed in Chapter Four. Making sense of the real, Gumana and Wunungmurra utilise language that confirms the legal nature of the problem. They understand it is about 'property', about 'theft', about 'rights' and they convey this understanding through the language used to describe the problem. The language of theft and of property positions indigenous claims within the property discourse and with a recognisable expectation of justice. The law is the tool to remedy instances of theft and property. In this sense, indigenous people are also responsible for positioning indigenous knowledge within the framework of intellectual property for it provides a legitimate framework of action, where respect for indigenous artistry can be gained.

---

[51] G. Gumana quoted in *Copyrites*, Australian Film Finance Corporation Limited, 1997.

As the comments of Marika, Gumana and Wunungmurra illustrate the problems of infringement are complex, not least because the process of infringement has a history relating to the position of Aboriginal artwork within a consumer society where people want to copy the styles and designs. This makes for a multidimensional social problem that the law is ill equipped to deal with. Moreover, whilst there may be a particular bureaucratic aim in positioning indigenous knowledge within a legal realm (my previous chapters have considered the levels of this engagement), this does not mean that outcomes are in any way predictable. A variety of responses, governmental, cultural and individual push and produce the category of indigenous intellectual property. That is it resides simultaneously within the law and outside it. For instance, the law captures and produces an element of the property discourse, but the process of creating an Aboriginal art market, as well as indigenous participation within this market and specific custodial demands, cannot be fully recognised. It is these elements that remain at the margins of legal competence. The emancipatory potential of the law is that individuals are constantly involved in remaking the problem and the solution, and these remain in a state of flux.

Terri Janke: the impact of *Our Culture, Our Future*

Terri Janke is an indigenous lawyer and the author of the 1998 (released in 2000) *Our Culture, Our Future: Report On Australian Indigenous Cultural and Intellectual Property Rights.* The Report was a response to the 1994 governmental initiative *Stopping the Rip Offs* [53] and functioned as "part of a process to develop practical reform proposals for the improved recognition of indigenous cultural and intellectual property."[54] The Report was broadly seen and presented as the 'indigenous' response to the issues of intellectual property and eighty-three submissions from the earlier Discussion Paper (a prelude to the Report) were incorporated into the body of the text. The Report is widely referenced in discussions nationally and internationally regarding

---

[52] Y. Wunungmura quoted in *Copyrites*, Australian Film Finance Corporation Limited, 1997.
[53] The Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Indigenous arts and cultural expression* Canberra, 1994 was considered in Chapter Four.
[54] T. Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights* supra n.5 at 1.

'Australian indigenous cultural and intellectual property'.[55] Functioning in the singular, the Report has become representative of Aboriginal voice and interests in this area. The language of intellectual property law has been consolidated and modified to include the term 'cultural property' owing to the assertion held in the Report that the two are one and the same and that it is artificial to separate them.[56]

In 1996, following the *carpets case*, and during the *Bulun Bulun v R&T Textiles* the Aboriginal and Torres Strait Islander Commission (ATSIC) commissioned the writing of the Report. The law firm Michael Frankel and Company, where Janke was employed, won the tender to develop a report proposing options and recommendations for reform of the intellectual property regime to include 'indigenous intellectual property'.[57] The Report specifically contained broader terms of reference than *Stopping the Rip-Offs* and was trying to open up the area of law to foster a response to indigenous interests. It was envisaged that the Report would recommend *sui generis* legislation to encompass these different conceptions of indigenous intellectual property, allowing for a consideration of a wide range of "cultural products and expressions ... for example rights in ecological and pharmaceutical knowledge, biological products and derivatives, secret or sacred information, and intangible cultural expressions such as song, story, dance and ceremony."[58] To this end the Report detailed relevant case law, legislation and international protocols and the specific problems of biopiracy and ripoffs.[59] The spectrum of issues addressed in the Report engaged what was understood as cultural property, or cultural heritage.

---

[55] It is the key report mentioned by World Intellectual Property Organisation in discussions of Australian innovation in regards to indigenous intellectual property. This influences its citation in other contexts. See also in Australia: M. Davis, *Protecting Culture: Indigenous Cultural and Intellectual Property Rights in the Far North Queensland Wet Tropics* Aboriginal and Torres Strait Islander Commission Cairns and District Regional Council, 2002. I will be discussing the flow between the national and the international in the following Chapter.

[56] T. Janke, *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* supra n.5.

[57] M. Davis, "Indigenous Intellectual Property Protection Consultations with Aboriginal and Torres Strait Islander People" (1997) 3(90) *Aboriginal Law Bulletin*, 22 at 22.

[58] Ibid. , at 22.

[59] See: S. McDonnell, "Book Review: *Our Culture: Our Future, Report on Australian Indigenous Intellectual Property Rights*" (2000) 4(27) *Aboriginal Law Bulletin* 23.

Janke began the Report posing the question "what is indigenous cultural and intellectual property?" The answer emphasises the interconnection of knowledge, culture and belief systems and illustrates the potential problems for the law.

> Indigenous people view the world they live in as an integrated whole. Their beliefs, knowledge, arts and other forms of cultural expression have been handed down through the generations. The many stories songs, dances, paintings and other forms of expression are therefore important aspects of Indigenous cultural knowledge, power and identity.[60]

In an interview Janke emphasised that the difficulty of terminology is a concern.[61] However Janke's view is that just focusing on terminology hedges the debate, where there is consequently little legislative action. In making this point Janke pointed to the efforts by the World Intellectual Property Organisation (WIPO) and how these are caught up in conflicts of definition.[62] For example, the emphasis focuses on terminology rather than broader practical contextualisation and meaning.[63]

To this end, and for the purposes of the Report, Janke adopted definitions already provided by the Special Rapporteur Erica Irene Daes from the United Nations Report *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples.*[64] Thus *Our Culture: Our Future* signals the authority of international efforts in authorising the national discourse. For it is Special Rapporteur Erica Irene Daes that states that it would be inappropriate to make the distinction between 'cultural property' and 'intellectual property' for indigenous people.[65] Further Daes recommends that indigenous intellectual and cultural property be based on the notion of heritage.[66] Janke adopts Daes' recommendations and provides the following working definition;

> 'Indigenous Cultural and Intellectual Property' refers to Indigenous people's rights to their heritage. Such rights are also known as "Indigenous Heritage Rights".
>
> Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and

---

[60] T. Janke, *Our Culture: Our Future, Report on Australian Indigenous Intellectual Property Rights*, supra n.5 at 2.
[61] T. Janke, interview with author 11 June 2002, Terri Janke Solicitors, Rosebery Sydney. See Appendix B.
[62] Ibid.
[63] I will explore this dilemma in the next Chapter.
[64] E. I . Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* E/CN.4/Sub.2/1993/28, July 28, 1993.
[65] T. Janke, *Our Culture: Our Future, Report on Australian Indigenous Intellectual Property Rights*, supra n.53 at 8-9.
[66] Notwithstanding the definitional problems of 'heritage'.

refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity, including:

- Literary, performing and artistic works (including songs, music, dances, stories, ceremonies and symbols, narratives and poetry);
- Languages;
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotyopes of flora and fauna);
- Spiritual knowledge;
- All items of moveable cultural property [as defined by UNESCO], including burial artifacts;
- Indigenous ancestral remains;
- Indigenous human genetic material (including DNA and tissues);
- Cultural environment resources (including minerals and species);
- Immoveable cultural property (including sacred and historically significant sites and burial grounds);
- Documentation of Indigenous peoples heritage in archives, film, photographs, videotape or audiotape and all forms of media.
- The heritage of an Indigenous people is a living one and includes items which may be created in the future based on that heritage.[67]

Janke insists that whatever the definition of indigenous intellectual and cultural property it needs to be flexible to cater for the differing attitudes and responses of indigenous people. However, as would be immediately clear from the above definition, what is understood as indigenous intellectual property (or 'Indigenous Heritage Rights') bares slight resemblance to the legal framework of intellectual property. The concept of 'culture' is centrally located, but there is a slippage between the term heritage and culture that mistakes one for the other. There are two points to make. Firstly, heritage comes to be interpreted as 'culture'. Secondly, indigenous heritage is streamlined into a distinct 'other' tradition, with little space for reflection upon the dynamism and inter-cultural nature of indigenous and non-indigenous experience and history. This definition remakes indigenous people, 'indigenous culture' and 'indigenous heritage' (in their singularity and uniformity) as forever 'different' despite the ambiguous and complex cultural heritage generated through inter-cultural colonial engagement. In part the definition seems to adopt an abstract understanding of 'heritage' and 'culture' without reflection upon the differences between the two terms, and within indigenous peoples' lived experience. Nevertheless, the location of indigenous knowledge and cultural material within a property discourse remains stable. This location signals a profound shift in the discourse of intellectual property, both in how indigenous knowledge is understood and discussed, and

importantly in the practical legal dilemma of justifying a property right in intangible property that becomes more and more elusive and difficult to identify.

Indigenous intellectual and cultural property

Janke has been instrumental in repositioning the category of indigenous knowledge within intellectual property law and remodeling questions of indigenous rights and intellectual property protection to issues of sovereignty and cultural identification. It is peculiar to this Report that intellectual property and cultural property are conflated into each other. In effect 'indigenous intellectual property' is constructed as a distinct entity that bares little or no similarity to intellectual property law in practice except in name. This is significant and points to a number of dilemmas for both the law and for indigenous engagement with the law.

Using the terminology of intellectual property and substantially altering its form, generates new meaning and shifts the discursive framework. As the Report highlights there is little differentiation between 'indigenous intellectual property' and 'cultural property', as they pertain to a distinct indigenous heritage. Following this line of thinking, 'indigenous knowledge' comes to be understood as a 'type' of knowledge that is defined against 'western' knowledge. This creates a tension that is difficult to mediate in practical contexts because it is increasingly difficult to name and identify the key 'indigenous' or 'western' distinctions without accounting for innovative instances of adaptation and exchange that all cultures engage. For instance, if Aboriginal art is understood to be distinctly 'indigenous' – how can we account for the adaptation of the art onto canvas and using acrylic paints? Where is the line between 'indigenous' traditions and 'western' traditions, and how can we account for the fluidity of these without fixing indigenous experience as 'traditional' and therefore premodern? How can we account for indigenous agency in appropriating artistic forms and styles and developing these in specific and localised contexts? Inevitably, the disparity of purpose – in whether intellectual property is for the protection of indigenous integrity and cultural identity or for protecting the commercial incentive that indigenous knowledge contains – again arise.

> In light of the above points, we believe that either 'Indigenous Cultural and Intellectual Property Rights' or 'Indigenous Heritage Rights' is appropriate to refer to

[67] T. Janke, *Our Culture: Our Future, Report on Australian Indigenous Intellectual Property Rights*, supra n.5 at 11-12.

> the types of rights of Indigenous people in Australia but note the debate concerning the fact that 'property' denotes commercialization and protection of commercial rights, whereas 'heritage' implies preservation and maintenance issues. In the course of our research, we found that Indigenous Australians not only want to protect their heritage. They also want to control and benefit from its commercial application. Hence the issue of whether 'Indigenous Heritage Rights' as a term is preferable to 'Indigenous Cultural and Intellectual Property Rights' should be subject to further debate.[68]

Indigenous 'culture' assumes central importance and as the key marker of distinction between 'western' laws of intellectual property and those understood to be uniquely indigenous. As we have considered the law can be used as a lever to elevate indigenous concerns and expectations of justice, especially in regards to self-determination. But the problem with the claim from a practical standpoint is that it relies on a clear distinction being made between 'indigenous' culture and 'western' culture. This claim misunderstands the ambiguity of colonial relations and the capacity of indigenous people to adapt and modify mechanisms of liberal governance for themselves. Arguably 'culture' is a term that is deployed for its political effect and in the light of a long history of colonisation and dispossession can be understood. Unfortunately this stance has the consequence of increasing confusion because of the lack of clarity at the outset. Janke is right that definitions are difficult, but ambiguity is perhaps even more challenging, as it can foster unworkable binaries and damaging representations.

In addition there is an assumption that intellectual property rights function for all non-indigenous people whilst being inadequate in allowing indigenous people full utility to this function of the law. Janke explains that;

> Intellectual property refers to the range of laws that protect knowledge and idea, including artistic endeavor. The focus on intellectual property rights is largely commercial. Indigenous art production involves both cultural and commercial considerations. Intellectual property laws are in many ways inadequate in protecting Indigenous cultural rights.[69]

Through the differences that are asserted in the context of the argument proposed in the paper, it is possible to get an idea of the function of the language of intellectual property in this context, as it forms a platform for the articulation of indigenous cultural rights.

---

[68] Ibid. , at 12.

[69] T. Janke, "Indigenous cultural and intellectual property rights: a visual arts perspective" (2002) 151 *Arts Monthly Australia* 26 at 26.

The articulation of cultural rights engages the political, informing debates regarding sovereignty and self-determination, similar to those launched with the land rights movement. The framework of intellectual property provides an alternate forum for the recognition of such rights, in addition to the emphasis that they are interconnected to land rights. It is worth remembering that 'rights' are powers or instruments used to secure or promote group interests, and as such can only be utilised within particular interpretative frameworks.[70] The law provides this interpretative framework, however there still remains a disjuncture with the way in which a particular perspective of 'culture' is deployed. In contrast to Golvan's emphasis on commonality, Janke accentuates the difference. In this way 'culture' becomes representative of difference, and to an extent incommensurate otherness.

The reliance upon culture to explain difference is directly related to the point I made in Chapter Two about the inclusion of 'culture' within the law.[71] Culture has become a vantage point to understand new polarities. The turn to the cultural provides a means for identifying and enacting strategies of governance that discretely manage differing cultural groups and sets of problems as 'distinct'. Importantly this is a cyclical process where representatives of the 'distinct' cultural group also put into circulation the emphasis on culture as otherness. Indigenous people participate in strategies that manage their inclusion within law and in relation to the state. In *Our Culture: Our Future* culture is deployed as representative of otherness. The law is directly challenged by this incommensurate position – but its capacity to engage and remedy the concerns are limited. This is because the cultural underpinnings of the law are also revealed. *Our Culture: Our Future* demonstrates how culture is employed in the law as both an explanatory tool – where cultural differences pose 'special' challenges to legal inclusivity – and as a problematic where law is challenged to accommodate difference.

The real dilemma for intellectual property is justifying a property right in this new description of knowledge as 'heritage' and 'culture'. Law has a long and difficult history in establishing the bounds and marks that identify intangible subject matter. These are thrown into confusion

---

[70] D. Ivison, P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000 at 17.
[71] See Chapter Two at page 49-50.

with the potential problem of identifying 'culturally' distinct forms of property. The inevitable consequence of this is that intellectual property law retreats to the position of the stability of its categories of measurement.

In *Our Culture: Our Future*, and other articles emanating from this Report, culture is deployed as a term to convey a wholeness and continuity of cultural expression and cultural practice. As Janke illustrates using Daes's defintion of 'heritage';

> Heritage includes all expressions of the relationship between the people, their land and other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships – through sharing – with other peoples. All of the aspects of heritage are inter-related and cannot be separated from the traditional territory of the people concerned. What tangible and intangible items constitute the heritage of a particular indigenous people must be decided by the people themselves.[72]

Whilst the Report emphasises the need for recognition of two parallel and existing bodies of law, the language of property rights still assumes a central position. Jeremy Webber has explained that "interests that are recognised are expressed in a form that involves some accommodation to the need for the rights to be intelligible within the broader legal narrative."[73] As we considered earlier, the law demands certain positions from its participants. This is particularly observed in that there is little challenge made to the intellectual property framework. It is presumed to be a naturally occurring category of law to be adapted to indigenous needs. As I considered in Chapter Three, intellectual property has been historically produced and reproduced to suit the needs of various stakeholders, and, more recently the needs of corporations. Indigenous people feature as new 'stakeholders', but the language of the debate is not changed. The practical utility of intellectual property law remains beyond the reach of many indigenous people as it requires access to the language and logic of intellectual property law. It is ironic that the dilemmas that haunted the initial *Report of the Working Party* return in *Our Culture: Our Future*, in a modified way. That is whether the purpose of intellectual property law is to protect indigenous cultural integrity or economic incentive, and the disparity produced in doing both in terms of ascribing a fixity to indigenous knowledge.

---

[72] T. Janke, *Our Culture: Our Future, Report on Australian Indigenous Intellectual Property Rights* supra n.5 at 2.
[73] J. Webber, "Beyond Regret: Mabo's Implications for Australian Constitutionalism" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n.68 at 61.

Importantly, *Our Culture: Our Future* consolidates categories of intellectual property law. Janke legitimises the legal language of property, and concerns for cultural integrity become translated into questions of sovereignty, replete with a sense of competing cultures and cultural practices. The unity ascribed to indigenous culture (evident in the title), is imagined as a political tool but it denies the diversity of indigenous experience and the capacity of indigenous people to negotiate and utilise a range of legal, social and cultural mechanisms for deliberate and considered purposes.[74] Indeed the repetitive use of culture to denote difference is at odds with the reality of intercultural exchange and practice. What is absent from the discussion is how law provides a lever to elevate indigenous rights to new levels of concern. Relations of power are intrinsically engaged here as legal frameworks provide the means for alternate concepts of community and critiques of liberalism to be articulated and debated. But in terms of practical engagement, the Report arguably forecloses debate because it takes the issue to an area where intellectual property law is unable to function. The upshot of the Report, and indeed its key recommendation is to advocate for the development of a new law. In governmental terms it is a political stalemate that only the introduction of new legislation can break.[75] Relying on new legislation to secure means for the control of indigenous knowledges and cultural practice means that alternative (and perhaps more compatible) visions are relegated to positions of exteriority. There is a real danger that a separate law would further the 'imaginary Aboriginal' myth. However, the reality of indigenous engagement and practice to date is that intellectual property law has provided a useful tool to manage discrete indigenous interests within the market.[76] The question that then arises is how would a new law be articulated and how would it gain transition in the difficult space that *Our Culture: Our Future* has directed it to go? Is it an ideal position that is totally incommensurable in contemporary law and indigenous politics?

The history of Australia is unique in that its colonisation and subsequent relationship between the state and indigenous peoples; and the state and colonial subjects, was based on the myth of *terra nullius*. Relationships between the state, individuals and communities have taken two centuries to begin recovery. As Valerie Kerruish has noted, "I do not see how legally and politically, we can be said to be done with *terra nullius* until there is a recognition of [Aboriginal]

---

[74] These are issues on a political level that can compound indigenous agency.
[75] With a conservative government, this is even more difficult to achieve.
[76] Consider the discussion of resale royalties (droit de suite) in the previous chapter.

laws"[77] In part this illustrates that change in law, in certain instances is developed temultuously: that in response to indigenous rights and interests it evolves reluctantly and it is always mediated.

In the Australian political environment, little has changed in the five years since *Our Culture: Our Future*. Following the flurry of litigation and the eye of the bureaucracy turned to the concept of 'indigenous intellectual property' there has been little action. Debate still centres on the utility of passing new laws, and instigating innovative legislation that all remains phrased within the language and discourse of intellectual property law. So what does the position of stalemate between indigenous interests, legal frameworks and governmental bureaucracy tell us about functions of governance? Are indigenous interests in maintaining cultural integrity and cultural heritage best served through intellectual property law? How is it that tensions that characterise intellectual property law as a whole, in terms of justifying rights in intangible property, escape more considered attention? Can directing our gaze here provide a way to escape the current malaise and effect change for indigenous people? Are the concerns reducible to the unstable and changeable nature of all knowledge and information?

A fundamental problem in intellectual property law has been explained in the following way,

> Because intellectual property relates to information and knowledge, and because information and knowledge is built up over time by many people, it is hard to work out just what any given individual is truly responsible for. Ideas are triggered by related ones. All ideas have fuzzy boundaries. Working out where the fences of intellectual property ownership should go is very difficult.[78]

The complex and contradictory history of intellectual property law has meant that the real difficulties such as determining the boundaries of intellectual property ownership have remained relatively hidden. A central concern threatening the stability of the law is how to justify an exclusive right in information or knowledge. The intangibility of indigenous knowledge provides the catalyst for problems that are inherent to the law itself. This is because the inability to draw clear boundaries in how indigenous knowledge is developed and transmitted invites a reassessment of how law determines a property right in intangible subject

---

[77] V. Kerruish, "Reconciliation, Property and Rights" Christodoulidis, E., and S. Veitch, (eds), *Lethe's Law: Justice Law and Ethics in Reconciliation* Hart Publishing: Oxford, 2001 at 198.
[78] P. Drahos with J. Braithwaite *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications Ltd: London, 2002 at 26.

matter. In order to save face, the problem is shifted from the internal machinations of the law to the problem that indigenous people have with the law. That is, indigenous knowledge is seen as a particularly troubling and unique case, rather than the same question being directed at other forms of intangible subject matter, revealing that the problem is located within the law itself. This shift helps construct indigenous knowledge as 'distinct' and different, a 'type' (or trope) contrasted to 'western' knowledge, which is supposedly easier to demarcate and identify. This is a false representation of the difficulty of identifying indigenous knowledge that generates a perception that it is the cultural difference in knowledge formation that provides the real problem for the law, not the law's process of classification. Cultural difference is deployed as a strategic means to divert attention from the indeterminacy and fuzzy boundaries within the law.

Given what has been said about the limitations in current debates on the subject in Australia, despite increasing practical concerns relating to managing indigenous cultural material,[79] I need to now consider one new opening reinvigorating interest in indigenous rights in intellectual property. That is the impetus from the international fora – where there is both the push to consider the 'special' interests of indigenous people in relation to intellectual property protection and an attention to strengthen economic structures through consolidated global intellectual property regulation.

Conclusion

The production of indigenous knowledge in intellectual property law effects strategies of governance that normalise the phrasing of indigenous rights in intellectual property, and regulate the way in which claims of property are made. This means that the law is affirmed both as the key authority to deliver indigenous rights and the key lever in elevating indigenous claims for justice. Individuals can test the extent of legal possibility but do so through frameworks that legitimate, justify and consolidate the already existing location of the problem.

---

[79] One example of an attempt to provide a forum to address increasing concerns for the protection of indigenous cultural material was the 14 week Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Seminar Series, *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material.* To the author's knowledge, this seminar series was the longest sustained forum in Australia for discussing many of the complex issues that arise from indigenous cultural material held in cultural institutions since 1999.

To this extent individuals can also strategically establish ways for particular social problems to be understood through the prism of the law.

In drawing attention to the similarity of the problem to be resolved in copyright law Golvan understood the responsive capabilities of the law, and that they required a sense of similarity and familiarity at first instance before moving into areas of difference. For the law accepts difference presented through its own categories, and drawing attention to these, Golvan was able secure protection for Aboriginal art. However Golvan, Marika and Janke amongst others, perceive that the real difficulties for the law revolve around issues of interpreting 'culture'.

Yet indigenous rights in intellectual property remain mediated rights because of the reluctance to address issues of 'culture'. The category of indigenous intellectual property is not a pre-existing concept, but one that has been negotiated and produced by numerous actors and agencies and one that has been generated through the use of culture to denote difference. Whilst it may be a category that imposes particular demands on participants, within the structures of acting within the intellectual property framework there remains the capacity to modify and transform that framework to suit particular ends, including but not exclusively, assertions of sovereignty and self-determination. It is significant that the problem has been produced as legal, as conveying a legally distinct category of problems, ranging from 'theft of property' to engaging indigenous rights and justice. To identify a problem as a legal need requires a judgment about appropriate solutions to that problem. In this instance the concept of theft and property is inevitably tied to the market for Aboriginal art. Economic relations are tied to the identification of the problem as well as the imagined solutions, such as copyright and even the Labels of Authenticity.[80] In this way the law is set a tough challenge in both mediating the indigenous differences, and also countenancing the commonality of indigenous needs and interests, for example in an engagement with the market.

The commonality of interests provides one point of intersection, but the law is also used as a domain to secure indigenous rights to art, as part of larger issues regarding sovereignty and self-determination. This means that concerns for the protection of cultural identity and cultural

[80] The Labels of Authenticity were considered in Chapter Six.

integrity are brought into the intellectual property framework. These claims exceed the capacity of the law in this area, but in order to try and make them fit, and make the law adapt, certain effects are generated. These effects include a reliance on a distinction being made between indigenous 'traditional' knowledge and western 'modern' knowledge. This is a false distinction that forgets indigenous engagement with markets of scale, and reimagines indigenous experience and subjectivity as temporally fixed. As Elizabeth Povinelli has argued, the multicultural legacy of colonialism perpetuates unequal systems of power, by demanding that indigenous people identify with an impossible standard of authentic traditional culture.[81] The varying levels of engagement experienced within the law and within a community, renders opaque the complexity of demands made by participants both indigenous and non-indigenous. The law consolidates its own legitimacy through the action of individuals but these are often positioned within liberal ideals of justice and equity. These notions function as techniques that shape the future direction of action and construct the terms of the debate.

In constructing and negotiating the terms of the debate this chapter has argued for an awareness of the instrumentality of individuals. Golvan's innovation in advancing the interests of the indigenous artists highlights how the narrative of intellectual property law maintains its consistency. Marika's translation of cultural practice into the courts, and the concept of copyright into her community, illustrates the function of legal discourse in shaping expectations to particular inequities and the intersection of legal with other forms of narrative. Janke's interpretation and advocacy of the category indigenous intellectual and cultural property demonstrates the (perceived) naturalness of the language of intellectual property and its classificatory frameworks. These instances of individual agency also represent how such agency consolidates governmental agendas, however contradictory and haphazard these will always be.

---

[81] E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* Duke University Press: Durham and London, 2002 at 6.

Chapter Eight

Globalising Indigenous Rights in Intellectual Property

> Question: My name is Marie Samuel. I am with the NGO Yachy Wasi, based in Peru and New York. I am not indigenous but our constituency is. I am glad to see WIPO is there, but at the same time I have a question. As you know the Permanent Forum on Indigenous issues has been adopted. I assume that one of the questions that they will deal with is traditional knowledge. Now I see that there is a panel of scholars, but you do not have an indigenous representative speaking from their point of view ...
> Professor Hugh Hanson: May I ask you a question? From which indigenous group should we have had a representative?
> Questioner: It could have been any indigenous group.
> Professor Hugh Hanson: What would they have said that was not said today or that you did not say?
> Questioner: Well it is like speaking about a dead body or something. The person is not there to speak. Apparently none of you are indigenous. It would have been good to have an indigenous point of view. That is my point.
> Professor Hugh Hanson: Okay. I might say we did put out a word to invite some NGOs to speak and, for whatever reason it never happened. But there was an invitation.[1]

This thesis has analysed the social, economic, political and individual influences that have produced the category of indigenous knowledge in Australian intellectual property law. As has been indicated throughout the work, the problem of protecting indigenous knowledge and the attention to intellectual property law for remedy is not only an issue in Australia. It is also a pressing international matter that peak global bodies and national governments are discussing.

This chapter will illustrate how many of the issues already explored within a national context are re-inscribed and developed in parallel within the international domain. The process of generating the category of indigenous knowledge within an intellectual property regime is also

---

[1] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" (2002) 11(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 753 at 793.

a product of multidimensional networks of power crossing transnational borders and incorporating varying levels of political interpretation and imagination. Significantly, the governing strategies deployed in the global context differ to those already considered within a national context owing to the diffuse biopolitics that informs the global order of things.

The chapter considers the global politics of intellectual property and the way indigenous knowledge is positioned as a particularly pressing, yet differential 'global issue' of international legal concern. It will illustrate how many of the problems that have been raised in the national discourse on the protection of indigenous knowledge also thrive and underpin international efforts and debate. However, these are moderated by differing political agendas engaged at the international level.

Overall the chapter will suggest the 'interpenetration' of national and international objectives governing how the category of indigenous knowledge is managed. It will point to the overlap of strategies for identifying indigenous subject matter, and demonstrate the extent to which cultural difference is treated in global initiatives. The point is to illuminate the concomitant elements engaging with the intangible subject matter of indigenous knowledge that help construe the subject as legally given and open to techniques of governance. The concluding chapter will take this global nexus as a point of departure thereby highlighting Australia's role in influencing and authorising the global construction of the indigenous knowledge category.

The global politics of 'traditional knowledge' and intellectual property

A brief summary of the World Intellectual Property Organisation (WIPO) and its history of engagement with colonial/postcolonial relations sets the context and will help situate the current politics involving the position of indigenous people and indigenous knowledge in international regimes of intellectual property. It will illustrate that the fluidity of issues within the international domain are related to both the decolonisation period following the Second World War and the increased globalisation of markets and trade that have dominated the world economic stage for the last quarter of the Twentieth Century.

As already stated in Chapter Three, prior to the establishment of WIPO in 1967, there existed a series of international conventions that regulated intellectual property frameworks and shaped intellectual property norms.[2] Theorists like Saunders and Bently and Sherman have highlighted how these conventions, in particular the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention on the Protection of Literary and Artistic Works* (1886), were established through political, social and cultural indices. Saunders argues that the signing the Berne Convention "was the outcome of unforeseeable interactions between a variety of geopolitical interests, legal traditions, cultural politics, commercial calculations, literary and artistic professional pressures and governmental concern with trade economics, foreign policy priorities and national cultural distinction."[3] Bently and Sherman take this argument as a point of departure in their analysis and conclude that, "Berne emerged out of a complex matrix of pre-existing international and colonial relations."[4] What is important in Bently and Sherman's reading of this history is the distinct presence of a colonial politics that informed the production of international standards for intellectual property protection. For instance, Britain was reluctant to enter a multilateral treaty owing to concerns regarding the negative impact such a treaty might have on Britain's relationship with its many colonies.[5] As Grosheide observes, "... for the domain of early intellectual property law, the relationship between law and culture is basically determined by the power structure within countries and between countries."[6] The illustrative point is that colonial (and later post-colonial politics) have been formative to the law in this area.

The Convention establishing WIPO occurred in 1967. It replaced the numerous treaties and conventions relating to intellectual property and assumed a governing and administration role

---

[2] Arup suggests that through these conventions, intellectual property provided one of the earliest occasions for multilateral agreement. C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* Cambridge University Press: Cambridge 2000 at 65.

[3] D. Saunders quoted in L. Bently and B. Sherman, "Great Britain and the Signing of the Berne Convention in 1886" (2001) 48(3) *Journal of the Copyright Society of the USA* 311 at 312. See: D. Saunders, *Authorship and Copyright* Routledge: London and New York, 1992. See also: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1996* Centre for Commercial Law Studies, Queen Mary College: London, 1987. This text is limited to a discussion of politics as primarily a product of the nation state which is not my interest here.

[4] Ibid. , at 339.

[5] Ibid. , at 318.

[6] F.W. Grosheide, "General introduction" Grosheide, F.W., and J.J. Brinkoff (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002 at 7.

in setting international standards and norms.[7] With the 1974 agreement to join the United Nations system, WIPO currently functions as the international government organistion (IGO) most central to the international intellectual property regime.[8] This is despite significant challenges from a turbulent and changing political environment that has marked the period. For instance, WIPO has faced encroachment by the World Trade Organisation (WTO) that sponsored the multilateral negotiations resulting in the TRIPs agreement, "challenging its own position as the forum for making international intellectual property law."[9]

The transition for WIPO to a United Nations international governmental organisation effectively tipped the balance of power in decision making matters, towards the decolonising and developing countries dominant in the new global polity.[10] "For the first time since the industrial revolution [there was] a shift from the developed to the underdeveloped world."[11] As Ryan notes, "the postcolonial enlargement of the United Nations in the 1960s and 1970s offered the best institutional setting to become a universal organization with the goal of promoting the 'protection of intellectual property throughout the world.'"[12] However, with the 'one vote, one nation' system, the international intellectual property framework developed with weak rules and limited enforcement capabilities.[13]

The 'one nation one vote' decision making at WIPO gave developing countries control over the WIPO agenda.[14] This disrupted the ambitions of other wealthier states (aptly demonstrated

---

[7] M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* Brookings Institution Press: Washington D.C. 1998 at 94-101.
[8] Ibid. , at 125.
[9] Ibid. , at 125. See also: C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* supra n.2 at 40 for an account of the norms and processes of the WTO.
[10] Grosheide comments, "As a consequence of decolonization the geopolitical and demographic map changed dramatically. In Asia the amount of internationally recognized states multiplied by a factor of five. Whereas Africa in 1939 knew of only one such state, after the war this amounted to about fifty. Even in South and Central America, some twelve states were formed." F.W. Grosheide, "General Introduction" supra n.6 at 13.
[11] Ibid. , at 13. It is important to note that the distinction between 'developed' and 'underdeveloped' nations is not clear. Moreover the terms of description are unsatisfactory in that they convey negative associations. For a good consideration of this problem see: D.E. Long, "'Globalisation': A Future Trend or a Satisfying Mirage?" (2001) 49(1) *Journal of the Copyright Society of USA* 313 at ft.11 at 317.
[12] M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* supra n.7 at 127.
[13] Drahos (with Braithwaite) argue that "WIPO's deepest failure from the US perspective lay in the arena of enforcement. The general view in the US private sector was that even if they could get a treaty through WIPO there was little point if the treaty standards were not enforceable." P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan: London, 2002 at 111.
[14] M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* supra n.7 at 91.

in the Group of 77) that asserted "state rights to rationalize foreign enterprises, create commodity cartels and regulate multinational organizations."[15] WIPO provided a forum where advocates from developing countries were provided a platform to suggest the lowering of intellectual property standards.[16] Drahos (with Braithwaite) explains that:

> As the number of developing countries joining WIPO grew, the task of the WIPO secretariat in managing conflict grew increasingly difficult ... But there was little hope of achieving consensus between the numerous states of the South, which were intellectual property importers, and a few wealthy states that were intellectual property exporters, especially in the 1970s and 1980s when developing countries were claiming that much technological knowledge was in fact the heritage of mankind. Moreover since Western intellectual property systems did not recognize the intellectual property of indigenous people, the states of the South were participating in a regime that by definition made them part of the intellectual property poor.[17]

Beginning in the 1980s, intellectual property industries based predominately in the United States and governmental representatives began turning away from WIPO in order to consider alternative and more effective ways of establishing and enforcing standards of international intellectual property protection.[18] Attention turned to the General Agreement of Trade and Tariffs (GATT) multilateral trade negotiations to secure such global ambitions. GATT, later the World Trade Organisation (WTO)[19], provided institutional support for developing and enforcing the agendas of states with intellectual property rich industries because it directly tied intellectual property protection and enforcement to trade. The most effective tool in securing this aim has been the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).[20] As Grosheide notes, "TRIPs for the first time covers all areas of ip [intellectual property] law and for the first time ever determines substantive minimum standards for the protection of iprs [intellectual property rights]. So it really introduces global norms rather than being once more an instrument resting on a diversity of common rules."[21]

---

[15] Ibid. , at 127.

[16] P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13 at 195.

[17] Ibid. , at 112.

[18] M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* supra n.7 at 132. See also: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13 at 110.

[19] The WTO was established at the end of the 1994 Uruguay Round and replaced GATT. See: C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* supra n.2 at 45-48.

[20] For a considered study of the political, bureaucratic, cultural and individual influences that led to the TRIPs agreement see generally: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the knowledge Economy?* supra n.13. Also see: M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* Sweet and Maxwell: London, 1996.

[21] F.W. Grosheide, "General Introduction" supra n.6 at 17. Arup also notes that the "agreement cuts across provisions made in other international organisations but in some instances defer to or actively support them." But

With such changes the WTO has had a significant impact on the organisational responsibilities of WIPO.[22] Whilst WIPO has struggled to remain relevant, both the WTO and WIPO have redefined their respective roles and cooperate where their roles intersect, for example in the implementation of TRIPs; the creation of new norms; and, intellectual property dispute settlement.[23] WIPO has also remained relevant by taking charge of discrete research interests that have arisen in relation to the increased promulgation of intellectual property regimes throughout the world. It is in this way that discussions regarding the possible protection of indigenous knowledge, known predominately through the analogue 'traditional knowledge', have fallen under the auspices of WIPO. However, how 'traditional knowledge' gained the attention of WIPO as a 'special' intellectual property concern is directly related to colonial/postcolonial politics and the emergence of indigenous people as subjects within international law.[24]

Indigenous people and their interests have been slowly recognised in the international arena.[25] The 1957 International Labor Organisation (ILO) Convention 107 was instrumental in positioning the initial claims for the recognition of indigenous rights.[26] However, as Martin Nakata suggests, the "specific concerns relating to indigenous populations had not been on the agenda at all prior to 1969."[27] The study on indigenous people in 1970 "directly led to the establishment of the UN Working Group on Indigenous Populations in 1982."[28] Coupled with

---

the question remains whether the WTO is serious about this project of complementarity. C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* supra n.2 at 42.

[22] "WIPO was rather taken surprise by the TRIPs agenda." C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* supra n.2 at 182.

[23] M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* supra n.7 at 132.

[24] See R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 *The American Journal of International Law* 369.

[25] See: S. Pritchard, "The United Nations and the making of a Declaration on Indigenous Rights" (1997) 3(89) *Aboriginal Law Bulletin* 4; and generally, S. Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* Zed Books: London, 1997; P. Thornberry, *International Law and the Rights of Minorities* Clarendon Press: Oxford, 1991.

[26] International Labor Organisation, *Convention 107 concerning Indigenous and Tribal Population* (1957). See also the International Labor Organisation, *Convention 169 concerning Indigenous and Tribal peoples in Independent Countries,* 76th Session, Geneva Switzerland, 1989.

[27] M. Nakata, "The United Nations and Indigenous People" Nakata, M. (ed), *Indigenous Peoples, Racism and the United Nations* Common Ground: Sydney, 2001 at 18.

[28] Ibid. , at 18.

special reports on discrimination and racism as part of a human rights agenda,[29] the concerns of indigenous people are currently dispersed across several United Nations forums.[30] A recent initiative has been the endorsement by the General Assembly for the establishment of the Permanent Forum on Indigenous Issues. But as Havermann points out, it has taken from 1993-2002 to get this forum established, and its representational nature and limited capacity remain unresolved concerns.[31] The key point is that cognisance of indigenous issues have arisen haphazardly within the international domain. In this sense it is worth noting that the power dynamics between indigenous people and state frameworks remain relatively intact even though postcolonial politics have informed the indigenous rights platform. The opening quote demonstrates how the question of indigenous representation remains a challenge. The problem of 'who to ask' as expressed by Professor Hanson indicates the effects of unresolved issues relating to indigenous inclusion and participation in the international domain.

The WIPO agenda on 'traditional knowledge' has been informed by the multiple sites that have articulated indigenous rights and interests.[32] For example, indigenous intellectual property was a key issue explored by the UN Special Rapporteur Erica Irene Daes.[33] It has also been directly addressed by indigenous people in alternate indigenous forums.[34] During this period, WIPO has also reinvigorated fresh research to this area.[35] This attention can also be seen in the

---

[29] In 1970 the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that a complete and thorough study of the problem of discrimination against indigenous people be undertaken. See J. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, U.N Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4(1986); and E.I. Daes, *Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous Peoples*, Final report of the Special Rapporteur, Mrs. Erica-Irene Daes in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights, Geneva, 47th Session, E/CN.4/Sub.2/1995/26.

[30] For example: UNESCO; the UN Development Program; and WIPO.

[31] P. Havermann, "The Participation Deficit: Globalisation: Governance and Indigenous Peoples" (2001) 3 *Balayi: Culture: Law and Colonialism* 9 at 24.

[32] The interest was initially in folklore. See: M. Blakeney, "Protection of Traditional Knowledge under Intellectual Property Law" (2000) 22(6) *European Intellectual Property Review* 251.

[33] E.I. Daes, *Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous People,* presented by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and President of the Working Group on Indigenous Populations, Geneva, 45th Session, E/CN.4/Sub.2/1993/28.

[34] See: *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* Written and adopted at the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatane, New-Zealand, 12-13 June, 1993.

[35] As Nakata notes, "In 1998, WIPO was mandated to identify and explore the issues with intellectual property aspects of traditional knowledge and folklore protection." M. Nakata, "The United Nations and Indigenous People" supra n.27 at 18.

light of my earlier comments about WIPO – given that trade issues were being decided elsewhere, to remain relevant WIPO has taken on issues of 'culture' and other fringe concerns.[36] However, as has been suggested at other stages of this thesis, trade is also in 'culture'.

Complicated political elements integral to indigenous interests in intellectual property remain peripheral concerns within the international domain. Here the danger is that the range of political claims, because they remain relatively unaddressed threaten to undermine efforts to be inclusive to indigenous rights. There is a sense of 'pan' indigeneity that exists at the heart of global theorising of indigenous concerns. Notably most of the 'pan' commonality is understood as exploitation, with localised differences (in terms of colonisation). This helps explain how most of the debate in relation to indigenous knowledge is not about copyright, but about patents. It is medicinal knowledge that is positioned as most under threat from exploitative practices. The emotive 'biopiracy' is the new challenge in protecting indigenous knowledge. This observation will be expanded in terms of 'future expectation' in the concluding chapter. However, first it is important to consider the effects of recent globalisation trends in intellectual property, and how the international debates summarily exclude politics and context. This directly impacts on the way indigenous knowledge is imagined as an intellectual property category in a global regime

Globalising intellectual property

Recent literature has highlighted the significance of globalisation (and the counter effects of regionalism) on intellectual property protection.[37] As globalisation has generated an increased

---

[36] Grosheide argues that it was UNESCO that "started introducing treaties, organizing conferences and setting up projects in order to stimulate a process of world wide reflection as to how cultural policies could be integrated into development strategies." F.W. Grosheide, "General Introduction" supra n.6 at 21.

[37] See for instance, D.E. Long, "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" (1998) 23 *N.C.J. Int'l L. & Com. Reg.*229; D.E. Long, "'Globalisation': A Future Trend or a Satisfying Mirage?" supra n.11; D.E. Long, "'Democratising Globalisation': Practicing the Policies of Cultural Inclusion" (2002) 10 *Cardozo Journal of International and Comparative Law* 218; C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* supra n.2. See also the following collection of essays: P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* Palgrave: McMillan: Hampshire 2002.

intersection of markets and stakeholders, new economic rights have been produced.[38] Concern for the effects of protecting these new rights at both an international and institutional level have left many commentators wary of the corresponding development of global standards for intellectual property frameworks.[39] As Drahos notes, "The dangers of central command and loss of liberty flow from the relentless global expansion of intellectual property *systems* rather than individual possession of an intellectual property right."[40]

To demonstrate and hence examine the effects of the global expanse of intellectual property systems focus has been directed to the multilateral TRIPs agreement.[41] TRIPs provides an example of how intellectual property harmonisation can profoundly alter strategies of global governance. It makes explicit the direct relationship between trade, economics and intellectual property. TRIPs has effectively consolidated a power dynamic privileging countries that are already key players in international markets of information and industrial technology.[42] Thus the TRIPs agreement has fundamentally shifted the way individual countries engage with intellectual property rights, the market and other nation states. As Ryan explains,

> TRIPs is potentially the most important legal advance for the world trading system since the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. Postwar diplomats conducted an 'industrial diplomacy' ... Now post-cold war

---

[38] P.E. Geller, "Copyright History and the Future: What's culture got to do with it?" (2000) 48 *Journal of the Copyright Society of the USA* 210 at 251. See also: P. Hirst and G. Thompson, "Globalisation and the History of the International Economy" Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate* Polity Press: Cambridge, 2000; and, J. Perraton, D. Goldblatt, D. Held and A. McGrew, "Economic Activity in a Globalising World" Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate* Polity Press: Cambridge, 2000.

[39] D.E. Long, "'Globalisation': A Future Trend or a Satisfying Mirage?" supra n.11at 318-319; R. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalisation of Intellectual Property" (1995) 24 *Denv. J. Int'l L. & Pol'y* 109; and, K. Aoki, "Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property and the Internet" (1998) 5 *Ind. J. Global Leg. Studies* 443.

[40] P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13 at 5 (emphasis in text).

[41] For a selection in the otherwise extensive literature see: S. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* State University of New York Press: New York, 1998; S. Sell, "Industry Strategy for Intellectual Property and Trade: The Quest for TRIPs and post-TRIPs Strategies" (2002) 10 *Cardozo Journal of International and Comparative Law* 79; D.E. Long, "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" supra n.37; D.E. Long, "'Globalisation': A Future Trend or a Satisfying Mirage?" supra n.11; P. Drahos and R. Mayne, *Global Intellectual Property Rights: Knowledge, Access and Development* supra n.37; P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13; M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* supra n.20; C. Correa, "Harmonisation of Intellectual Property Rights in Latin America: Is there still room for differentiation?" (1997) *N.Y.U. J. Int'l L. & Pol'y.* 109.

[42] K. Aoki, "Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) 6 *Ind. J. Global Leg.Stud.* 11.

> diplomats are conducting a knowledge diplomacy that is institutionalising trade in products of invention and expression, offering innovators the incentive to make their products for the global market. [43]

The implementation of the TRIPs agreement is significant in determining what options for global reform of intellectual property to protect indigenous knowledge can be considered for the future. Yet there remain considerable political tensions within and between states that the TRIPs agreement has ignored and these have come to characterise the debates regarding the inherent inequities codified through the agreement and the sense that it presents deeply perspectival positions.

Christopher May suggests that there is a scarcity of work investigating the new global politics of intellectual property.[44] He posits that it was predominately non-legal scholars who drew attention to the wider political issues that surround concerns for intellectual property protection and the social effects generated by such rights. Therefore May emphasises the need for discussion of intellectual property law to be set within broader political contexts.[45] As he states,

> ... much of the current legal discussion misses important global political issues related to the general balance between the private right to reward and the construction or fostering of a public realm of 'free knowledge' ... While legal scholars have much to offer these debates they also need to think about the global context of these issues and address the issues that stem from the mismatch of the (national) justifications and (global) society.[46]

One primary problem is how inequitable relations of power are disguised under the rubric of 'equitable' international standards. There is a presumption of equality in the global politic that belies the multiple social and economic inequalities that characterise relations between (and within) countries and nation states.[47] "We are currently in a transitory period, where the global

---

[43] M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* supra n.7 at 1. See also: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13.

[44] C. May, "Why IPRs are a Global Political Issue" (2003) 1 *European Intellectual Property Review* 1.

[45] Ibid. , at 1.

[46] Ibid. , at 5.

[47] May understands the most obvious economic divide to be between 'developed' and developing countries (despite the inherent problems in making such a neat division). See also C. May, *A Global Political Economy of Intellectual Property Rights: The new enclosure?* Routledge: London and New York, 2000; S. Sell, *Power and Ideas: North South Politics of Intellectual Property and Antitrust* State supra n.41; D.E. Long, "Democratizing Globalization: Practicing the Politics of Cultural Inclusion" supra n.37; D.E. Long, "Globalization: A Future Trend or a Satisfying Mirage?" supra n.11; Gana, "Internationalisation of intellectual property or has creativity died in the

governance regime of IPRs has been established but the political community on which the justification of intellectual property itself depends is far from globalised."[48] Here May makes a pertinent point, namely the danger of assuming a generality of purpose from international discussions about intellectual property to the particular social and political contexts governing their adoption and utilisation. As Aoki also notes, "[o]ne of the biggest mistakes one can make when considering the globalisation of intellectual property law is to assume away the increasingly contentious politics of the phenomenon."[49]

Differing national concerns and contexts destabilise the universality approach in setting global intellectual property standards. Attention to the increased globalisation in knowledge management frameworks of intellectual property and the attempts at harmonisation of standards and procedural rules misunderstands the underlying disparity in social and economic wants of individual countries and stakeholders. As Ryan has observed, "[k]nowledge diplomacy is being conducted with participation from nearly all the world's states. But state's interests and goals differ widely because of variations in levels of wealth, economic structure, technological capability, governmental form and cultural tradition."[50] This makes for contested politics informing both national and international domains. Yet circularity characterises the tension between the national and the international development of intellectual property standards because "each depends on the other for integrity."[51]

It is crucial to note that, within each nation state exist multiple subjectivities that also respond, engage and interact within the circularity of local and global engagement. The presumption that power is vested in nation states misunderstands the dynamics internal to these same states and that individual subjectivity is intrinsic to the complicated relays, dispersions and resistances of power. As Sarat and Simon have noted, "[r]ealist legal studies almost always operate within a political body, usually the nations, although this body is not often itself an object of realist

---

Third World" supra n.39; P. Drahos, "BITs and BIPs: Bilateralism in Intellectual Property" (2001) 4(6) *The Journal of World Intellectual Property* 791.

[48] Ibid. , at 4.

[49] K. Aoki, "Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" supra n.42 at 11.

[50] M. Ryan, *Knowledge Diplomacy Global Competition and the Politics of Intellectual Property* supra n.7 at 191.

[51] K. Aoki, "Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property and the Internet" supra n.39 at 469.

analysis. The boundaries and exclusions wrapped up in this national frame are made up not just of its political borders, but also of its racial, cultural and linguistic embodiments."[52]

It is the interwoven strategies of the global and the local that makes the dichotomy between the two unworkable. This runs against the popular argument that the "global entails homogenization and undifferentiated identity whereas the local preserves heterogeneity and difference."[53] Whilst there lies an homogenisation of indigenous interests (a pan indigeneity) at an international level, this is an observation about the lack of politics and subjectivity informing the construction of the 'indigenous knowledge' category. For instance, the diversity of indigenous political interests within a state like Australia remain relatively undisclosed. Thus the point is how politics and particularity can be missed in both national and international contexts: the imaginary Aboriginal stretches across transnational borders.

The global and the local are intermeshed with the production of the local context informing the interest in the global spaces. Hardt and Negri suggest that this process requires reflection upon the "production of locality, that is, the social machines that create and recreate the identities and differences that are understood as the local."[54] Thus the governing strategies are understood as mutually engaged but produce "different networks of flows and obstacles in which the local moment or perspective gives priority to the reterritorialising of barriers and boundaries and the global moment privileges the mobility of deterritorialising flows."[55] What Hardt and Negri suggest here is that mobile and modulating networks of power produce problems of differentiation.

Whilst political elements may underpin (and contest) the classification of other intellectual property subject matter, indigenous knowledge presents special difficulties for the law owing to the highly politicised character of indigenous knowledge. Broader political claims (like those for self-determination) and diverse indigenous contexts and expectations are flattened, with attention to indigenous differences deflected by the primacy of the established

---

[52] A. Sarat and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship" (2001) 13(35) *Yale Journal of the Humanities* 1 at 7.
[53] M. Hardt and A. Negri, *Empire* Harvard University Press: Massachusetts and London, 2000 at 45.
[54] Ibid. , at 45.
[55] Ibid. , at 45.

modern/tradition polarity within the intellectual property framework. As already discussed, any incongruity is identified as cultural in nature. With indigenous claims, culture is implicitly brought within a legal discourse.

The turn to culture within legal study more generally indicates a conscious sensitivity to these issues. The law has been forced to consider the world beyond its boundaries through the specific moments where claims of legal expectation also incorporate arguments regarding cultural identity. As examined in Chapter Four, the implications such identity claims have for law point to the need for legal studies to engage cultural critiques.[56] The position of cultural issues within law significantly points to a shift in how culture has become a nexus for governing. As Sarat and Simon explain, "[w]hether we like it or not, the practices of governance help set the agenda for legal scholarship."[57]

To some degree political and cultural contexts are rendered explicit in the identification of indigenous subject matter in intellectual property frameworks. However, rather than finding a stable legal object, the recognition of the cultural elements also influence perceptions of the incompatibility of the subject matter. This is not a problem for those comfortable with poststructuralist deconstruction and cultural approaches to the law. However with indigenous knowledge the interest in the 'indigenous' exceeds that particular discursive legal framework. For the more traditional legal scholar, such as the legal realist, the lack of solidity and universality in the legal object creates an unhappy tension. Under such circumstances, cultural politics within the 'indigenous' category are underplayed so that attempts to manage the legitimacy of the broader negotiation of cultural inclusion, within the law's established terms, can be effected. It is this interplay between acknowledging the cultural politics and reducing it that characterises the position of indigenous knowledge within both Australian and global systems of intellectual property.

---

[56] See the collection of essays in: A. Sarat and J. Simon (eds), *Cultural Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism* Duke University Press: Durham and London, 2003.

[57] S. Sarat and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship" supra n.52 at 6. See also: N. Mezey, "Approaches to the Cultural study of Law: Law as Culture" (2001) 13(35) *Yale Journal of Law and the Humanities* 35.

Since 1976 discussion about how to adequately protect indigenous knowledge has featured in international forums, and since that time there has been contest over the identification and even the instrumentality of the law in this area.[58] For instance, as mentioned above, attention to secure indigenous knowledge as subject matter in intellectual property discourse was made difficult by the ambiguity of term 'folklore'.[59] National reports like the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*[60] and the discussion stimulated internationally following the 1967 Tunis Model Law, indicated the varying difficulties in developing a representational consensus about the nature of 'folklore' and how an identification of folklore might be achieved. At its inception as a concept for legal attention, 'indigenous knowledge' was noted as difficult to identify.

Chapter One highlighted the struggle to describe indigenous knowledge through a quote from a key WIPO Report.[61] The exact position of indigenous knowledge within the intellectual property discourse remains uncertain. The following example aptly illustrates the point.

> We are going to discuss two issues: a *cultural* one which is loosely referred to as 'folklore' and a *scientific* one, which is referred to as 'traditional knowledge and genetic resources' – traditional knowledge being those remedies which indigenous people usually have developed over time. We will discuss whether these remedies are then exploited, genetic resources; just that community's resources that are used by others and are not necessarily tied to any known cures within that particular community. [62]

In this instance, traditional knowledge is deployed in a limited sense – it refers only to medicinal and scientific form. A troubling binary is replayed where folklore equates to 'culture' whilst traditional knowledge is defined scientifically and consequently set apart from the 'cultural'. To this end 'culture' becomes representative of difference whereas 'traditional knowledge' is made identifiably familiar through its association with science. Folklore as a sufficiently vague term with little legal clout renders these cultural elements beyond legal jurisdiction. In similar circumstances to those analysed in reference to the 1981 *Report of the*

---

[58] See: M. Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law" supra n.32.
[59] See Chapter Four at page 171.
[60] Department of Home Affairs and the Environment *Report of the Working Party on the Protection of Aboriginal Folklore* Canberra, December 1981.
[61] World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999),* Geneva, Switzerland, 2001. See Chapter One at page 15.
[62] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" (2002) 11(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 753 at 754 [emphasis mine].

Working Party on the Protection of Aboriginal Folklore, the problem of identifying the substance of folklore is remade as ambiguous and anthropological. Indigenous cultural expression remains unidentifiable to the law except in the circumstances of knowledge pertaining to 'remedies' classified through a scientific lens. The mistake of making such a division is the production of the (false) divide assumed between indigenous and scientific knowledge.[63] Echoing similar concerns but in a different context, Long has also observed that "culture and intellectual property appear to have gotten a divorce".[64] Culture remains a term that is utilised to indicate (irreconcilable) difference rather than recognised as intrinsic to the emergence and function of intellectual property law.[65] As Geller reiterates, "The categorical terms of the law do not easily translate into the terms of the constantly mutating cultural discourse."[66]

Notwithstanding these consistent difficulties, the international interest in the subject of protection for indigenous knowledge parallels the development of the issue locally. Debate about the protection of indigenous knowledge is stimulated by the increased recognition of the value of indigenous knowledge in local and international contexts.[67] As I have already discussed, multiple stakeholders, not only indigenous, direct attention to the value of this subject. The promulgation of indigenous knowledge databases nationally and internationally suggest that there are a diverse range of interest groups working to document and 'preserve' indigenous knowledges for reasons ranging from environmental conservation to future development opportunities. According to Agrawal;

> The strategy of creating databases to preserve and spread indigenous knowledge has received significant support from a large number of donor agencies and international researchers, among them the World Bank, UNESCO, IDRC, UNDP, and also many networks of scholars and policy activists.[68]

In this context, Agrawal suggests that the objectives of the databases are twofold –

> They are intended to protect indigenous knowledge in the face of myriad pressures that are undermining the conditions under which indigenous peoples and knowledge thrive. Secondly they aim to collect and analyse the available information, and identify

---

[63] See Chapter One at page 12.
[64] D.E. Long "'Democratising Globalisation': Practicing the Policies of Cultural Inclusion" supra n.37 at 217
[65] The cultural production of intellectual property law was considered in Chapter Three.
[66] P.E. Geller, "Copyright History and the Future: What's culture got to do with it?" supra n.38 at 261.
[67] This is demonstrated in the increase value of Aboriginal art. See also A. Ridgeway, *Indigenous Arts Update*, August 2003.
[68] A. Agrawal, "Indigenous Knowledge and the Politics of Classification" (2002) 54 (173) *International Social Science Journal* 287 at 288.

> specific features that can be generalized and applied more widely in the service of more effective development and environmental conservation.[69]

Thus a range of political interests shape national and international directives and contribute to the management of future expectation in this area. In addition a composite of power relations underpin both the increased recognition of value of indigenous knowledge and the implementation of strategies for managing the storage of such knowledge.

The extent of interest in developing an intellectual property remedy for indigenous knowledge furthers the production of the category within global frameworks. In addition, globalisation trends also inform the identification and hence the construction of the category. Indeed as Kimberely Tallbear suggests, processes of globalisation have also been valuable for in mobilising the political impetus of indigenous people's claims: "In condemning globalization without nuance, we fail to note that we benefit from globalization in some ways; it enables more effective international organization on behalf of indigenous causes."[70] Correspondingly, effects of globalisation that result in increased markets for cultural commodities means that expressions of indigenous cultures are remade into commodities of high value within national contexts and also across international borders – 'culture' is big business.[71] But as Appadurai explains, "The new global cultural economy has to be understood as a complex, overlapping disjunctive order, which can no longer be understood in terms of centre-periphery models."[72] Like other evolving and lucrative industries, indigenous knowledge has been subject to new strategies for identification in order to streamline and better regulate these new markets. This is because the "complexity of the current global economy has to do with certain fundamental disjunctures between economy, culture and politics."[73]

The resulting international attention to indigenous knowledge subject matter has established the broader significance of the category 'traditional knowledge'. Yet the preferred analogue

---

[69] Ibid. , at 288.
[70] K. Tallbear, "Racialising Tribal Identity and the Implications for Political Cultural Development" Nakata, M. (ed), *Indigenous Peoples, Racisms and the United Nations* supra n.24 at 170.
[71] D.E. Long, "The impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" supra n.37 at 229-231.
[72] A. Appadurai, "Disjuncture and Difference in the Global Cultural Economy" Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate* Polity Press: Cambridge, 2000 at 231.
[73] Ibid. , at 231.

'traditional knowledge' circulates as a global term that is relatively featureless. Arguably the category of 'traditional knowledge' functions as a viable standard that can cut across national and international borders, and contested political and cultural environments. The postcolonial politics in which the international arena is engaged means that terms have to be inclusive of the diverse political environments that characterise the world order. But, "in a world composed of diverse cultures, histories, and political, economic and legal realities, a universal standard is not only incapable of achievement but also poses the risk of being an externally imposed standard."[74]

This observation also has direct relevance in regard to the opening quote of this chapter – where in certain forums it is enough that the 'traditional knowledge' issue is on the agenda, but it is not engaged with any real sensitivity or particularity. As inferred from the quote, the respondent seemed to suggest that cultural particularity or specificity would be disruptive and pose problems of legitimacy. With such potential challenges, it is far safer (and easier) to avoid the problem by abstraction, objectification and exclusion. The politics of indigenous knowledge remain absent from discussions of its (potential) intellectual property protection. Local identities might be privileged in making the category legitimate in terms of international discussion, but these identities are displaced when they actually threaten to reveal the explicit cultural boundaries at play within the global space.

Arguably the cultural particularity is deemed a subject more worthy of consideration by each nation state. In this sense, the nation state is posited as more qualified to address the issue in view of the distinct colonial and postcolonial experiences of governing indigenous people. This also presents the quandary where the international forums seek to set the terms of the debate and authorise discussions set in those terms but ignore quite fundamental questions about the limitations of the debate. Cultural particularity is relegated to a position that does not disrupt the dominant circulation and proliferation of terminology.

[74] D.E. Long, "'Democratising Globalisation': Practicing the Policies of Cultural Inclusion" supra n.37 at 225.

An example of this is the way the distinct critiques by indigenous people of the term 'folklore' fail to change the use of the term in international arenas.[75] For instance Michael Dodson[76] has emphatically stated: "I do not agree with the term folklore to describe aspects of our cultural heritage."[77] Other representatives from the Aboriginal and Torres Strait Islander Commission (ATSIC) have also stated publicly that, "the use of this term is not appropriate to describe the living heritage of indigenous peoples. It trivialises the significance indigenous peoples place on their intangible heritage as an integral part of their cosmology."[78] Yet on the global stage the political emphasis on the pejorative meaning of 'folklore' remains a peripheral issue. The international arena has little space to respond to the political and social contexts that point to the problems of terminology.[79] Assuming it were to be left to national indigenous representatives to raise concerns at the state level, the international endorsement of the category places critics at a distinct and real disadvantage.

The international arena is integral in setting the key terms of the debate and sidelines discussion that may compromise the adoption of those terms within national contexts. This way of shaping the terminology and hence the debate has direct correlation with processes of harmonisation. In this context, harmonisation means the adoption of very broad abstract statements that imply an intention to 'do better' in relation to a particular concern. It suggests agreement upon the various cultural aspects embedded within the construction of the categories and the subsequent relation to economics and obligations for the enforcement of private property rights. At the same time it deflects attention from claims that do not fit that particular formula of rights. Whilst critiques of harmonisation point to the inequitable

---

[75] See: World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, Switzerland 2001; World Intellectual Property Organisation, Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Fourth Session, Geneva, Switzerland, December 9-17, 2002.

[76] Michael Dodson is a prominent indigenous spokesperson, former Aboriginal and Torres Strait Islander Human Rights Commissioner and currently Chairperson of the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra.

[77] M. Dodson, "Indigenous Peoples and Intellectual Property Rights" *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney 1996 at 35.

[78] P. Thomas, "The 1989 UNESCO Recommendation and Aboriginal and Torres Strait Islander Peoples' Intellectual Property Rights" Paper prepared by the Indigenous Cultural and Intellectual Property Task Force, Australia, 1989 at 3.

[79] See: World Intellectual Property Organisation, Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Third Session, Geneva, Switzerland June 13-21, 2002.

frameworks of intellectual property that are imposed as regulatory standards, the very construction of category of 'traditional knowledge' itself imposes regulatory standards. In this context, the standard is the metaphysical imaginary of 'tradition' similar to that deployed in the Australian context. Whilst indigenous people may be increasingly recognised as an international group commanding attention, they are situated in incredibly difficult subject positions that must be mediated. The next section provides a practical exploration of the communicative practices that affect the expression of indigenous subjectivities in global law and have significant consequences for indigenous agency.

Fordham Intellectual Property Symposium 2002

A symposium "Global Intellectual Property Rights: Boundaries of Access and Enforcement" was held at Fordham University in the United States in 2002.[80] This discussion is representative of a global discourse on intellectual property and indigenous knowledge. Within the fora provided through this symposium in discussing 'global intellectual property', 'traditional knowledge' registered as a global concern and thus warranted a specific panel discussion. This discussion was subsequently reprinted in full in the *Fordham Intellectual Property, Media and Entertainment Law Journal*.[81]

Attention is given to the panel discussion "The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources" for two reasons. Firstly, the five key speakers nicely illustrate the range of 'expert' interests in the subject matter. For instance the speakers include: an Australian law professor based in London; a North American law professor; a South African law professor; a representative from WIPO; and, a policy maker from the US Patent and Trade Mark Office. Secondly, as the discussion is reprinted in full, it provides a rare glimpse at the dynamics of the interaction between intellectual property experts, policy analysts, non-governmental representatives and other interested parties.

---

[80] Fordham University School of Law is based in New York. It is a prestigious law school that produces four high quality journals and convenes regular conferences relating to contemporary intellectual property issues. The *Fordham Intellectual Property, Media and Entertainment Law Journal* sponsors the "Annual Intellectual Property Symposium".

[81] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1.

Broadly speaking the discussion is indicative of the competing and intersecting ways of interpreting the problem that the inclusion of indigenous subject matter within intellectual property generates. The forum provides an insight into the way indigenous knowledge is constructed. It highlights how outcomes imagined within such spaces rely upon key institutional and organisational representatives. Significantly, that there are no indigenous representatives, is itself illustrative of the marginal position that indigenous people ironically occupy in discussions about indigenous knowledge protection.

The facilitator for the panel discussion, Professor Hugh Hansen, begins by stating, "we are going to assume, for the purposes of this discussion, that traditional IP will not work, and even if theoretically it could, there is probably not a legal infrastructure that would allow vindication of those rights."[82] Given that the guest speakers are all 'experts' in intellectual property law this is a curious statement to begin the forum that would most likely alarm those from outside the legal discipline interested in the subject. From the outset, indigenous knowledge is constructed as wholly different to other forms of knowledge that intellectual property law must manage. The implicit assumption is that the purposes of indigenous people seeking the use of intellectual property framework are incommensurate with what is possible within this field.

Nevertheless, through the particular legal expertise of the panel of invited speakers in the Fordham Symposium, intellectual property law remains the medium charged with identifying and justifying the property right and also the metaphysical dimensions of the subject matter. Despite the exhortations of Hanson, the discourse of intellectual property law is not displaced but is integral in shaping the conversation. The forum is not directed to problems that are internal to the law. Instead the issue is clearly one that indigenous people have with the law.

The established intellectual property discourse manages the problem of indigenous knowledge and even maintains the power to direct attention to possible alternatives, for instance in the suggestion of a 'special' WIPO treaty designed for traditional knowledge and folklore. Expert power is required to interpret and negotiate on the others' – the absent indigenous peoples' – behalf. The experts are engaged in confirming and consolidating the privilege of defining the

[82] Ibid. , at 755.

indigenous knowledge field into the future. So, for example, when attention is directed towards developing 'new' alternatives such as a special WIPO treaty presumably the same field of experts would have the most appropriate knowledge base from which to explain the treaty in the name of the same absent parties, and advise those very same persons and groups what to do.[83]

Following the description and classification of traditional knowledge, the forum then moves to the first speaker. Professor Blakeney's paper discusses the evolution of the term 'traditional knowledge'. He explains that 'traditional knowledge' is his term of choice to cover all elements referred to as folklore or indigenous knowledge. Blakeney then contextualises the problems indigenous people have with intellectual property frameworks with illustrations from Australia. These problems are taken to be representative of the problems all indigenous people have with the framework – the general legal principles of originality and authorship (in other words identification of subject matter). He cites the *carpets case* (1994), and another instance involving rock art images, "dating back 86,000 years."[84] With these examples, Blakeney explains the problems of authorship and originality as pertaining to indigenous art and cultural expression.[85] His point is to illustrate the difficulty of applying intellectual property law, and the problems that indigenous people in Australia generally have in this area.[86] Yet the presentation is set within an indigenous/non-indigenous paradigm. For instance the example he cites of appropriation and misuse of the rock images is phrased in the familiar terms of surfboard company versus indigenous group. But the real complexity of the issue is that it was a representative of the aggrieved indigenous communities (amounting to around eighty in the Kimberley region) that 'sold' the Wandjina image to the surfboard company.[87] The cultural

---

[83] A similar point is made by Drahos (with Braithwaite) in relation to WIPO. "WIPO over time carefully forged and managed a group of like minded technical experts who understood WIPO agendas perfectly. It was these experts who produced the complex background legal papers needed in any treaty revision process and who helped to lay the juristic foundations for expansionist desires of business owners of intellectual property. These experts also became missionaries, traveling to exotic developing country locations where intellectual property law was largely unknown." P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13 at 113.

[84] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 753.

[85] These were discussed in Chapter Three from page 108.

[86] Blakeney's paper draws heavily from an earlier paper. See: M. Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law" supra n.32.

[87] M. Mansell, "Barricading Our Last Frontier – Aboriginal Cultural and Intellectual Property Rights" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997.

particularity of the example is glossed over, for the actual case reveals that the complexity of subject positions occupied by indigenous people cannot be reduced to a standard indigenous/ non-indigenous binary. Blakeney notes the limited success in Australia (for instance the *carpets case*) whilst also suggesting that the limitations of the law derive from incommensurable differences. As he concludes, "these concepts are alien for us, but they have to be fitted into the intellectual property tradition."[88] Producing the image of the local for the global relies upon a particular and limited representation of Australian indigenous people and their claims.

The second speaker, Professor Visser from South Africa then discusses the protection of traditional knowledge in the context of scientific knowledge.[89] Visser speaks for instances of appropriation and biopiracy in India and South America, but there is no qualification made for why he is able to speak for these issues, except that they circulate as popular examples of incommensurability. He cites the example of the Neem patent[90] to illustrate the inappropriate usage of indigenous knowledge from India. The example serves to introduce a discussion about the possible introduction to the patents system of the requirement of notification.[91] The conversation about traditional knowledge is grounded in specific discussions regarding scientific knowledge and patents. It is not directed to complicated cultural elements, development politics or the politics of postcolonial relations. He also briefly discusses the Merck agreement in Costa Rica where, through a non-governmental organisation (NGO), 10,000 plant species samples were transferred to Merck for annual royalties. As Visser explains, "the problem of course, with the transfer of technology approach, is that you have an organised body of knowledge, so you need some sort of databases or the like, and also an identifiable entity, like this organisation in Costa Rica, to administer the transfer of technology,

---

[88] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 764.
[89] Coeenradd Visser is Professor of Mercantile Law at the University of South Africa, Pretoria.
[90] Dutfield notes that "The neem tree has been the subject of a considerable number of patents, with more than 40 in the United States alone and well over 150 worldwide. The inventions described in virtually all of the neem related patents used public domain traditional knowledge as a starting point. They have aroused considerable controversy, especially in India, where most of the traditional knowledge holders are from. There have been at least two patent challenges...The challenge to the former patent succeeded in 2000 when the European Patent Office revoked the patent on the grounds of lack of novelty and inventive step." G. Dutfield, "Protecting Traditional Knowledge and Folklore" Grosheide, F.W., and J.J. Brinkoff (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* supra n.6 at 72.
[91] This would mean that to register a patent, the patentee would also have to note the where the information was gathered.

to receive the royalties and to distribute them to the appropriate beneficiaries."[92] In other words, an institution or organisation to manage the centralisation of knowledge and its royalties.[93] But as Visser continues,

> The problem we are finding with this is that the tribes themselves have a problem with the establishment of the corporation. The elders in the tribe see the corporation as supplanting the authority structure in the tribes. The members of the tribes have problems with transferring what they see as their knowledge to an outside entity.[94]

The key problem exposed here is getting around implicit cultural differences in knowledge management and storage. That the problem is posed as that of database creation neatly illustrates what globalisation theorists recognise as the economic shift in contemporary capitalism from circulation of product to production of communicative networks.[95] But ironically, the local politics undermines the global construction of the problem and frustrates the development of this particular economics. Culture, evidenced as premodern authority structures, remains a marker of difference and legal incongruity even when efforts have been made to make traditional knowledge in the image of scientific knowledge – that is distinct from the issues informed by cultural discourse. Contested cultural politics makes the problem of protecting indigenous knowledge more complicated than a direct analysis of categories of the law.

The third speaker, Paul Salmon, is the Senior Counselor in the Co-ordination Office of WIPO. His discussion centres on the efforts of WIPO in the area of 'traditional knowledge'. His paper covers the initiatives guiding the fact-finding missions to independent countries to discuss intellectual property and the reports and roundtable discussions subsequently generated. Salmon advocates intellectual property law as the key technique for protecting indigenous knowledge: that protection could be secured utilising a range of tools, combined with the 'good will' of all the member states. Salmon insists on the compatibility (with limitations) of 'traditional knowledge' within (a reformed) intellectual property framework. Salmon concludes

---

[92] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 766.
[93] I discussed the governing implications of centralising knowledge through a discussion of the emergence of registration in intellectual property (introduced through design law) in Chapter Three at 104.
[94] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 769-770.
[95] See for instance: A. Agrawal, , "Indigenous Knowledge and the Politics of Classification" supra n.68; M. Hardt and A. Negri, *Empire* supra n.53.

with the following statement that, "The purpose of the intellectual property system is to encourage *individual creativity* so it can benefit us all economically, socially and culturally. *Intellectual property is foreign to no culture and native to all nations.*"[96] Intellectual property exists as the primary vehicle in furthering cultural, social and economic development given its universal applicability as a concept.

Intellectual property is presented as a 'global' concept. That this is possible speaks to the production of narratives around which our social existence is organised.[97] Narrative is fundamental to the law as it function to "make sense of basic organizing legal ideas."[98] As Almog argues;

> To use J. Hillis Miller's phrasing, all sorts of generative narratives, whether the source is literary, religious, historic, or any other, manifest "a peculiar and unexpected relation between the affirmation of universal moral law and storytelling." As Miller elucidates, it would seem that the connection of such law to any particular narrative or to narration at large would be adventitious, or superficial, but in actual fact, ethics and narration cannot be kept separate, "not because stories contain the thematic dramatization of ethical situations, choices and judgments ... [but] because ethics itself has a peculiar relation to that form of language we call narrative."
>
> In other words narratives transform abstract constructs or formulas into expressions loaded with ethical meaning. Without the presence of some kind of validating narrative in the background, the norm and the law are empty shells, with no intelligible ethical substance within.[99]

But since when has intellectual property been 'always there'?[100] Salmon's statement presents an example of how the narrative of intellectual property law remains relatively consistent and with a most problematic association with its own historicity and contingency. As Almog also explains:

> A central act within the legal field is to master "both sorts of discourse (both narrative and analysis) and put them to work, at the same time and despite their inconsistencies, in the service of a larger enterprise." The apparently impossible reconciliation between "these discordant modes of thought and expression, these incompatible, uncommunicating sides of oneself" is one of the central acts of the legal mind and one of the achievements of the legal imagination.[101]

---

[96] Ibid. , at 777 (emphasis mine).
[97] S. Almog, "From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law" (2002) 13 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1 at 2.
[98] Ibid. , at 3.
[99] Ibid. , at 9.
[100] Its haphazard development was discussed in Chapter Three.
[101] S. Almog, "From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law" supra n.97 at 4.

To Salmon, intellectual property exists as a naturally occurring subject regardless of the distinct cultural, economic, social and individual pressures that have influenced its development. His form of statement glosses over the tensions in colonial/postcolonial states and the problem of making WIPO relevant in these contexts given the shift to TRIPs, trade and WTO.

Linda Lourie is the final speaker in the forum and represents the United States Patent and Trademarks Office. She begins by noting her delight at speaking about this issue with a panel of intellectual property 'experts'.

> I am very pleased to be here, especially on a panel exchanging views with experts in the field of intellectual property. This is unusual. I have been dealing with this issue for six years and usually in these kinds of discussions we have people from the environment ministries or cultural ministries who are not as familiar with traditional and current forms of intellectual property protection.[102]

The process of managing a problem as legal generates its own language, logic and possibility, not only what the problem is, but how to adequately address it and speak for it.[103] Through construction of this 'public' communicative space, the authority and legitimacy of the intellectual property discourse is consolidated.

In her paper Lourie reflects on the WIPO fact-finding missions, and how the subsequent report was interpreted by the US Government.

> From the US Government perspective ... we seemed to be able to distill one theme from all those discussions, namely, that there were vast differences among indigenous communities across valleys, let alone across continents, in the types of folklore and traditional knowledge that has been developed over the generations. At the same time there were diverse interests in determining such things as 'ownership', on the one hand, and exclusion, on the other hand, versus openness and free access. The local rules concerning rights to use and own traditional knowledge and the differing desires to commercialise and maintain secrecy of such knowledge were some of the differences we saw from community to community. So we asked ourselves whether it is possible – or infact even desirable – to establish a comprehensive, uniform set of rules at the international level to govern the use of traditional knowledge and folklore.[104]

---

[102] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 777.
[103] See Chapter Four "Law and Governable Spaces" at 147.
[104] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 778.

In this sense Lourie, as a self-identified outsider, identifies the matrix composed of indigenous knowledge and intellectual property politics. In this area, despite the singularity of the category in the law, there is no real uniformity of argument or expectation held by indigenous people and communities seeking to use intellectual property law. The differing political contexts elevating concern, from the indigenous community to the national bureaucracy, produce different expectations of the law. Lourie recognises the challenge of accommodating these through a standardisation or harmonisation approach. Significantly, instead of pushing for an international result, she suggests that outcomes in this area will only be determined nationally where national politics inform bureaucratic objectives rather than imposed international directives that minimise complicated internal dynamics. It is perhaps that her expertise is rooted in the 'practical' rather than in the 'academic' that underpins this position.

The gaze to the international forums for outcomes is often turned directly back to national initiatives. This is as much of a deferral of the issue internationally as it is a recognition of the intricacy that the subject generates in each distinct and diverse locale. Relations of power and resistance are mutually engaged here, where the difficulty of the subject is both realised and minimised: realised in the emphasis on the need for national initiatives (and hence the differing politics) and minimised through the displacement of internal politics for the global intellectual property dialectic. Additionally this means that instances of legal utility are glossed over in the struggle to emphasise the incompatibility of the current legal regimes. Indigenous commonality in terms of engagement with the market and hence with intellectual property strategies remain unacknowledged and therefore unexplored in terms of instrumentality and practical utility. Arup notes in a different context, that in relation to the global supply of legal services, "... this kind of lawyers' work may project around the world a distinctive brand of transaction-based and market-orientated legality ... (however) these lawyers' own legalities fail fully to negotiate the rich texture of local legal rules and practices."[105]

Lourie's paper indicates the primary failings of the earlier papers. This failing is the presumed generalisation of concerns facing indigenous people, as an identifiable group. Lourie provides more realism to the politics informing indigenous rights in this area, and the extent that

[105] C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* supra n.2 at 144.

indigenous people have extremely diverse knowledge management practices and thus expectations of intellectual property law. By stressing the real she moves beyond the essentialising of indigenous communities that is indicative and endemic in international advocacy. Lourie provides a succinct example of the layering of positions through the example of the patenting of turmeric.

> I note a famous case, not about secret knowledge but certainly about traditional knowledge, traditional medicine. The case was of turmeric, you know the one you buy in the supermarket ... So why was this patent granted? Was this some misappropriation by some scientist or anthropologist going out and trying to steal knowledge from India? No. In fact these were two Indian nationals who were working in a university in Mississippi, two Indian nationals who knew this was their folk knowledge...[106]

The example captures the complicated interplay between the 'community' and the individual. As a policy maker, Lourie recognises the profound difficulties inherent in any efforts at legislating for the protection of 'traditional knowledge' internationally – through a treaty or a *sui generis* system. The difficulty for these suggested remedies is that 'traditional knowledge' is treated as though it has no specific political or social contexts, nor that these may be highly contested. The idea of a treaty, whilst laudable, is highly problematic. Notwithstanding the numerous contexts where individual governments refuse to support 'special' or differential rights for indigenous people locally or internationally – how could a treaty get beyond establishing a regulatory standard that would make the subject matter indigenous knowledge globally recognised, categorised and by implication, homogenised. Using Lourie's earlier words, how could a treaty *establish a comprehensive, uniform set of rules at the international level to govern the use of traditional knowledge and folklore* when these concepts themselves are without consensus in definition between indigenous people? The danger is that a treaty would further a harmonisation approach to the subject at the expense of local practice. It could present a regulatory standard that takes little account of diverse political context and relations of power between indigenous people, states and economic markets. As Mick Dodson additionally asks, "How effectively are international treaties and statements being translated into the domestic situation?"[107] A treaty purports to govern the use of a subject that itself has no clear boundaries

---

[106] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 782.
[107] M. Dodson, "Indigenous peoples, social justice and rights to the environment" *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney, 1996 at 28.

or identification. The politics of indigenous knowledge disrupts the effectivity and possibility of establishing workable global standards for indigenous intellectual property protection.

Displacing the market in favour of tradition

There has been little discussion of the TRIPs agreement and its effects on indigenous knowledge. Arguably no direct relationship between TRIPs and indigenous knowledge has been made because construction of the subject 'traditional knowledge' has tended to emphasise the traditional (and premodern) characteristics. Whilst there has been the suggestion that Article 27.3(b) of the agreement could be altered to include the protection of traditional knowledge (via plant varieties) this argument retains much of the 'preservation of indigenous knowledge' agenda.[108] Engagement with trade, the marketplace and commercialisation tends to destabilise the construction of traditional knowledge as 'traditional' and therefore outside the market. Thus indigenous knowledge occupies a space relatively immune from trade and economics – notwithstanding that this was and remains a primary key in the recognition of the subject matter, and the various interest groups that proffer it as a subject for protection.

This displacement of the economic component in discussions of 'traditional knowledge' is evident in the Fordham Symposium. It is demonstrated aptly in the way that Michael Blakeney represents Aboriginal art. Whilst the history of the making of the Aboriginal high art market was discussed in Chapter Six, the emphasis on 'traditional' art practices, and sacred motifs is a recurring theme. For whatever reason, Blakeney romanticises and inevitably essentialises Aboriginal art practices, and by implication Aboriginal and Torres Strait Islander people. For instance: "All indigenous artwork, almost without exception is concerned with the legends of the creation of the indigenous people, so this is semi-sacred for them."[109] Certainly some indigenous artwork is significant for its totemic and religious characteristics, but here Blakeney makes a wide generalisation that denies both contemporary Aboriginal art practices, and the ingenuity of Aboriginal artists in modifying particular images of importance and generating a successful and thriving art market. It simplifies the changeable and dynamic intercultural

[108] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 764.
[109] Ibid. , at 760.

dimension of indigenous cultural experience and denies the fluidity and adaptability of indigenous cultural production.

The participation of indigenous people in the global intellectual property discourse demands that they identify with an impossible standard of authentic 'traditional' culture. Relying on traditionalised interpretations of Aboriginality leaves contemporary and inter-cultural exchanges as marginal concerns. This presents indigenous people with considerable difficulties in making claims and phrasing expectations of the law in response. Blakeney's comments contribute to and endorse this imaginary standard. Whilst it may provide more moral weight to arguments for better intellectual property protection for indigenous people's cultural expression, this narrative actually does harm by denying the complicated and contested political and social contexts in which Aboriginal art, as a marketable commodity thrives. Indeed the evocation of the traditional says more about consumers' desires for authentic, traditional and sacred art. Ironically, Blakeney's comments feed into the reasons underpinning the commodification of indigenous cultural products.

In another example, the following discussion with the audience at the Fordham Symposium is similarly telling:

> Questioner: It just happens that a group came through our office a couple of days ago, and one of the representatives was from Ghana, and posed a question about folklore protection. We had a similar dialogue to what I have seen going on here, and I was emphasising that there are a lot of goals of folklore protection that do not match the goals of IP protection. Rather bluntly he put up his hand and said, "No no no. This is about money. You have intellectual property and you get money from that. This is what we have and we want money for this." Now to what extent are we really just talking about dividing up the pie? To what extent are we just talking about money? And if this is really the central part of the issue, I think the practical problems of who administers it ... become very important.
> Professor Vissor: Just one question. Was it a governmental official or not?
> Questioner: He was a governmental official from Ghana.
> Professor Vissor: ... My experience is, especially in case of expressions of folklore, for the indigenous community it is often not so much about money. For that community it is about protecting a way of life. As Michael (Blakeney) has said often, it is about the religious significance, the sacred significance of many of these expressions, art works, musical works, things like that, and that is important if you go to the community ... So for the community often it is not a question of money.[110]

[110] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 794.

The government official from Ghana is not indigenous because he is a 'governmental' official. Therefore the issue of economics is dismissed. The governmental role excludes (potential) membership of the (imagined) community. The 'community' signifies both the 'traditional' knowledge and also locates indigenous people. There is no space for indigenous people to exist beyond the 'community'. The key difficulty of this position is that it ignores the tensions inherent in many indigenous communities. For example, many indigenous communities in Australia are internally fragmented. Communities are not, and have never been, stable entities in themselves. The illusionary evocation of community and communal ownership (in the sense that there are no internal problems disclosed) belies why indigenous people would even be interested in using intellectual property law and ignores many of the contemporary problems that for instance, indigenous people in Australia, currently struggle and engage with. Communal ownership is an important concept to understand, but not in a romaticised reconstruction of what is 'best' and most relevant to indigenous people, and certainly not as a binary that puts indigenous people and communal ownership on one side, and individual and non-indigenous people on another. In this sense, a hegemonic account of colonialism belies the ambiguity of colonial relations and the complicated cultural politics that intellectual property law cannot ignore.

The extensive relations and diverse engagement with the market are displaced through the emphasis on the traditional (which is also enhanced by the construction of the communal). The question of money and economics destabilises the assumed inherent differences presented by 'traditional' knowledge. Such assumptions justify the inclusion and treatment as 'special' subject matter. This is not to say that there aren't real issues of preservation of cultural integrity. But these claims of 'culture' are more political than has been suggested to date and cannot be limited to preservation issues which, in themselves, actually disclose relations of power.

Despite the professed representation of global indigenous cultures by Visser and Blakeney, indigenous people, at least those in Australia who have been asked and speak for themselves, are interested in money, in making money and making sure that they reap the economic

benefits to be derived from their cultural knowledge.[111] On one hand there is the idealism that fuels Visser and Blakeney, but on the other there is the practical pragmatic element that people are astute enough to realise – indigenous culture can make money. Thus, in the international domain there is the real struggle of purpose. This is the tension that I have highlighted in Australia's efforts in this field: namely whether intellectual property law is to protect cultural integrity or the economic potential that indigenous knowledge contains. It is easier for identification of the 'special' category to focus on the former, at the expense of the latter. However the problematic effect of this emphasis is that indigenous people are positioned as beyond the market which the reality of the Aboriginal art market in Australia clearly demonstrates is false.[112] This raises real concerns for the position that indigenous people are expected to occupy in a world where attention is to increased levels of globalisation and the power of new and increasing global systems to manage and direct markets of scale. Appadurai aptly captures this paradox of representation wherein he states: "The critical point is that both sides of the coin of global cultural processes today are products of the infinitely varied mutual contest of sameness and difference on a stage characterized by radical disjunctures between different sorts of global flows and the uncertain landscapes created in and through these disjunctures."[113]

Conclusion

Global intellectual property forums and the position of indigenous people

As already noted, the quote at the beginning of the chapter highlights the absence of an indigenous voice within the Fordham Symposium and the consequent surprise held by the facilitator of the session that this would even manifest itself as an issue. Whilst the quote baldly

---

[111] In Australia, the debate of resale royalties (droit de suite) illustrates this point. With the exponential growth of the Aboriginal art market, the argument is that resale royalties would provide continued and sustained economic benefit to indigenous artists and indigenous communities. In this sense, the economic dimension of Aboriginal art is at the forefront of these discussions made by indigenous artists and indigenous politicians like Senator Aden Ridgeway. The debate usually receives wide media coverage during the annual Sotheby's auction of Aboriginal art. More generally see: Department of Communication, Information Technology and the Arts, *Report of the Contemporary Visual Arts and Crafts Inquiry* (The Myer Report) Canberra, September 2002.

[112] A clear illustration of instances of indigenous subjectivity in the engagement with the art market is detailed in F. Myers, *Painting Culture: The Making of an Aboriginal High Art Market* Duke University Press: Durham and London, 2002.

[113] A. Appadurai, "Disjuncture and Difference in the Global Cultural Economy" supra n.72 at 237.

illustrates a concern that may not be as obvious in other international intellectual property discussions, it is nevertheless representative of the broader global intellectual property narrative where indigenous people are generally absent. The point is that whilst the framework of intellectual property manages possibilities in this area, a discrete control over participants is also exerted.

In the opening quote Hanson asks what an indigenous person would have contributed to the debate that has not already been said. In this sense he assumes that there would be no additional information or perspective that would be contributed to the dialogue by an indigenous representative. It escapes Hanson that the absence of an indigenous voice, in the context of discussing indigenous subject matter, replicates power dynamics that allows for the discussion of indigenous subject matter by a majority of non-indigenous people. The problem with this paternalism is that it avoids sustained recognition of the power imbalance most obviously demonstrated through access – both to the language, logic and utility of the law and physically to the international forums.

In Chapter One I discussed Martin Nakata's concern that the indigenous knowledge enterprise has everything and nothing to do with indigenous people. As part of extending attention to this enterprise, Nakata points to the way in which the subject 'indigenous knowledge' is remade with little indigenous involvement or participation. Securing indigenous participation requires reflexivity about the exclusionary practices that may prohibit indigenous participation, for example practical problems of financing travel, disputed governmental representative status and other elements required for engagement in international forums. The problem of accessing the language and framework of the law functions as a significant prohibitive element maintaining indigenous people as peripheral to the discourse. This is more a institutional and educative exclusion where, as a result, indigenous interests are largely mediated, spoken, interpreted, constructed and argued, by non-indigenous experts. Paul Patton's comments regarding the aeporic translation of indigenous rights have significant resonance.[114] For instance if indigenous people are marginalised because of the exclusionary language used to

[114] P. Patton, "The translation of indigenous land into property: the mere analogy of English jurisprudence..." (2000) 6(1) *parallax* 25.

discuss and interpret indigenous knowledge, limits are consequently placed on what indigenous people can contribute.

The earlier analysis of the governmental Issues Paper *Stopping the Rip Offs* enhances Nakata's observation regarding the marginalisation of indigenous people in discussions of legal remedy for knowledge protection. As was made evident in examination of the Issues Paper, indigenous people were subjects of governmental interest, observation and intervention.[115] The head of ATSIC Lowitja O'Donohughe remained absent from the text whilst non-indigenous governmental officials authorised the document and spoke on indigenous people's behalf endorsing a particular location of indigenous people as residing in 'remote' communities. Indicative of a broader problem of access and representation, indigenous people's perspectives and interpretations remain marginally influential in the production of the international discourse. The interpenetration of strategies between the local and the global points to a surprising overlap where indigenous people remain difficult to position in relation to global knowledge management strategies, while indigenous knowledge is constructed and authorised by intellectual property 'experts'.

As a field registering increased interest in the subject of 'indigenous knowledge', intellectual property forums authorise interpretations of this subject – making it into a form that can be interpreted, identified and acted upon by global forms of bureaucracy. Yet there remains an anxiety here in the position of indigenous people: they exist as both internal to the law as modern subjects and external as 'traditionalised' subjects. There is a juxtaposition of location for indigenous people in regards to discussions of intellectual property protection for 'traditional' knowledge that reinforces an imaginary position that is easily malleable within the global space because indigenous people remain relatively absent to dispute the positioning. Colin Perrin has considered this anxiety in more depth in relation to the Draft Declaration on the Rights of Indigenous People.[116] Perrin's point focuses upon an anxious moment that

---

[115] See Chapter Four at page 180-182.

[116] C. Perrin, "Approaching Anxiety: The Insistence on the Postcolonial in the Declaration if the Rights of Indigenous Peoples" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the postcolonial* University of Michigan Press: Michigan, 1999.

pervades the document, namely the placement of indigenous people. This is owing to the location of indigenous people as occupying two places at the one time. As he explains:

> The Declaration cannot be regarded as simply complicit with the exclusion of indigenous peoples and neither can it be considered according to a straightforward effort to include them. Indigenous people are hard to place simply here (inside) or there (outside), and it is the terms of inclusion and exclusion, in which indigenous people are approached colonially or critically, that are rendered difficult.[117]

The uncertain positioning of indigenous people has more to do with postcolonial tensions than it does with deliberate exclusionary practices. In seeking to account for the distinct needs and aspirations of indigenous people, intellectual property forums configure the 'distinct' nature of these needs. Certain 'truth claims' regarding what indigenous people want and need are summarily put into circulation. This is achieved through the assertion of difference, where "indigenous people are not placed simply before or behind colonialism and modernity; ... it is time immemorial which is therefore not quite historical."[118] The postcolonial tensions are precisely how to account for this assertion of distinctness (rather than difference), and therefore how to treat it. This poses significant difficulties in regards to both the international politic of global citizenry and classic liberal conception of international community and equality.

The diverse political and social contexts in which indigenous people function potentially destabilises their position within intellectual property forums that attempt to account for their similarity (pan indigeneity) as a unique and distinct cultural grouping. In producing the subject of 'traditional knowledge' in law, indigenous people and their relation to this new category are also constructed. This is made quite clear in attempts at describing who 'traditional' knowledge holders are.[119] In addition, the lack of consensus about definitions of 'indigenous people' also hinders an accurate assessment of who occupies this rather abstract position.[120] Yet intellectual property forums on indigenous knowledge remain dependent upon and thus reproduce a concept of 'tradition' as the underlying marker of identification.

---

[117] Ibid. , at 25-26.
[118] Ibid. , at 27.
[119] See Chapter One at page 15.
[120] For an account of some of these problems of definition see: R. Barsh, "Indigenous Peoples: An Emerging Object of International Law" supra n.24; P. Havemann, "The Participation Deficit: Globalisation, Governance and Indigenous Peoples" supra n.31. See also note prepared by E.I.Daes, *Note on the Concept of Indigenous People* E/CN.4/Sub.2/AC.4/1995/3 (1995).

As mythical images of indigenous people are constructed in intellectual property forums, so too are their needs and expectations. In many cases these are set against current intellectual property framework. This is most notable in the insistence of the communal ownership versus individual ownership arguments.[121] The unity and agreement assumed of 'community' is problematic given the extent that, in Australia at least, communities are far from neat linear models, but exist as contested spaces with dynamics that expose multiple positions and levels of agency and action. Agrawal and Gibson encourage reflective critique of the range of interests and actors within communities and a consideration that these shape decision-making processes.[122] Whilst the communal versus individual binary may appear to establish a starting point in considering the inclusion of indigenous subject matter, it actually diverts attention away from the inherent social and cultural complications informing the law. The problem is presented as one of clear sociological and ontological otherness. Inevitably there is a failure to account for those indigenous people who do not necessarily identify with distinct communities, let alone the internal politics confounding identification of the spatial unit that could be named as a 'community'. The focus on the community versus individual ownership as the loci of the intellectual property and indigenous knowledge problematic relegates the diverse dynamics of ownership within indigenous social and political contexts to the margins. It excludes recognition of indigenous people as 'individual' owners and at the same time it removes interrogation of the laws' own processes of categorisation and identification.

Indigenous people are invited participants when they affirm the legitimacy of the discourse to account for what indigenous people want and how they expect the law to function. In this sense the authority of the law is maintained in intellectual property forums and indigenous perspectives are incorporated when they confirm the authorised conception of the problem and correspondingly, the nature of the proposed solution. The dynamics of power means that indigenous participants are included when they comply with particular assumptions about the

---

[121] See for instance: M. Blakeney, "Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions" (1998) 1(6) *Journal of World Intellectual Property* 985; R. Grad, "Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia" (2003) 13 *Duke J. Comp. & Int'l L.* 203.
[122] A. Agrawal, and C.C. Gibson, "The Role of Community in Natural Resource Conservation" Gibson, C., M. McKean, E. Ostrom (eds), *People and Forests: communities, institutions and governance* Massachusetts Institute of Technology: Massachusetts 2000.

legal nature of the problem and the legal discourse governing future solutions. Terri Janke's work, and its adoption both in Australia and in WIPO forums demonstrate that indigenous people are not totally marginalised from the legal discourse of intellectual property and indigenous knowledge.[123]

Practicing the politics of cultural inclusion in global intellectual property frameworks necessitates the recognition of the social and cultural contexts in which people make claims, identify needs, and generate expectations. In treating indigenous people and indigenous needs and expectations as wholly different from those experienced by other stakeholders, a harmonisation approach to 'traditional' knowledge is made possible. The subject of indigenous knowledge is produced in such a way as to allow for a global system of management to be endorsed. This is at the expense of appreciating the differences between indigenous people and their expectations of intellectual property law.

[123] See T. Janke, *Minding Cultures Report* commissioned by The World Intellectual Property Organisation 2002 at http://www.wipo.org/globalissues/studies/cultural/minding-culture/index.html.

Chapter Nine

The Pragmatics of Indigenous Knowledge

There are national and international overlays in the way that the concept of indigenous intellectual property is circulated. Aoki has explained how, "[d]ichotomising the international and the national implies an illusory separation between the two that obscures the constitutive role of sovereign nation states in constructing and participating in these supranational arenas."[1] There are also considerable discrepancies in what is understood to be indigenous intellectual property and how the law can accommodate these interpretations and differences. What is clear however is that a concomitant of factors influence the production of the category and that this is made possible through a strategic field of legal action and engagement. Complex social and political relations of power are positioned within a legal discourse because the field holds a powerful capacity to direct outcomes and secure particular interests.

Global discourse remains informed by the national. It endorses particular approaches and applauds certain initiatives but the internal politics and the struggles for relevance and inclusivity within the very organisations themselves condemn concerns like the protection of indigenous knowledge to standardised approaches. This leaves little space for contested and contentious politics. Because solutions cannot be secured in the international sphere onus is shifted back to the national initiatives and thus the cyclical nature of the relationship between the local and the global continues. It is with these thoughts in mind that I now turn my attention to the way in which Australia has informed this global discourse. For Australia has

[1] K. Aoki, "Considering Multiple and overlapping sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property and the Internet" (1998) 5 *Ind. J. Global Leg. Studies* 443 at 469-470.

been able to present a unique account of the problem of indigenous knowledge protection through instances of practice and this experience functions to authorise strategies of global management developed from the production of localised accounts.

The examples of Australian case law that I have already discussed are formative to the unique Australian engagement with intellectual property and indigenous knowledge. This Australian indigenous experience circulates internationally. It informs and infuses a global politics about the issue of indigenous intellectual property and significantly influence international objectives and initiatives. The frequent reference to the Australian case law, legislative initiatives like the Labels of Authenticity, and the prominence of Terri Janke's work, at least within WIPO forums[2] indicate the authority of Australian experience. This is especially the case when it contributes to an homogeneity of indigenous perspectives, in keeping with those expressed by experts in intellectual property forums like Fordham and WIPO.

This raises key issues about the role of Australia in influencing international levels of governance.

Informing the global: the authority of the Australian experience

The experience of Australia in locating the problem and judicially determining outcomes, in terms of copyright protection for Aboriginal art, feature as significant developments in international discussions of intellectual property. Thus Australia occupies a privileged position in regards to the production of the subject 'traditional' knowledge in international intellectual property systems.

In the Fordham symposium on protecting folklore and traditional knowledge, Linda Louries makes the following comment:

> I recognise that this problem is broader than national, particularly when you have communities on either side of a national boarder. But I think it first has to be a national problem, and I am not seeing many countries – and we will see the results from the WIPO survey demonstrate this – I do not think many national governments

[2] See: T. Janke, *Minding Cultures Report* Commissioned by WIPO, 2002 at http://www.wipo.org/globalissues/studies/cultural/minding-culture/index.html.

> have actually addressed this at home. I think we have to have local legislation before we can go internationally. I think that there is an interest in national governments to shut this off and let the international community resolve their local problems, but I think it has to be resolved locally first, or perhaps regionally in certain regional groups.[3]

The above statement suggests significant impetus for a workable strategy managing and protecting indigenous knowledge being invested with national direction rather than international intention in the first instance. Thus the onus is placed on independent nation states to develop adequate structures addressing indigenous needs which are not derived from international judgments about the appropriate course of action. This removes the need for the international system to mediate contested politics especially given the earlier discussion of the dramatic change in the structure of states following the period of decolonisation.

In a global context however, there remains an interplay between the national and the international which raises a series of questions: What capacity does the global space hold in terms of generating new opportunities for reinvigorating and extending debate within Australia? Does the international gaze upon patents, agriculture and biotechnology inform current Australian governmental interest? Does the shift from the 'cultural' in terms of folklore to agricultural and biodiversity issues suggest a subject that is easier to monitor and regulate through bureaucratic means because the cultural elements are displaced in favour of more 'scientific' types of classification?

Australia and the production of the 'TK' category

It is important to note that Australia would have had debate about indigenous knowledge and intellectual property protection even without international influence. Chapter Two and Three pointed to the distinct internal politics of Australia that brought the initial copyright cases to the fore. These cases were also developed and enhanced through bureaucratic initiatives such as the 1981 *Report of the Working Party into the Protection of Aboriginal Folklore* and the 1994 *Stopping the Rip Offs*. Certainly the *Report of the Working Party* was influenced by international attention to folklore, but *Stopping the Rip Offs* was a localised response to the cases, and the national issue of

[3] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" (2002) 11(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 753 at 788-789.

reproduction and appropriation of Aboriginal art. The distinct political and social pressures, and individual action and agency relied upon the identification of both localised development and national attention to the concerns and difficulties held by indigenous people in relation to intellectual property law. The framework of action within Australia was developed in parallel to the international efforts to grapple with the subject, and as such the local experience provided a primary example of the way a national government could manage the needs and expectations of indigenous subjects.

The expertise generated through the practical experience of Australia is valuable in informing the international domain. It also marks a distinctive history in the emergence of intellectual property jurisprudence within Australia. In Chapter Three I discussed the emergence in British history of intellectual property law, which as representative of the Empire, informed the national development of such laws. Though it is an area with very scant, if not negligible research, it is generally assumed that Australia lacks a distinctive history in the emergence of intellectual property law. But what the concept of indigenous intellectual property suggests is that this is far from the case. The discrete political and social experiences of Australia exert considerable influence in the production of unique circumstances of intellectual property action and promulgation. The development of an intellectual property approach to indigenous subject matter, latter consolidated in case law, and more recently in legislative initiatives, positions Australia at the forefront internationally. This is in regards to what the problem is, the identification of the issue as legal and how legislative remedies are proposed and developed. Australia represents a country that has generated expertise in the area of copyright and indigenous knowledge – both mediating the rights of indigenous people and securing some tangible outcomes.[4] The authority of the Australian engagement with intellectual property law generally and indigenous knowledge, is instructive in the production of the traditional knowledge category internationally. Within Australia there remains a lively debate around the issue and indigenous representatives and organisations regularly raise the issue of indigenous intellectual property in quite diverse public contexts.[5]

---

[4] The case law demonstrates tangible outcomes in terms of economic restitution and the delivery up (supply) of all remaining carpets and material to the community.

[5] See for instance: Senator Aden Ridgeway, *Indigenous Arts Update* August 2003; The Garma Forum 2003: Dhuni – Indigenous Arts and Culture, "Protecting Aboriginal Arts and Artists: Communal Moral Rights and Intellectual

The well-documented account of the Australian experience has helped generate authority and expertise about current and future engagement with indigenous knowledge and intellectual property protection. This authority has also been generated through the academic literature dealing with the issue, both in terms of case law and indigenous expectations of the law.[6] As discussed in Chapter One, through national and international journals Australian academics have debated the possibility, feasibility and appropriateness of positioning indigenous cultural knowledge within the law. As a consequence academic literature has been part of the production of knowledge about indigenous intellectual property.[7] Recent writing has established and confirmed the precedence of the new terminology of 'indigenous intellectual and cultural property'. The experiences in Australia have been influential – and it could be claimed has authorised a particular approach in the international domain. For instance, in the fourth WIPO Intergovernmental Committee's discussion on traditional knowledge and folklore, articles written about Australia feature prominently in the footnotes and back up broader statements made in the body of the text.[8]

Australia features as a key example in the international debate confirming the legitimacy and success of the legal approach in this area. This legitimacy is highlighted in three ways: firstly the success of copyright law in responding to indigenous needs; secondly, the engagement between the colonial state and indigenous people, where indigenous interests are not beyond the competence of the legal discourse; and, thirdly the way in which indigenous people have actively engaged and responded to the intellectual domain, consequently reworking the expectations of the law in this area. As Michael Blakeney notes, "[o]ne thing that indigenous people are doing is taking in hand the promulgation of their own intellectual property rights, or agitation for their own intellectual property rights ... basically indigenous people want to be

---

Property, 7 August 2003 <http://www.garma.telstra.com/forum.htm>. The limits of intellectual property law are also raised in native title claims. See: *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002).

[6] See Chapter One footnotes 4-10.

[7] Academic literature has also been part of elevating the concept of traditional knowledge. For instance see the current list of journals documenting indigenous knowledge. See: World Intellectual Property Organisation, Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Third Session, Geneva, Switzerland June 13-21, 2002 at Appendix One.

[8] World Intellectual Property Organisation, Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore* Fourth Session, Geneva, Switzerland, 9-17 December, 2002.

able to define their own intellectual and cultural property and the way in which intellectual and cultural property is to be exploited."[9] Australia demonstrates the possibilities in this area and for this reason influences international direction and attention. The importance lies in the reality that indigenous aspirations, whilst modified and reworked are still part of the broader intellectual property conversation.

Yet the international space also influences the national. This does not necessarily come in terms of experience at managing a particular issue – but more in terms of how particular phrases and terminology are circulated. The structuring of a field of action illustrates the interpenetration of strategies for managing the inclusion of indigenous knowledge in intellectual property law. For instance in the previous chapter I discussed this fluidity as it appears in Janke's definition of *heritage* and *intellectual property*, where she draws directly upon the phrases of the United Nations Special Rapportuer Erica Irene Daes. These terms, not unique in themselves but by this process acquiring a specified meaning, are adopted and put into circulation in Australia, and fed back into international sphere confirming both legitimacy and utility. The fluidity between experience and language demonstrates the overlap of national and international governing objectives where the international domain relies upon direct instances and examples of national experience. The commonality of the complaint is affirmed as exploitation. Authority and future frameworks are established through the circulation and proliferation of categories and forms of language.

A recent example of this interplay is in the use of the term 'TK' to denote the category 'traditional knowledge'. International fora have adopted the acronym 'TK' as an abbreviated form of 'traditional knowledge'. It has passed as legitimate bureaucratic speak, in a similar way that 'IP' circulates as the abbreviated form of 'intellectual property'. Yet the problem of the increased circulation of the acronym 'TK' is that it suggests that the 'traditional knowledge' category is a relatively stable category thus underplaying the sustained disagreement over the

[9] "Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" supra n.1 at 762.

terminology.[10] An additional concern is the potential for 'TK' to consolidate the 'traditional' element of the knowledge as its primary identifying factor. The danger here, as I have already emphasised is that accent on the 'traditional' component of indigenous knowledge minimises and silences the diverse contexts and contests that actually inform and infuse indigenous knowledge and knowledge systems. The key failing in the use of the 'TK' category and its increased adoption by WIPO member states is that indigenous political and cultural problems with terminology remain as peripheral issues.

The use of 'TK' locates the discussion of the category of traditional knowledge within a governmentalised realm. Presented as a stable category it becomes amenable to strategies of governance, for example status as legitimate intellectual property subject matter is affirmed and discrete programmes of governing in the form of legislation or white papers (national or international) are therefore possible. The means by which such institutional and bureaucratic agencies debate 'TK' and intellectual property protection establish networks through which the subject is understood. Conceptualising 'TK' is made functional within a govenmental space that maintains a capacity to circulate and discuss strategies for managing (through protection) indigenous knowledge. The power to name the category indigenous knowledge as 'TK', to make indigenous knowledge intelligible contributes to how the subject can be identified and characterised. The labeling and classification also directs attention to how access to the term is regulated. For instance, it is unlikely that people who have interests in the practical engagement and practice of indigenous knowledge would be able to identify 'TK' as pertaining to their knowledge systems and thus it becomes an abstracted concept that has very little to do with indigenous people – except as a legal category derived from indigenous interests.

The point generally of acronyms is to simplify and codify a particular term however, it also demonstrates a position of power whereby knowledge is bureaucratised. 'TK' as a category honed for legal action, comes to exist without relation to any other social or political factors. The subjectivity that renders traditional knowledge possible is absent. Thus 'TK' is a decontextualised term where indigenous people have been reduced to additional factors of

[10] See for instance the number of terms that are circulated to denote traditional knowledge: World Intellectual Property Organisation, *Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* Third Session, Geneva, Switzerland June 13-21, 2002 Annex 1.

'TK' when in fact they are integral to its production. The same problems that haunted the effectivity of the terminology 'folklore' return in a modified way with the circulation of this new term.

As language shapes the possibility of action, how indigenous knowledges are rendered thinkable in a legal context shapes the potentiality of outcomes. The change of terminology marks a point of governance where the language is adapted to suit the increased codification of traditional knowledge through the international organisations. The acronym 'TK' pins a complex reference to a contemporary transactional setting found only in the abstract discourse of bureaucratic documents. In this context there is little scope for the recognition of the constantly changing dynamic of traditional knowledge. 'TK' marks indigenous knowledge as forever 'traditional'.

The point is that indigenous people are still provided with impossible positions that they are expected to mediate and the problem of access and audience remains highly significant.[11] As was the case with the 1994 *Stopping the Rip Offs* Issues Paper, the audience of the Paper, and those who could access the document, illustrated fundamental issues that undermined its effectivity and utility as a governmental initiative. With only eleven submissions garnered from the Issues Paper, the proportion of representation from indigenous communities throughout Australia indicated serious communication problems, including language issues of interpretation and translation. These remain fundamental to the international discourse which in turn impacts upon the increased adoption of this 'TK' terminology nationally.

In such circumstances, the extent that the interaction between the international and national can generate new opportunities for Australia in the debate and discussion remain somewhat limited. The key instance that could generate further fuel to the debate is the direct and sustained dialogue and negotiation with indigenous people. This holds the possibility of moving beyond dictates of terminology and legislative inaction because it begins to alter the

[11] Access here is not just a problem of legal education and accessing legal services. It also encompasses far more fundamental poverty related issues common to dispossessed peoples. For example, Colin Golvan notes that one of the problems he encountered with running the copyright cases was securing access to the dialysis machines required for the artists. See: C. Golvan, interview by author, 19 June 2002, tape recording, Owen Dixon Chambers, Melbourne. See Appendix A.

imaginary positions and needs that have been historically constructed for indigenous people even in postcolonial political environments. Whether the divergent political and cultural differences of indigenous people could be recognised and adopted are yet to be witnessed. What is clear however, is that national experience fuels international attention. Directly engaging indigenous people within Australia has the possibility of informing a broader discourse that provides for indigenous expectation and accords realistic and attainable outcomes.

Managing future expectation

Given that the experience of Australia has been largely restricted to copyright and indigenous cultural expression in the form of art, it is interesting that the international forums now tend to focus predominately on biodiversity and issues involving patents.[12] In this regard at least, Australia is informed by this international attention, in the sense that there is an effort to gage indigenous interests in biodiversity as the current battle-ground in securing intellectual rights in intellectual property.[13]

As May amongst others has noted, the controversy surrounding affordable medicines for AIDS in Africa starkly illustrates the inequity between countries in adopting intellectual property standards.[14] In discussions regarding the power imbalance and hence negotiating power of individual nation states, questions of innovation and technological development and transfer are at the forefront.[15] Agribusiness and biotechnology, as well as securing affordable medicines generate questions of accessibility. Importantly they also highlight issues of business, economics and market pressures. The point is that the relationship between biopiracy and

---

[12] This was also the key interest for the Fordham Symposium.

[13] See S. Gray, "Vampires around the Campfire" (1997) 22(2) *Alternative Law Journal* 60; M. Blakeney, "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" (1997) 19(6) *European Intellectual Property Review* 298; H Fourmile, "Protecting indigenous intellectual property rights in biodiversity" *Ecopolitics IX: Conference papers and resolutions* Northern Land Council: Sydney, 1996; P. Drahos, "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Collecting Society the Answer?" (2000) 6 *European Intellectual Property Review* 245.

[14] C. May, "Why IPRs are a Global Political Issue" (2003) 1 *European Intellectual Property Review* 1. See also R. Mayne, "The Global Campaign on Patents and Access to Medicines" Drahos, P. and R. Mayne (eds) *Global Intellectual Property Rights: Knowledge, Access and Development* Palgrave, Macmillan: London, 2002.

[15] See generally S. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* State University of New York Press: New York, 1998; S. Sell, "Industry Strategy for Intellectual Property and Trade: The Quest for TRIPs and post-TRIPs Strategies" (2002) 10 *Cardozo Journal of International and Comparative Law* 79.

economics is significant and has the capacity to afford some realistic alternatives to the paradigm of tradition that characterises current effort. As Bengwayan has noted:

> Perhaps the most serious appropriation however, and one that is taking place in almost all countries of indigenous and tribal peoples in Asia, is the appropriation of indigenous knowledge of biodiversity through biopiracy: indigenous peoples knowledge of plants, animals and the environment is being used by scientists, medicinal researchers, nutritionists and pharmaceutical companies for commercial gain, often without their informed consent and without any benefits flowing back to them.[16]

Commercialisation and potential monetary rewards function as the fulcrum that determines the increased attention in this nexus and the consequential impact on indigenous people. The focus on biodiversity and biopiracy internationally certainly informs a national agenda in Australia. But a question remains about its genesis. Are indigenous people involved in reframing the issue because it is about 'big business'? Yet with no case law in this area, the national discourse on biopiracy and its projected trajectories in Australia remain largely hypothetical.

Successfully managing future expectation in relation to indigenous claims for intellectual property protection requires the debate to be maintained within a specific sphere complete with an intelligible rationale. As I have demonstrated throughout this work, law establishes governable spaces where through explicit means, a particular problem is identified and rendered amenable to strategies of intervention: for example legal remedy. Outcomes and possibilities are refracted through the prism of the law. This means that legal rationality bolsters attention and bureaucratic intention to deal with the problem. As the category of indigenous knowledge has been relatively secured in intellectual property law, managing future expectation requires surprisingly little direction – the legal discourse is affirmed and consolidated. Even efforts by indigenous people to identify and delineate their own intellectual property systems still occur within the intellectual property continuum. The governing space of the law in directing attention to indigenous knowledge has made new kinds of experience possible and produced new modes of perception. This is also in relation to other factors that

---

[16] M. Bengwayan, *Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia* Minority Rights Group International: London 2003. This Report suggests that there are estimated to be 190 million indigenous people in Asia thus pointing to difficulties of representation.

produce an account of indigenous intellectual property, including political influence and individual agency.

Moreover, successfully managing future expectations in the area of intellectual property does not only mean managing indigenous expectations but also the expectations of key interest groups, governmental industries and others involved in producing the indigenous knowledge category. This means establishing multiple ways of developing responses to international initiatives and initiating ways of making them relevant in specific governing contexts. Here an interpenetration of international and national objectives managing the location and identification of indigenous knowledge is fundamental.

In Australia, party political stances remain involved in keeping issues of indigenous intellectual property on the agenda. Concern for economic benefits such as resale royalties,[17] which are significant in Australia owing to the exponential growth of the Aboriginal art market, indicate the intersection of money and business in the Australian indigenous intellectual property paradigm. The significant monies potentially involved for indigenous artists, keep the prospect of intellectual property remedy and utility on the political agenda.

Diverse indigenous politics within Australia makes it increasingly difficult to present a consolidated 'indigenous' position. With different regions encountering different levels of engagement with intellectual property, and sympathetic industries developing programs recognising indigenous intellectual property rights, there is certainly no consensus in what the needs and expectations of indigenous people are in relation to intellectual property. This means that bureaucrats located in policy making positions, rarely engaging with indigenous people and diverse indigenous positions, will repetitively fail to grasp and therefore inadequately represent what indigenous people are seeking in relation to intellectual property law and also, what indigenous conceptions of intellectual property may include. Well intentioned platitudes that stem from ideological positions are unlikely to invigorate real and sustained debate with indigenous people and indigenous communities.

---

[17] As discussed in Chapter Eight, droit de suite are voluntary under the Berne Convention. See: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1996* Centre for Commercial Law Studies, Queen Mary College: London, 1987.

At the recent Garma forum,[18] a festival of Yolngu culture held in north east Arnhem Land, key indigenous and political leaders highlighted the diverse interests reflected in intellectual property, now that it recognises indigenous knowledge as a distinct category.[19] Whilst debate initially circled around the proposal of a specific *sui generis* law, this was directly challenged as still leaving indigenous people practically disengaged and disempowered from the processes of employing intellectual property laws in instances of common complaint with the market. The inescapably inter-cultural dimension of indigenous experience renders this similarity a reality to be addressed.

The challenge of making intellectual property accessible and usable for indigenous interests remains paramount. Indigenous knowledge is now a category recognised in intellectual property law. But indigenous people still remain distanced from options for how to use this legal tool as a vehicle of leverage – both economically and culturally. Of course the limitations in legally understanding and acknowledging indigenous difference remain and advocacy in these areas is still required. But waiting for governmental action in regards to new laws and new legislation practically places indigenous people in compromised negotiating positions that disadvantages those who want to use and need to use intellectual property laws for a variety of purposes. The globalisation of intellectual property debate and issues has included the interests and rights of indigenous people and by implication it is time to start practically engaging with intellectual property as a legitimate tool in the arsenal that can be used by indigenous people to advance self-determination claims and objectives. Despite the inherent biases and culturally contingent nature of the law, the common problem remains one within the law – not one that indigenous people have with the law. This reflection provides the catalyst for a productive engagement that affords indigenous people the capacity to appropriate and reappropriate the law to suit particular instances of knowledge use and knowledge regulation.

---

[18] See the Garma Forum website at <http://www.garma.telstra.com/forum.htm>.

[19] Participants in this discussion on intellectual property included: Senator Aden Ridgeway; Justice Lindgren, Federal Court Judge; Tamara Winnikoff, Executive Director of NAVA; Cristopher Sexton, Arts Law Centre; Gawarrin Gumana, senior elder and Yolngu artist; Vivien Johnson, Lecturer Macquarie University; Chips McKinolty, Arts Advisor to the Northern Territory Government; Jane Anderson, Visiting Research Fellow, AIATSIS; and, Brett Cottle, Australian Performing Rights Association.

Conclusion

This thesis began with the premise that in all the writing dedicated to discussing indigenous knowledge and intellectual property law, none had looked at the production of this category in law, and what the effects of this position were. Curiously little investigation in this area has been directed to the way in which law grants property rights in intangibles, nor how this has been justified through particular categories and forms of classification.

This work has provided an account of the complicated emergence of indigenous knowledge, as a discrete category, in intellectual property law. It has considered the multiple ways in which indigenous knowledge has been produced within a legal discourse, and the regimes of truth about its inclusion and properties that have subsequently been generated. Significantly this work has looked to the internal mechanisms of the law to explain problems of accommodating indigenous difference. This investigation has revealed that the hidden dilemma of providing protection for indigenous knowledge resonate with tensions that characterise intellectual property as a whole: namely how it is possible to justify property rights in intangible subject matter.

Intellectual property is always being presented with 'new' knowledges as subject matter and thus it is always in a position of managing difference. Owing to the adaptability in the face of new developments, digital technology and biotechnology providing two examples, this thesis questioned why indigenous knowledge generates particular contests about its inclusion and what form these took. Much critical literature has focused on the incommensurability between indigenous knowledge systems and western intellectual property frameworks. Upon analysis of these positions however, there remains little examination of the complex ways in which knowledge is understood as property in both indigenous and non-indigenous contexts, and how the law is deeply imbued with managing this process of identification.

The term indigenous intellectual property invites a misplaced perception that it is a naturally occurring subject of the law. Rather than assume the naturalness of the category, this work has examined the politics of its construction precisely as a 'special' category. In examining its

production, the thesis has highlighted the manifold ways in which the category has been produced by social, political, governmental, legal and individual agents and influences. These diverse elements have produced the category, and also hold the capacity for future directions.

It was the copyright cases in the 1980s involving Aboriginal art that provided the first solid catalyst for the inclusion of indigenous knowledge in intellectual property law in Australia. Prior to this indigenous knowledge was predominately translated through anthropological and ethnographic locations. The copyright cases were indicative of various fluctuations in the use and function of indigenous knowledge as well as changing political environments. This was in regards to the increased value that was attached to the knowledge, in research, scientific, indigenous and artistic domains. In various forms an international and national industry circulating around and dependent upon indigenous knowledges has been generated. In Australia at least, the industry has fostered and supported valuable infrastructure within indigenous communities. Significantly with this industry has come an inevitable push for ways of compensating for the value of the knowledge and measures to restrict and control the circulation in certain circumstances. In many ways a corollary can be drawn between the indigenous knowledge industry and new technologies, where the increased circulation means greater access from differing communities, which also correspondingly leads to misuse and inappropriate applications of this knowledge. Of course what constitutes inappropriate behaviour changes from context to context, and this challenges the competency of the law: for such struggles inevitably arise from relations of power.

There is little surprise that the indigenous knowledge enterprise has turned to intellectual property law for remedy to readdress issues of control and modes of circulation by the 'owners' and custodians of indigenous knowledge. In a globalising and interconnected world, knowledge itself has been naturalised as generating property rights, even though the historical justification of this remains unclear. The increased circulation of rights in intellectual property provides an interpretative framework that normalises the concept of a property right in information and relies upon narratives of its emergence, logic and rationale. This is helped by the generality of discussions that intellectual property and copyright have produced when

detached from specific practical negotiations. "Copyright law questions can make delightful cocktail party small talk, but copyright law answers tend to make eyes glaze over everywhere."[20]

Competing interests vie for control of the intellectual property language: what is an infringement, what is property, how to determine originality and so forth. Indigenous people also have the power to effect such changes as the term 'indigenous intellectual and cultural property' illustrates. Yet the legal framework remains pivotal and influences how discussions about knowledge use and information exchange are made. Intellectual property is not a neutral form but is also open to influence from a range of interested parties and competing interests, something that can be seen from any considered look at its history. Yet the challenge remains that of exposing contingencies that have (ironically) historically remained hidden.

Jessica Litman has argued, that faced with pressures in terms of what intellectual property can include and whether the copyright statute can adjust, two familiar lines of debate are engaged. One side claims an incommensurability with the current regime and calls into question the "assumptions upon which our copyright laws are based."[21] The other camp insists that copyright is always faced with the issue of change in subject matter and as a consequence continues to manage the orbit of its categories with relative success thus not requiring any substantial change.[22] Litman's comments are useful, but not in the standard dualism that she presents. For these are not so neatly divided, and one argument that points to the problems of assumption of copyright law can also recognise the relative success in how the categories have been historically employed. To this end, this thesis has found a middle road between these two positions, arguing that the issues faced here are part of an intellectual property continuum in managing differing sorts of knowledge.

The point is that the success in mediating categories and the difficulties of including new subject matter are part of one and the same concern: how to justify property in something that has no clear boundaries of marks of identification. Any claim to property in knowledge faces this same problematic, whether property rights are argued to be invested in culture and

---

[20] J. Litman, *Digital Copyright* Prometheus Books: New York, 2001 at 13.
[21] Ibid. , at 35.
[22] Ibid. , at 35.

heritage or in some form of labour exerted to compile a telephone book. To avoid sustained challenge on what would otherwise be a destabilising element, the law has come to rely on the tangible product to invest property. But in certain cases, like indigenous knowledge, this reliance is revealed as being culturally contingent on certain standards of identification. A key irony is that in positioning indigenous knowledge within an intellectual property regime, the law produces a subject that is difficult to manage, and this exposes the instability of the law's own metaphysical categories.

A more complicated question to the dualing arguments raised by Litman is: given intellectual property is limited and perhaps inappropriate in catering for the diversity of indigenous knowledge, both in its remedy and forms of justification, why hasn't it then been abandoned as a political cause? Of course there is no clear answer, but what is apparent is that in the circumstances where the legal potential resides and involves the market, and law is the carrier of important entitlements, an abandonment of the language and framework of intellectual property could potentially discriminate indigenous interests that intersect the market. There also needs to be a realistic awareness that indigenous people use the tools that are available. This also means realising indigenous people know they have agency, albeit on compromised terms, and that not all indigenous people reside in traditional communities and remote communities. Even when they do this does not automatically exclude innovation and contemporary practice at the cultural interface or necessarily access to legal knowledge. We cannot afford, in Australia to continue talking as though all indigenous people are the same, have the same problem with intellectual property, or would want to be part of a unique indigenous *sui generis* system. We need to start arguing in the particular, rather than the general, as the general abstracts and categorises indigenous experience in ways that are curiously similar to the critiques leveled at the biases with intellectual property law.

Of course indigenous needs can and do differ. However this also helps us understand why the intellectual property framework has not been abandoned: it provides a means of leverage for indigenous self-determination claims in that it allows the exercise of control over uses and circulations of information. These are legitimate claims that engage international and national discourses of human rights and demand recognition of the troubling past of this nation. But at

the same time, we have to be realistic about what can be gained through an intellectual property regime: legal frameworks of themselves cannot ever adequately provide a stand-in-grid for issues that require social and cultural reflection and reconciliation.

I have not proffered precise solutions in this work, and perhaps made the issues more complex than they initially seemed. The objective of this project has been to highlight the complicated relations of power implicit in producing indigenous knowledge within intellectual property law. It has revealed the concomitant political, social and cultural mechanisms within the struggles for inclusion and recognition, and that it is these intersections that influence legal possibility and direct the potential capabilities for future practical engagement. Yet this work contains within its frame future research: a project focused on specifically understanding the diverse ways in which indigenous people appreciate knowledge as property and the varied ways in which intellectual property can be effectively employed.[23] Only a sustained examination of the particular can begin to generate some useful and workable strategies.

[23] For instance in the development of Knowledge Centres in communities in Northern Territory and Queensland. These centres aim to function at the interface between community education and market demands for cultural products. See: J. Nepparnga Gumbula, "Indigenous Knowledge Centres: Returning and Disseminating Knowledge -The Galiwin'ku Knowledge Centre" AIATSIS Seminar Series *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* 14 April 2003.

Selected Bibliography

"A Tribute to Banduk Marika" *Arts Yarn Up*, Aboriginal and Torres Strait Islander Arts Board of the Australia Council, 2002.

"Aboriginal art copyright win" *The Advertiser*, 14 December, 1994.

"Aboriginal art on carpets costs importer $188,000" *Townsville Bulletin*, 15 December, 1994.

Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report* Australian Government Publishing Service: Canberra, 1994.

Aboriginal and Torres Strait Islander Social Justice Commissioner *Fifth Report* HREOC, 1997.

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000* Superfine Printing, Sydney 2000.

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* J.S. McMillan Publishing Sydney 2001.

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* J.S. McMillan Publishing Sydney 2002.

Agrawal, A. "Dismantling the Divide Between Indigenous and Scientific Knowledge" (1995) 26 *Development and Change* 413.

Agrawal, A. and C.C. Gibson, "The Role of Community in Natural Resource Conservation" Gibson, C., M. McKean, E. Ostrom (eds), *People and Forests: communities, institutions and governance* Massachusetts Institute of Technology: Massachusetts 2000.

Agrawal, A. "The Regulatory Community: Decentralisation and the Environment in the Van Panchayats (Forest Councils) of Kumaon, India" (2001) 21(3) *Mountain Research and Development* 208.

Agrawal, A. "Indigenous knowledge and the politics of classification" (2002) 54(173) *International Social Science Journal* 287.

Almog, S. "Frome Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law" (2002) 13 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1.

"Amazon tribes fight vine patent" *The Canberra Times* 29 May 1999.

Anderson, B. *Imagined Communities: Reflections on the Origins and Spread of Nationalism* Versco Publishing: London, 1983.

Anderson, J. "The difficulties in recognising 'cultural knowledge' in native title following the *Miriuwung Gajerrong* decision" Conference Paper, *The Native Title Conference 2003: Native Title on the Ground* 4 June 2003.

Annas, M. "The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin" (1997) 3(90) *Aboriginal Law Bulletin* 4.

Aoki, K. "Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) 6 *Ind. J. Global Leg. Studies* 11.

Aoki, K. "Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property and the Internet" (1998) 5 *Ind. J. Global Leg. Studies* 443.

Appadurai, A. "Disjuncture and Difference in the Global Cultural Economy" Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate* Polity Press: Cambridge, 2000.

Apthorpe, R. "Writing development policy and policy analysis plain or clear" Shore, C. and S. Wright (eds), *Anthropology of Policy: Critical Perspectives on Governance and Power* Routledge: London and New York, 1997.

Arnold, M. *Culture and Anarchy: An Essay in Social and Political Criticism* Bobbs-Merrill: Indianapolis and New York, 1971.

Arup, C. *The New World Trade Agreements: Globalizing Law Through services and Intellectual Property* Cambridge University Press: Cambridge 2000.

Ashcraft, R. *John Locke: Critical Assessments* Routledge: London, 1991.

Attwood, B. and A. Markus, "Representation Matters: The 1967 Referendum and Citizenship" Peterson, N. and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* Cambridge University Press: Cambridge, 1998.

Attwood, B. and S.G. Foster (eds), *Frontier Conflict: The Australian Experience* National Museum of Australia, Canberra, 2003.

Austin, J. *The Province of Jurisprudence Determined* and *Lectures on Jurisprudence* (3 vols) John Murray: London, 1861-3.

Australian Broadcasting Commission, *Cultural Protocol*, July 2002.

Australian Copyright Council, Protecting *Indigenous Intellectual Property: A Discussion Paper*, September 1998.

Australian Copyright Council, *Indigenous Arts and Copyright*, August 1999.

Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies*, Canberra, 2002.

"Australians happy to return" *The Age*, 11 December, 2002.

Barcham, M. "(De)Constructing the Politics of Indigeneity" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000.

Barrett, M. *The Politics of Truth: From Marx to Foucault* Polity Press: London, 1991.

Barron, A. "No Other Law? Author-ity, Property and Aboriginal Art" Bently, L. and S. Maniatis (eds), *Perspectives on Intellectual Property Volume 4: Intellectual Property and Ethics* Sweet and Maxwell: London, 1998.

Barry, A. "Lines of Communication and spaces of rule" Barry, A., N. Rose and T. Osborne (eds), *Foucault and Political Reason: Liberalism, Neoliberalism and Rationalities of Government* University of Chicago Press: Chicago, 1996.

Barsh, R.L. "Indigenous peoples and the right to self-determination in international law" Hocking, B. (ed), *International Law and Aboriginal Human Rights* The Law Book Company: Sydney, 1988.

Barsh, R.L. "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 *The American Journal of International Law* 369.

Bartlett, R. "The obsession with traditional laws and customs creates difficulties establishing native title claims in the South" (2003) 31(1) *The University of Western Australia Law Review* 35.

Beckett, J. (ed), *Past and Present: The Construction of Aboriginality* Aboriginal Studies Press: Canberra, 1988.

Behrendt, L. "In your dreams: cultural appropriation, popular culture and colonialism" (1998) 4(1) *Law, Text, Culture* 256.

Behrendt, L. *Achieving Social Justice: Indigenous rights and Australia's future* Federation Press: Sydney, 2003.

Bell, R. "Protection of Aboriginal folklore: or do they dust reports" (1985) 17 *Aboriginal Law Bulletin* 5.

Bengwayan, M. *Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia*, Minority Rights Group International: London, 2003

Bennett, D. "Native Title and Intellectual Property" (1996) 10 *Land, Rights, Laws: Issues of Native Title* 1.

Bennett, G. "The Manifest Toe" McLean, I., and G. Bennett, *The Art of Gordon Bennett* Craftsman House: Australia, 1996.

Bennett, T. *Culture: A Reformer's Science* Allen and Unwin: Sydney, 1998.

Bentham, J. *The Theory of Legislation* Ogden, C.K (ed), Keagan Paul Publishers: London, 1931.

Bently, L. and B. Sherman, "Great Britain and the Signing of the Berne Convention in 1886" (2001) 48(3) *Journal of the Copyright Society of the USA* 311.

Bettig, R. and H. I. Schiller, *Copyrighting Culture: The Political Economy of Intellectual Property*, Westview Press: Boulder, Colorado, 1997.

Bhabha, H. *The Location of Culture* Routledge: London and New York, 1994.

Bird, G. *'The Civilising Mission': Race and the Construction of Crime* Contemporary Legal Issues No.4, Monash University, 1987.

Bird, G. "Koori Cultural Heritage: Reclaiming the Past?" Bird, G., G. Martin and J. Neilsen (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996.

Bird, G., G. Martin and J. Nielson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996.

Blackstone, W. *Commentaries on the Laws of England* (facsimile of the first edition [1765-1769]) Chicago University Press: Chicago, 1979.

Blakeney, M. "*Milpurrurru & Ors v Indofurn Pty Ltd & Ors* – Protecting Expressions of Aboriginal Folklore Under Copyright Law" (1995) *elaw: Murdoch Electronic Law Journal* at www.murdoch.edu.au/elaw/issues/v2n1/blakeney.txt.

Blakeney, M. *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* Sweet and Maxwell: London, 1996.

Blakeney, M. "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" (1997) 19(6) *European Intellectual Property Review* 298.

Blakeney, M. "Protecting Expressions of Aboriginal Culture under Intellectual Property Law" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997.

Blakeney, M. "Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions" (1998) 1(6) *Journal of World Intellectual Property* 985.

Blakeney, M. "Protection of Traditional Knowledge under Intellectual Property Law" (2000) 22(6) *European Intellectual Property Review* 251.

Blakeney, M. "Protecting the cultural expressions of Indigenous peoples under intellectual property law – the Australian experience" Grosheide, F.W. and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

Bonham-Carter, V. *Authors by Profession, Volume One and Two* The Society of Authors: London, 1978.

Bottomley, S. and S. Parker (eds), *Law in Context* (second edition) The Federation Press: Sydney, 1997.

Bowrey, K. *Don't Fence Me In: The Many Histories of Copyright*, Doctor of Juridical Studies, University of Sydney, 1994 (unpublished).

Bowrey, K. "Copyright, photography and computer works: the fiction of original expression" (1995) 18(2) *UNSW Law Journal* 278.

Bowrey, K. "Who's writing copyright's history?" (1996) 18(6) *European Intellectual Property Review* 322.

Bowrey, K. "The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture" (2001) 12 *Law and Critique* 75.

Bowrey, K. "Originality in Copyright: How low can you go?" UNSW Seminar Paper, September 11, 2001 (unpublished).

Bowrey, K., and M. Rimmer, "Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law" (2002) 7(8) *First Monday*

at http://firstmonday.org/issues/issue7_8/bowrey/index.html.

Bowrey, K. *Copyright and Culture: Australian Law and Controversies* (forthcoming 2003).

Boyd White, J. *Justice as Translation: An Essay in Cultural and Legal Criticism* University of Chicago Press: Chicago and London, 1990.

Boyle, J. *Shamans, Software and Spleens: Law and the Construction of the Information Society* Harvard University Press: Cambridge, Massachusetts, 1996.

Brady, M. "Aborigines and Alcohol" (2002) 61(2) *Meanjin* 147.

Brady, M. "The feasibility and acceptability of introducing brief intervention for alcohol misuses in urban Aboriginal medical service" (2002) 21 *Drug and Alcohol Review* 375.

Braithwaite, J. "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice: A Review of Research* 1.

Brennan, F. "Mabo and its Ramifications for the Future of Indigenous Australians" Johnston, E., M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish Publishing: Sydney, 1997.

Brosius, P. "Anthropological engagements with environmentalism" (1999) 40(3) *Current Anthropology* 277.

Brosius, P. "Green dots, pink hearts: Displacing politics from the Malaysian rain forest" (1999) 101(1) *American Anthropologist* 36.

Brown, M. "Can Culture be Copyrighted?" (1998) 39(2) *Current Anthropology* 193.

Brush, S. "Whose Knowledge, Whose Genes, Whose Rights?" Brush, S. and D. Stabinsky (eds), *Valuing Local Knowledge: Indigenous Peoples and Intellectual Property Rights* Island Press: Washington D.C., 1996.

Bryan, B. "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13 *Can. J. L. & Juris.* 3.

Bunting, S.W. "Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture" (2000) 18 *Context: Journal of Music Research* 15.

Burchell, G. "Liberal government and techniques of the self" Barry, A., T. Osborne and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of government* University of Chicago Press: Chicago, 1996.

Butler, J. *Gender Trouble: feminism and the subversion of identity* Routledge: New York, 1990.

Casey, D., M. Neale and F. Cubillo, "Possession, Protocol and Property: Museums collections" *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* AIATSIS Seminar Series, 19 May 2003.

Chakrabarty, D. "Modernity and Ethnicity in India" Bennett, D. (ed), *Multicultural States: Rethinking Difference and Identity* Routledge, London, 1998.

Chakrabarty, D. *Provincialising Europe: Postcolonial Thought and Historical Difference* Princetown University Press: New Jersey, 2000.

Charles, C. "Call for Government to consult with Aboriginal communities on alcohol policies" (2003) 6(1) *ALRM Focus* 2.

Charlesworth, H. "Critical Legal Education" (1989) 5 *Australian Journal of Law and Society* 27.

Christie, J. "Enclosing the Biodiversity Commons: bioprospecting or biopiracy" Hindmarsh, R., G. Lawrence, J. Norton (eds), *Altered Genes: Reconstructing Nature – the debate* Allen and Unwin: Sydney, 1998.

Clarke, J. "Law and Race: The position of Indigenous people" Bottomley, S. and S. Parker (eds), *Law and Context* (second edition) The Federation Press: Sydney, 1997.

Clifford, J. *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* Harvard University Press: Cambridge and Massachusetts, 1988.

Cohen, B. *Colonialism and its Forms of Knowledge: The British in India* Princetown University Press: New Jersey, 1996.

Cohen, J. "Freedom, Equality and Pornography" Sarat, A. and T. Kearns (eds), *Justice and Injustice in Legal Theory* The University of Michigan Press: Michigan, 1996.

Coleman, E. "Aboriginal Painting: Identity and Authenticity" (2001) 59(4) *The Journal of Aesthetics and Art Criticism* 385.

Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* London, 2002.

Coombe, R. "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" Ziff, B. and P.V. Rao (eds), *Borrowed Power: Essays on cultural appropriation* Rutgers University Press: New Brunswick, New Jersey, 1997.

Coombe, R. *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Durham and London, 1998.

Cope, M. *Constructive Trusts* The Law Book Company: Sydney, 1992.

Cornell, D. *The Philosophy of the Limit* Routledge: New York, 1991.

Correa, C. "Harmonisation of Intellectual Property Rights in Latin America: Is there still room for differentiation?" (1997) *N.Y.U. J. Int'l L. & Pol'y*. 109.

Cotterrall, R. *Law's Community: Legal Theory in Sociological Perspective* Clarendon Press: Oxford, 1995.

Cotterrell, R. *The Politics of Jurisprudence* Butterworths, London, 1989.

Cramer, S. (ed), *Postmodernism: a consideration of the appropriation of Aboriginal imagery: forum papers* Institute of Modern Art: Brisbane, 1989.

Croft, B. "Roundtable Discussion" *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* AIATSIS Seminar Series, 16 June 2002.

"Cultural pretensions to the native thrown" *The Australian* 17 June 2003.

Cuneen, C. "Judicial Racism" (1992) 2(58) *Aboriginal Law Bulletin* 9.

Cuneen, C. *Conflicts, Politics and Crime* Allen and Unwin: Sydney, 2001.

Cuneen, C. and T. Libesman, *Indigenous People and the Law in Australia* Butterworths: Australia, 1995.

Curthoys, A. "Citizenship, race and gender" Daley, C. and M. Nolan (eds), *Suffrage and Beyond* Pluto Press: Sydney, 1994.

Daes, E.I. *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* E/CN.4/Sub.2/1993/28, July 28, 1993.

Daes, E.I. *Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous People,* presented by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and President of the Working Group on Indigenous Populations, Geneva, 45th Session, E/CN.4/Sub.2/1993/28.

Daes, E.I. *Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous Peoples*, Final report of the Special Rapporteur, Mrs. Erica-Irene Daes in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights, Geneva, 47th Session, E/CN.4/Sub.2/1995/26.

Daes, E.I. "Striving for self-determination for Indigenous peoples" Kly, Y., and D. Kly (eds) *In pursuit of the right to self-determination* Clarity Press: Geneva, 2000.

Daes, E.I. *Note on the Concept of Indigenous People* E/CN.4/Sub.2/AC.4/1995/3, July 1995.

Dahl, T.S. *Women's Law: An Introduction to Feminist Jurisprudence* Oxford University Press: Oxford, 1987.

Davies, M. *Asking the Law Question* The Law Book Company: Sydney, 1994.

Davies, M. *Delimiting the Law: Postmodernism and the Politics of Law* Pluto Press: London and Chicago, 1996.

Davies, T. "Aboriginal Cultural Property?" (1996) 14 (2) *Law in Context* 1.

Davila, J. "Aboriginality: A lugubrious Game?" (1987) 23(4) *Art and Text* 53.

Davis, M. "Indigenous intellectual property protection consultations with Aboriginal and Torres Strait Islander Peoples" (1997) 3(90) *Aboriginal Law Bulletin* 22.

Davis, M. "Indigenous Peoples and Intellectual Property Rights (1996-7) 20 *Parliamentary Library Research Paper* 1.

Davis, M. "Law, Anthropology and the Recognition of Indigenous Cultural Systems" (2001) 11 *Law and Anthropology* 298.

Davis, M. *Protecting Culture: Indigenous Cultural and Intellectual Property Rights in the Far North Queensland Wet Tropics* Aboriginal and Torres Strait Islander Commission Cairns and District Regional Council, 2002.

Davis, R. "Society, ecology and pastoralism: aspects of Aboriginal cattle ownership in the Kimberley" (forthcoming 2003).

Dawson, F. "The importance of property rights for biodiversity conservation in the Northern Territory" (1996) 3(2) *The Australian Journal of Natural Resources Law and Policy* 179.

Dean, M. *Governmentality: Power and Rule in Modern Society* Sage Publications: London, 1999.

Deazley, D. "Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters" (2003) 25(6) *European Intellectual Property Review* 270.

Department of Communication, Information Technology and the Arts *Report of the Contemporary Visual Arts and Crafts Inquiry* (The Myer Report), Canberra, September, 2002.

Department of Home Affairs and the Environment *Report of the Working Party on the Protection of Aboriginal Folklore* Canberra, December 1981.

Derrida, J. "Force of Law: The Mystical Foundation of Authority" (1990) 11 *Cardozo Law Review* 919.

Dirks, N., G. Eley and S. Ortner (eds), *Culture/Power/History: a reader in contemporary social theory* Princetown University Press: Princetown New Jersey, 1994.

Dodds, J. "The New Constructive Trust: An Analysis of its Nature and Scope" (1988) 16 *Melbourne University Law Review* 482.

Dodson, M. "Indigenous Peoples and Intellectual Property Rights" *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney 1996.

Dodson, M. "The end in the beginning: re(de)finding Aboriginality" (1994) 1 *Australian Aboriginal Studies* 2.

Dodson, M. "Towards the exercise of Indigenous rights: Policy, power and self-determination" (1994) 35(4) *Race and Class* 65.

Dodson, P. *Royal Commission into Aboriginal Deaths in Custody: Regional Report of the Inquiry into Underlying Issues in Western Australia* Australian Government Printing Service: Canberra, 1991.

Dodson, P. *The Wentworth Lecture 2000 – Beyond the Mourning Gate: Dealing with Unfinished Business* AIATSIS: Canberra, 2000.

Donzelot, J. "The mobilisation of society" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Donzelot, J. *The Policing of Families* Pantheon Books: New York, 1979.

Drahos, P. *A Philosophy of Intellectual Property* Dartmouth Press; Sydney 1996.

Drahos, P. "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Collecting Society the Answer?" (2000) 6 *European Intellectual Property Review* 245.

Drahos, P. "BITs and BIPs: Bilateralims in Intellectual Property" (2001) 4(6) *The Journal of World Intellectual Property* 791.

Drahos, P. "Capitalism, Efficiency and Self-Ownership" (2003) 28 *Australian Journal of Legal Philosophy* 215.

Drahos, P. with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications: London, 2002.

Drahos, P. and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* Palgrave McMillan: Hampshire 2002.

Dunn, J. *The Political Thought of John Locke* Cambridge University Press: Cambridge, 1969.

Dutfield, G. "Protecting Traditional Knowledge and Folklore" Grosheide, F.W., and J.J. Brinkoff (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

Dworkin, R. *Law's Empire* Fontana Press: London, 1986.

Eatock, C. and K. Mordaunt, *Copyrites* Australian Film Finance Corporation Limited, 1997.

Edelman, B. *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. Kingdom, E.) Routledge and Keegan Paul: London, 1979.

Eisenstein, E. *The Printing Revolution in Early Modern Europe* Cambridge University Press: Cambridge, 1983.

Egan, C. "Tickner to protect Aboriginal Artists" *The Australian* 15 December, 1994.

Ellinson, D. "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17(2) *UNSW Law Journal* 327.

"Euphoria in South Africa as drug company drops case" *The Sydney Morning Herald* 20 April, 2000.

Fanon, F. *Black Skin, White Masks* (transl. Markmann, C.L.) MacGibbon and Kee: London, 1968.

Fanon, F. *The Wretched of the Earth* Penguin Books: Middlesex, 1961/1967.

Feather, J. *The Provincial Book Trade in Eighteenth Century England* Cambridge University Press: Cambridge, 1985.

Fitzpatrick, P. "Racism and the Innocence of Law" Fitzpatrick, P. and A. Hunt (eds), *Critical Legal Studies* Basil Blackwell: Oxford, 1991.

Fitzpatrick, P. *The Mythology of Modern Law* Routledge: London and New York, 1992.

Fitzpatrick, S. "Prospect of Further Copyright Harmonisation" (2003) 25(5) *European Intellectual Property Review* 215.

Fletcher, C. (ed), *Aboriginal Self-Determination in Australia* Aboriginal Studies Press: Canberra, 1994.

Ford, L. "An Indigenous Perspective on Intellectual Property" (1997) 3(90) *Aboriginal Law Bulletin* 13.

Foucault, M. *Discipline and Punish: The Birth of the Prison* Penguin Books: London, 1991.

Foucault, M. *The Archaeology of Knowledge* Tavistock Publishing: London, 1972.

Foucault, M. *The History of Sexuality: Volume 1* Penguin Books: London, 1990.

Foucault, M. *The Order of Things: An Archaeology of the Human Sciences* Tavistock: London, 1970.

Foucault, M. "Clarifications on the Question of Power" Lotringer. S. (ed), *Foucault Live: Collected Interviews, 1961-1984* Semiotext(e): New York, 1989.

Foucault, M. "Governmentality" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Foucault, M. "Interview with Michel Foucault" Faubion, D. (ed), *Essential Works of Michel Foucault: (1954 – 1984) Vol 3* Penguin Books: London, 2000.

Foucault, M. "Politics and the Study of Discourse" Burchell, G., C. Gordon, P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Foucault, M. "Questions of Method" Burchell, G., C. Gordon, P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Foucault, M. "The Birth of Biopolitics" Rabinow,P. (ed), *The Essential Works 1. Ethics: Subjectivity and Truth* Penguin Books: London, 1994.

Foucault, M. "The Proper Use of Criminals" Faubian, D. (ed), *Essential Works of Foucault: Power (1954 – 1984) Vol 3* Penguin Books: London, 2001.

Foucault, M. "The Subject and Power" Dreyfus, H. and P. Rabinow (eds), *Michel Foucault: Between Structuralism and Hermeneutics* Harvester Press: Brighton, 1983.

Foucault, M. "Truth and Power" Gordon, C. (ed), *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* Pantheon: New York, 1980.

Foucault, M. "Two Lectures" Gordon, C. (ed & transl.), *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* Pantheon: New York 1980.

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

Foucault, M. *History of Sexuality, (vol 1)* (transl. Hurley, M.), Pantheon: New York, 1978.

Foucault, M. *Language Counter-Memory and Practice: Selected Essays and Interviews* (transl. Bouchard, D.F. and S. Simon), Cornell University Press: New York, 1977.

Foucault, M. *Power/Knowledge: Selected Interviews and Other Writings 1972 – 1977* Gordon, C.(ed & transl.), Pantheon: New York 1980.

Fourmile, H. "Cultural survival v cultural prostitution" Paper presented at the Cultural Tourism Awareness Workshop, Cairns, Queensland 1993.

Fourmile, H. "Protecting indigenous intellectual property rights in biodiversity" *Ecopolitics IX: Conference papers and resolutions* Northern Land Council: Sydney, 1996.

Fourmile, H. "Some background to issues concerning the appropriation of Aboriginal imagery" Cramer, S. (ed), *Postmodernism: a consideration of the appropriation of Aboriginal imagery: forum papers* Institute of Modern Art: Brisbane, 1989.

Fourmile, H. "The Aboriginal art market and the repatriation of Aboriginal cultural property" (1989) 8(1) *Social Alternatives* 19.

Fox, C. *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth Century Britain* University of California Press: Berkeley, 1988.

Fraser, N. "Foucault on Modern Power: Empirical Insights and Normative Confusions" (1981) 1 *Praxis International* 272.

Fraser, N. "Michel Foucault: A 'Young Conservative'" (1985) 96 *Ethics* 165.

Frug, G. "A Critical Theory of Law" (1989) 1 *Legal Education Review* 43.

Gaines, J. *Contested Culture: The Image, the Voice and the Law* The University of North Carolina Press: Chapel Hill, London, 1991.

Gana, R. "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24(1) *Denv. J. Int'l L. & Pol'y* 109.

Garnett, K. "Copyright in Photographs" (2000) 5 *European Intellectual Property Review* 229.

"Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources" (2002) 11(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 753.

Geller, P.E. "Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?" Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays in Copyright Law* Clarendon Press: London, 1994.

Geller, P.E. "Copyright History and the Future: What's culture got to do with it?" (2000) 48(1) *Journal of the Copyright Society of the U.S.A.* 210.

Gellner, E. *Culture, Identity and Politics* Cambridge University Press: Cambridge, 1987.

Gerhardt, P. "Why Law Making for Global Intellectual Property is Unbalanced" (2000) 22(7) *European Intellectual Property Review* 309.

Gibson, J. "Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property" (2001) 6(1) *Australian Indigenous Law Reporter* 1.

Giddens, A. *Modernity and Self-Identity: Self and Society in the Late Modern Age* Polity Press: Cambridge, 1991.

Gilroy, P. *The Black Atlantic: modernity and double consciousness* Harvard University Press: Cambridge, Massachusetts 1993.

Gilroy, P. *Between Camps: Race, Identity and Nationalism at the End of the Colour Line* Allen Lane, The Penguin Press: London, 2000.

Ginsburg, J. "Creation and Commercial Value: Copyright Protection of Works of Information" (1990) 90 *Columbia Law Review* 1865.

Golvan, C "Copyright in Aboriginal Art: An Overview" Paper delivered at the Australiasian Intellectual Property Teachers Conference, University of Melbourne 2001.

Golvan, C. "Aboriginal art and copyright infringement" Taylor, L. and J. Altman (eds), *Marketing Aboriginal Art in the 1990's* Aboriginal Studies Press: Canberra, 1996.

Golvan, C. "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 10 *European Intellectual Property Review* 346.

Golvan, C. "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 *European Intellectual Property Review* 227.

Golvan, C. "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 2(56) *Aboriginal Law Bulletin* 5.

Golvan, C. "Court provides strong protection for Aboriginal artwork" (1995) 8(1) *Australian Intellectual Property Law Bulletin* 6.

Gordon, C. "Governmental rationality: an introduction" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Grad, R. "Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia" (2003) 13 *Duke J. Comp. & Int'l L.* 203.

Gray, K. "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252.

Gray, S. "Black, White or Beyond the Pale: The Authenticity Debate and Protection for Aboriginal Culture" (2001) 15 *The Australian Feminist Law Journal* 105.

Gray, S. "Peeking into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art" (2000) 9(2) *Griffith Law Review* 227.

Gray, S. "Squatting in the Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14(2) *Law in Context* 29.

Gray, S. "Vampires around the Campfire" (1997) 22(2) *Alternative Law Journal* 60.

Gray, S. "Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land" (1993) 3(63) *Aboriginal Law Bulletin* 10.

Gray, S. *The Artist is a Thief* Allen and Unwin: Sydney, 2001.

Grosheide, F.W. "General Introduction" Grosheide, F.W., and J.J. Brinkoff (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

Grosheide, F.W. "When Ideas Take the Stage" (1994) 6 *European Intellectual Property Review* 219.

Guha, R. "The Prose of Counter Insurgency" Guha, R. and G. Spivak (eds), *Selected Subaltern Studies*, Oxford University Press: New York, 1988.

Guha, R. *Dominance without Hegemony: History and Power in Colonial India* Harvard University Press: Cambridge, 1997.

Habermas, J. "Modernity v Postmodernity" (translated by S. Benhabib) (1981) 22 *NGC.*

Hall, S. "Cultural identity and diaspora" Rutherford. J. (ed), *Identity* Lawrence and Wishart London, 1990.

Hall, S. "Cultural Identity in Question" Hall, S., D. Held and T. McGrew (eds), *Modernity and its Futures* Polity Press: London, 1993.

Hall, S. "When was the postcolonial? Thinking at the Limit" Chambers, I. and L. Curti (eds), *The Post-Colonial Question: Common Skies, Divided Horizons* Routledge: London, 1996.

Hall, S. and P. Du Gay (eds), *Questions of Cultural Identity* Sage Publications: London, 1996.

Hanks, P. and B. Keon-Cohen, *Aborigines and the Law* Allen and Unwin: North Sydney, 1984.

Harris, C. "Whiteness as Property" (1993) 106(8) *Harvard Law Review* 1709.

Harris, L. "Back to Culture" *Koori Mail* 1 August 2003.

Harrison, S. "Ritual as intellectual property" (1992) 27 *Man* 225.

Harrison, S. "The Politics of Resemblance: Ethnicity, Trademarks: Head-Hunting" (2002) 8 *Journal of the Royal Anthropological Institute* 211.

Hardt, M. and A. Negri, *Empire* Harvard University Press: Massachusetts and London, 2000.

Hart, H.L.A. *The Concept of Law* Clarendon Press: Oxford, 1961.

Harvey, D. *Justice, Nature and the Geography of Difference* Blackwell Publishers: Oxford, 1996.

Havermann, P. "The Participation Deficit: Globalisation: Governance and Indigenous Peoples" (2001) 3 *Balayi: Culture: Law and Colonialism* 9.

Hawkins, C. "Stopping the rip-offs: protecting Aboriginal and Torres Strait Islander cultural expression" (1995) 20(1) *Alternative Law Bulletin* 7.

Helliwell, C. and B. Hindess, "The 'Empire of Uniformity' and the Government of Subject Peoples"(2002) 6 (1&2) *Cultural Values* 139.

Henderson, J. and D. Nash (eds), *Language in Native Title* Aboriginal Studies Press: Canberra, 2002.

Hesse, C. "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793" (1990) 30 *Representations* 109.

Hesse, C. *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* University of California Press: Berkeley, 1991.

Hessey, R. "Designs on the future" *The Sydney Morning Herald* December 15, 1994.

Hettinger, E. "Justifying Intellectual Property" (1989) 18(1) *Philosophy and Public Affairs* 31.

Hindess, B. "Liberalism, socialism and democracy: variations on a governmental theme" (1993) 22(3) *Economy and Society* 300.

Hindess, B. *Discourses of Power: From Hobbes to Foucault* Blackwell Publishers: Cambridge, Massachusetts, 1996.

Hindess, B. and M. Dean, "Introduction" Hindess, B. and M. Dean (eds), *Governing in Australia: Studies in Contemporary Rationalities of Government* Cambridge University Press: Cambridge, 1998.

Hirsch, E. "Malinowski's intellectual property" (2002) 18(2) *Anthropology Today* 1.

Hirst, P.Q. "Introduction" Edelman, B. *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. Kingdom, E.) Routledge and Keegan Paul: London, 1979.

Hirst, P. and G. Thompson, "Globalisation and the History of the International Economy" Held, D. and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate* Polity Press: Cambridge, 2000.

"Historians in bitter plagarism dispute" *The Age*, 16 December, 2002.

Hodge, A. "Cultural Revolution in the Making" *The Australian* 28 July, 2003.

Hogg, R. and D. Brown, *Rethinking Law and Order* Pluto Press: Sydney, 1998.

Hogg, R. and K. Carrington, "Governing Rural Australia: Land Space and Race" Wickham, G. and G. Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* Hart Publishing: Oxford, 2001.

Hohfeld, W.N. "Some Fundamental Legal Conceptions as Applied in Juridical Reasoning" (1913) 23*Yale Law Journal* 16.

Howden, K. "Indigenous Traditional Knowledge and Native Title" (2001) 24(1) *UNSW Law Journal* 60.

Hughes, J. "The Philosophy of Intellectual Property, (1988) 77 *The Georgetown Law Journal* 287.

Hunt, A. "Governing the city: liberalism and early modes of governance" Barry, A., T. Osborne and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of governance* University of Chicago Press: Chicago, 1996.

Hunt, A. "The Critique of Law: What is 'Critical' about Critical Legal Studies" (1987) 14 *Journal of Law and Society* 5.

Hunt, A. and P. Fitzpatrick (eds), *Critical Legal Studies* Basil Blackwell: Oxford, 1987.

Hunt, A. *The Sociological Movement in Law* Temple University Press: Philadelphia, 1978.

Hunt, A. and G. Wickham, *Foucault and Law: Towards a sociology of law as governance* Pluto Press: London and Colorado, 1994.

Hunter, I. "Aesthetics and Cultural Studies" Grossberg, L., C. Nelson, P. Treichler (eds), *Cultural Studies* Routledge: New York and London, 1992.

Huntington, S. "The Clash of Civilisations" (1993) 72 *Foreign Affairs* 22.

International Labor Organisation, *Convention 107 concerning Indigenous and Tribal Population* 1957.

International Labor Organisation, *Convention 169 concerning Indigenous and Tribal peoples in Independent Countries,* 76th Session, Geneva Switzerland, 1989.

"Is it altruism or fear of losing their marbles?" *Sydney Morning Herald*, December 28, 2002.

Isaacs, J. *Spirit Country: Contemporary Australian Aboriginal Art* Hardie Grant Books: Australia, 1999.

Ivison, D. *Postcolonial Liberalism* Cambridge University Press: Cambridge, 2002.

Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples.* Cambridge University Press: Cambridge, 2000.

Janke, T. "Copyright: the carpets case" (1995) 3(72) *Aboriginal Law Bulletin/Alternative Law Journal* (Joint Issue) 36.

Janke, T. "Don't give away your valuable cultural assets" (1998) 4(11) *Indigenous Law Bulletin* 8.

Janke, T. "Museums and Indigenous cultural and intellectual property rights" (1998) 7(1) *Museum National* 13.

Janke, T. *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* (produced for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and the Aboriginal and Torres Strait Islander Commission[ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, 1998.

Janke, T. "Intellectual property and indigenous dance issues" paper for the Arts Law Seminar 14 May 1999.

Janke, T. "Berne, baby, Berne: the Berne Convention, moral rights and Indigenous peoples cultural rights" (2001) 5(6) *Indigenous Law Bulletin* 14.

Janke, T. "Indigenous cultural and intellectual property rights: a visual arts perspective" (2002) 151 *Arts Monthly Australia* 26.

Janke, T. *New Media Cultures: protocols for producing Indigenous Australian new media* The Australia Council: Sydney 2002.

Janke, T. *Visual Cultures: protocols for producing Indigenous Australian visual arts and crafts* The Australia Council: Sydney 2002.

Janke, T. *Writing Cultures: protocols for producing Indigenous literature* The Australia Council: Sydney 2002.

Janke, T. *Minding Cultures Report* The World Intellectual Property Organisation, 2002 at http://www.wipo.org/globalissues/studies/cultural/minding-culture/index.html.

Janke, T. "Future Legal Directions" *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* AIATSIS Seminar Series, 26 May 2003.

Johnson, E., M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish Publishing: Sydney, 1997.

Johnson, T. "the hypnotist collector" *The Painted Dream: Contemporary Aboriginal Paintings from the Tim and Vivien Johnson collection* Auckland City Art Gallery: Auckland, New Zealand, 1990.

Johnson, V. "A Whiter Shade of Paleolithic: Aboriginal Art and Appropriation" (1988) 34 *Aboriginal Law Bulletin* 8.

Johnson, V. *Copyrites: Aboriginal art in the age of reproductive technologies* National Indigenous Arts Advocacy Association and Macquarie University: Sydney, 1996.

Jopson, D. "Aboriginal seal of approval loses its seal of approval" *Sydney Morning Herald*, 14-15 June, 2002.

Kalpagam, U. "Colonial governmentality and the economy" (2000) 29(3) *Economy and Society* 418.

Kaplan, B. *An Unhurried View of Copyright* Columbia University Press: New York, 1967

Kelman, M. *A Guide to Critical Legal Studies* Harvard University Press: Harvard, 1987.

Kerriush, V. and C. Perrin, "Awash in Colonialism" (1999) 24(1) *Alternative Law Journal* 3.

Kerruish, V. "Reconciliation, Property and Rights" Christodoulidis, E. and S. Veitch (eds), *Lethe's Law: Justice Law and Ethics in Reconciliation* Hart Publishing: Oxford, 2001.

Kirsch, S. "Environmental Disaster, 'Culture Loss' and the Law" (2001) 42(2) *Current Anthropology* 167.

Klein, N. *No Logo: Taking Aim at the Brand Bullies*, Picador: New York, 1999.

Kymlicka, W. "Introduction" Kymlicka, W. (ed), *Justice in Political Philosophy (Vol II)* Edward Elgar Publishing: England, 1992.

Kymlicka, W. *Liberalism, Community and Culture* Clarendon Press: Oxford, 1989.

Kymlicka, W. *Multicultural Citizenship: A Liberal Theory of Minority Rights* Clarendon Press: Oxford, 1995.

"Landscapes in Blood" *Sydney Morning Herald* 14 December, 2002.

Lang, M. "Artists win copyright case" *West Australian* 14 December, 1994.

Langton, M. *Too much sorry business: the report of the Aboriginal Issues Unit of the Northern Territory* AGPS: Canberra, 1991.

Langton, M. *'Well I heard it on the radio and saw it on the television…': an essay for the Australian Film Commission on the politics and aesthetics of filmmaking by and about Aboriginal people and things* The Australian Film Commission: Sydney, 1993.

Langton, M. *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* (prepared for the Council for Aboriginal Reconciliation) Australian Government Printing Service: Canberra, 1994.

Langton, M. "Dumb politics wins the day" (2000) *Land Rights Queensland* 11.

Langton, M. "Introduction: culture wars" Grossman, M. (ed), *Blacklines: Contemporary Critical Writing by Indigenous Australians* Melbourne University Press: Melbourne, 2003.

Le Carre, J. *The Constant Gardener* Coronet Books: London, 2001.

Leiberman, D. *The Province of Legislature Determined: Legal Theory in Eighteenth Century Britain* Cambridge University Press: Cambridge, 2002.

Lessig, L. *The Future of Ideas: The Fate of the Commons in an Interconnected World* Random House: New York, 2001.

Lippard, L. *Mixed Blessings: New Art in Multicultural America* Pantheon Books: New York, 1990.

Litman, J. "The Public Domain" (1990) 39(4) *Emory Law Journal* 965.

Litman, J. *Digital Copyright* Prometheus Books: New York, 2001.

Locke, J. *Two Treatises of Government* (reprint) J.M. Dent & Sons Ltd: London, 1990.

Lofgren, N. "Common law Aboriginal knowledge" (1995) 3(77) *Aboriginal Law Bulletin* 10.

"Look back in anger" *Sydney Morning Herald* 4 January, 2003.

Long, D.E. "'Democratising' Globalisation: Practicing the Policies of Cultural Inclusion" (2002) 10 *Cardozo J. Int'l and Comp. L.* 218.

Long, D.E. "'Globalization': A Future Trend or a Satisfying Mirage" (2001) 49(1) *Journal of the Copyright Society of the USA* 313.

Long, D.E. "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" (1998) 23 *N.C.J. Int'l L.& Com.Reg.* 229.

Loos, N. and K. Mabo, *Edward Koiki Mabo: his life and struggle for land rights* Queensland University Press: St Lucia, 1996.

McKenna, M. *Looking for Blackfella's Point: An Australian History of Place* University of New South Wales Press: Sydney ,2002.

Macklin, R. "Court moves to stop rip-off of Aboriginal art" *The Canberra Times*, 17 December, 1994.

MacKinnon, C. *Feminism Unmodified: Discourses on Life and Law* Harvard University Press: America, 1987.

Macpherson, C.B. *The Political Theory of Possessive Individualism: Hobbes to Locke* Clarendon Press: Oxford, 1962.

Maddock, K. "Copyright and Traditional Designs: An Aboriginal Dilemma" (1988) 34 *Aboriginal Law Bulletin* 8.

Mann, R. "In Denial" (2001) 1 *The Quarterly Essay* 1.

Mansell, M. "The Body Snatchers" (1985) 17 *Aboriginal Law Bulletin* 8.

Mansell, M. "Barricading Our Last Frontier – Aboriginal Cultural and Intellectual Property Rights" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997.

Marcus, G., and F. Meyers, *The Traffic in Culture: Refiguring Art and Anthropology* University of California Press: Berkeley, 1995.

Marika, B. "Surviving as Printmaker" Smith, T. and S. Anderson (eds), *Getting into Prints: A Symposium of Aboriginal Printmaking* Association of Northern and Central Australian Aboriginal Artists: Darwin, 1993.

Marika, W. "Copyright on Aboriginal Art" (1976) 3(1) *Aboriginal News* 7.

Martin, E. "The Neem Tree Patent: International Conflict over the Commodification of Life"(1999) 22 *B.C. Int'l and Comp. L. Review* 279.

Martinez Cobo, J. *Study of the Problem of Discrimination against Indigenous Populations*, U.N Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4, July 1986.

May, C. *A Global Political Economy of Intellectual Property Rights: The new enclosures?* Routledge: London and New York, 2000.

May, C. "Why IPRs are a Global Political Issue" (2003) 1 *European Intellectual Property Review* 1.

McClintock, A. "The Angel of Progress: Pitfalls of the Term 'Post-colonialism'" (1992) *Social Text* 1.

McDonnell, S. "Book Review: *Our Culture: Our Future, Report on Australian Indigenous Intellectual Property Rights*" (2000) 4(27) *Aboriginal Law Bulletin* 23.

McGrath, A. "Citizenship, Rights and Aboriginal Women" (1993) 37 *Journal of Australian Studies* 99.

McKeough, J. and A. Stewart, "Intellectual Property and the Dreaming" Johnstone, E., M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law* Cavendish: Sydney, 1996.

McKeough, J., K. Bowrey and P. Griffith. *Intellectual Property: Commentary and Materials* (third edition) The Lawbook Company: Pyrmont, Sydney 2002.

McKnight, D. *From Hunting to Drinking: the devastating effects of alcohol on an Australian Aboriginal community* Routledge: London, 2002.

McMahon, M. "Indigenous cultures, copyright and the digital age" (1997) 3(90) *Aboriginal Law Bulletin* 14.

McMahon, M. "The Intellectual Property Regime and the Protection of Indigenous Cultures" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997.

Mellor, D. and T. Janke, *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector* National Association for the Visual Arts: Sydney, 2001.

Memmi, A. *The Coloniser and the Colonised* Beacon Press: Boston, 1965.

Merry, S.E. "Tenth Anniversary Symposium – New Direction: Law Culture and Cultural Appropriation" (1998) 10 *Yale Journal of Law and the Humanities* 575.

Mezey, N. "Approaches to the Cultural study of Law: Law as Culture" (2001) 13 *Yale Journal of Law and the Humanities* 35.

Michaels, E. "Bad Aboriginal Art" (1988) 28 *Art and Text* 59.

Michaels, E. *Bad Aboriginal Art: Tradition, Media and Technological Horizons* Allen and Unwin: Australia, 1994.

Michelman, F. "Judicial Supremacy, the Concept of Law and the Sanctity of Life" Sarat, A. and T. Kearns (eds), *Justice and Injustice in Legal Theory* The University of Michigan Press: Michigan, 1996.

Miller, J. *The Passion of Michel Foucault* Harper Collins Publishers: London, 1994.

Miller, P., and N. Rose, "Governing economic life" (1990) 19(1) *Economy and Society* 1.

Minister for Immigration and Multicultural and Indigenous Affairs, The Hon Phillip Ruddock MP, "Aboriginal Remains Welcomed Home from UK" Media Release, 9 April 2003.

Mishra, V. and B. Hodge, "What is Post(-)colonialism" (1991) 5(3) *Textual Practice* 399.

Morris, M. "Tooth and Claw: Tales of Survival, and *Crocodile Dundee*" (1987) 25 *Art and Text* 267.

Myers, F. *Painting Culture: The Making of an Aboriginal High Art Market* Duke University Press: Durham and London, 2002.

Nakata, M. "The United Nations and Indigenous People" Nakata, M. (ed), *Indigenous Peoples, Racism and the United Nations* Common Ground: Sydney, 2001.

Nakata, M. "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" (2002) 28 *International Federation of Libraries Association Journal* 281.

Neparrnga Gumbula, J. "The Galiwin'ku Virtual Knowledge Centre" *Intellectual Property and Indigenous Knowledge: Access and Ownership of Indigenous Cultural Material* AIATSIS Seminar Series, 14 April 2003.

Nicholls, C. *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art Exhibition Catalogue*, March 2000.

Novas, C. and N. Rose. "Genetic risk and the birth of the somatic individual" (2000) 29(4) *Economy and Society* 485.

"One rule for all is patently inequitable: intellectual title will be the next battle ground for academics and other traditional cultures" *The Australian* 18 September 2002.

O'Connor, P. "Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust" (1996) 30 *Melbourne University Law Review* 735.

O'Faircheallaigh, C. *Negotiating Major Agreements: The 'Cape York Model'* Discussion Research Paper No. 11, AIATSIS: Canberra, 2000.

O'Malley, P. "Genealogy, Systematisation and Resistance in 'Advanced Liberalism" Wickham, G., and G. Pavlich (eds) *Rethinking Law, Society and Governance: Foucault's Bequest* Hart Publishing: Oxford, 2001.

O'Malley, P. "Indigenous governance" Hindess, B. and M. Dean (eds), *Governing Australia: Studies in contemporary rationalities of government* Cambridge University Press: Australia, 1998.

O'Malley, P. "Risk and responsibility" Barry, A., T. Osborne and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of governance* University of Chicago Press: Chicago, 1996.

O'Malley, P. "Uncertain subjects: risks, liberalism and contract" (2000) 29(4) *Economy and Society* 460.

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

O'Malley, P., L. Weir and C. Shearing, "Governmentality, criticism, politics" (1997) 26(4) *Economy and Society* 501.

Oram, A. (ed), *Peer to Peer: Harnessing the Benefits of a Disruptive Technology* O'Rielly: Cambridge, Massachusetts, 2001.

Osborne, T. "Liberalism, neo-liberalism and the liberal profession of medicine" (1993) 22(3) *Economy and Society* 345.

Otto, D. "Subalterity and International Law: The Problems of Global Community and the Incommensurabilty of Difference" Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999.

Pashukanis, E. *Law and Marxism* Arthur, C. (ed), Ink Links: London, 1978.

Pasquino, P. "Political theory of war and peace: Foucault and the history modern political theory" (1992) 22(1) *Economy and Society* 77.

Patterson, R. *Copyright in Historical Perspective* Vandebilt University Press: Nashville, 1968.

Patton, P. "The translation of indigenous land into property: the mere analogy of English jurisprudence..." (2000) 6(1) *parallax* 25.

Pavlich, G. "The Art of Critique or How Not to be Governed Thus" Wickham, G. and G. Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* Hart Publishing: Oxford, 2001.

Pearce, F. and S. Tombs, "Hegemony, risk and governance: 'social regulation' and the American chemical industry" (1996) 25(3) *Economy and Society* 428.

Pearson, N. "Aboriginal law and colonial law since Mabo" Fletcher, C. (ed), *Aboriginal Self-determination in Australia.* Aboriginal Studies Press: Canberra, 1994.

Penner, J.E. "The Bundle of Rights Picture of Property" (1996) 43 *UCLA Law Review* 711.

Perraton, J., D. Goldblatt, D. Held and A. McGrew, "Economic Activity in a Globalising World" Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate* Polity Press: Cambridge, 2000.

Perrin, C. "Approaching Anxiety: The Insistence of the postcolonial in the Declaration of the Rights of Indigenous People" Darian-Smith, E. and P. Fitzpatrick (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999.

Peterson, N. and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* Cambridge University Press: Cambridge, 1998.

Posey, D. "Indigenous peoples and traditional resource rights: A basis for equitable relationships" *Ecopolitics IX: Conference papers and resolutions* Northern Land Council: Sydney, 1996.

Posey, D. and G. Dutfield, *Beyond intellectual property* International Development Research Centre: Ottowa, 1996.

Povinelli, E. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* Duke University Press: Durham and London, 2002.

Pritchard, S. "The United Nations and the making of a Declaration on Indigenous Rights" (1997) 3(89) *Aboriginal Law Bulletin* 4.

Pritchard, S. (ed), *Indigenous Peoples, the United Nations and Human Rights* Zed Books: London, 1997.

Procacci, G. "Social economy and the government of poverty" Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* The University of Chicago Press: Chicago, 1991.

Purdy, J. "British Common Law and Colonised Peoples: Studies in Trinidad and Western Australia" Bird, G., G. Martin and J. Nielson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996.

Purdy, J. "Postcolonialism: The Emporer's New Clothes?" Darian-Smith, E. and P. Fitzpatrick (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999.

Puri, K. "Copyright Protection for Australian Aborigines in the Light of Mabo" Stephenson, M.A. and S. Ratnapala (eds), *Mabo: A Judicial Revolution* The University of Queensland Press: Brisbane, 1993.

Puri, K. "Copyright Protection of Folklore: A New Zealand Perspective" (1988) 22 *Copyright* 23.

Puri, K. "Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action" (1995) *Intellectual Property Journal* 293.

Puri, K. "Is traditional or cultural knowledge a form of intellectual property?" (2000) *Oxford Electronic Journal of Intellectual Property Rights* at www.oiprcox.ac.uk/EJWP0100.pdf.

Purvis, N. "Critical Legal Studies in Public International Law" (1991) 32 *Harvard International Law Journal* 98.

Queensland Government, *Meeting Challenges: Making Choices*, April 2002.

Radin, M. *Reinterpreting property* University of Chicago Press: Chicago, 1993.

RAFI press release "GM Fallout from Mexico to Zambia: the great containment", October 25, 2002 at http://www.rafi.org/article.asp?newsid=366.

RAFI press release "Sovereignty or Hegemony: Africa and security, Negotiating from reality" May 30 1997 at http://www.rafi.org/article.asp?newsid=192.

Rapport, N. and J. Overing, *Social and Cultural Anthropology: The Key Concepts* Routledge: London, 2000.

Raz, J. *The Authority of Law,* Clarendon Press: Oxford, 1979.

Reich, C. "The New Property" (1964) 73*Yale Law Journal* 733.

Ricketson, S. *The Berne Convention for the Protection of Literary and Artistic Works 1886-1986* Centre for Commercial Law Studies, Queen Mary College: London, 1987.

Ricketson, S. *Intellectual Property: Cases, Materials and Commentary* Butterworths: Australia 1994.

Ridgeway, A. *Indigenous Arts Update*, August 2003.

Rimmer, M. *The Pirates' Bizarre* PhD Dissertation, University of New South Wales, 2001 (unpublished).

Rimmer, M. "Bangarra Dance Theatre: Copyright Law and Indigenous Culture" (2000) 9(2) *Griffith Law Review* 275.

Rimmer, M. "Albert Namatjira: copyright estates and traditional knowledge" (2003) 24 *Incite* 6.

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

Rose, M. *Authors and Owners: The Invention of Copyright* Harvard University Press: Cambridge and Massachusetts, 1993.

Rose, N. "Governing 'advanced' liberal democracies" Barry, A., T. Osborne, and N. Rose (eds), *Foucault and Political Reason: liberalism, neoliberalism and rationalities of government* University of Chicago Press: Chicago, 1996.

Rose, N. "Government, authority and expertise in advanced liberalism" (1993) 22(3) *Economy and Society* 283.

Rose, N. "Government, authority and expertise in advanced liberalism" (1993) 22(3) *Economy and Society* 283.

Rose, N. *Powers of Freedom: Reframing Political Thought* Cambridge University Press: London, 1999.

Rose, N., and P. Miller, "Political power beyond the state: problematics of government" (1992) 43(2) *British Journal of Sociology* 172.

Rothwell, N. "Technology preserves ancient traditions" *The Australian* June 10, 2003.

Rowse, T. "The Royal Commission, ATSIC and self-determination: A review of the Royal Commission into Aboriginal Deaths in Custody" (1992) 27(3) *Australian Journal of Social Issues* 153.

Rowse, T. *After Mabo: interpreting Indigenous traditions* Melbourne University Press: Carlton, 1993.

Royal Commission into Aboriginal Deaths in Custody – Interim Report AGPS: Canberra, 1988.

Royal Commission into Aboriginal Deaths in Custody – National Report AGPS: Canberra, 1991.

Ryan, M. *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property Future* Brookings Institution: Washington D.C., 1998.

Sackville, R. "Legal Protection of Indigenous Culture in Australia" (2003) 11 *Cardozo Journal of International and Comparative Law* 711.

Said, E. *Orientalism* Penguin Books: London, 1985.

Sandel, M. (ed), *Liberalism and its Critics* New York University Press: New York, 1984.

Sandel, M. *Liberalism and the Limits of Justice* Cambridge University Press: Cambridge, 1982.

Sarat, A. and J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship" (2001) 13(35) *Yale Journal of Law and the Humanities* 1.

Sarat, A. and J. Simon (eds), *Cultural Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism* Duke University Press: Durham and London, 2003.

Sarat, A. and T. Kearns (eds), *Justice and Injustice in Legal Theory* The University of Michigan Press: Michigan, 1996.

Saunders, D. *Authorship and Copyright* Routledge: London and New York, 1992.

Scott, D. "Colonial Governmentality" (1995) 43 *Social Text* 191.

Scott, J. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* Yale University Press: New Haven and London, 1998.

Seeger, T. "Ethnomusicology and Music Law" Ziff, B. and P. Rao (eds), *Borrowed Power: essays on cultural appropriation* Rutgers University Press: New Jersey, 1997.

Sell, S. *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* State University of New York Press: New York, 1998.

Sell, S. "Industry Strategy for Intellectual Property and Trade: The Quest for TRIPs and post-TRIPs Strategies" (2002) 10 *Cardozo Journal of International and Comparative Law* 79.

Sherman, B. "From the Non-original to the Ab-original" Sherman, B. and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford 1994.

Sherman, B. and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford, 1994.

Sherman, B. and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999.

Shirky, C. "What is P2P and What Isn't," O'Reilly Network 2000 at www.openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html.

Shiva, V. *Monocultures of the Mind: perspective on biodiversity and biotechnology* Zed Books: India, 1993.

Shiva, V. *Protect or Plunder? Understanding Intellectual Property Rights* Zed Books: India, 2001.

Shulman, S. *Owning the Future* Houghton and Mifflin: Boulder Colorado, 1999.

Smallacombe, S. "On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press: Cambridge, 2000.

Smart, C. *Feminism and the Power of Law* Routledge: London, 1989.

Smith, G. and R. Parr, *Valuation of intellectual property and intangible assets* John Wiley: New York, 1989.

Smith, L. and G. Campbell, "Governing Material Culture" Hindess, B. and M. Dean (eds), *Governing Australia: Studies in contemporary rationalities of government* Cambridge University Press: Australia, 1998.

Spivak, G.C. "Can the Subaltern Speak?" Nelson, C. and L. Grossberg (eds), *Marxism and the Interpretation of Culture* Macmillan Education: Bassingstoke, 1988.

Spivak, G.C. *The Post-Colonial Critic: Interviews, strategies, dialogues* Harasym, S. (ed), Routledge: London, 1990.

Stacey, H. "Legal Discourse and the Feminist Political Economy: Moving Beyond Sameness/Difference" (1996) 6 *The Australian Feminist Law Journal* 115.

Stenson, K. "Community policing as a governmental technology" (1993) 22(3) *Economy and Society* 373.

Stephenson, M. and S. Ratnapala (eds), *Mabo: A Judicial Revolution* University of Queensland Press: Brisbane, 1993.

Stevenson, N. "Case Note: Infringement in Copyright in Aboriginal Artworks" (1985) 17 *Aboriginal Law Bulletin* 5.

Stokes, G. (ed), *The Politics of Identity in Australia* Cambridge University Press: Sydney, 1997.

Stoler, A. *Race and the Education of Desire: Foucault's* History of Sexuality *and the Colonial Order of Things* Duke University Press: Durham and London, 1995.

Stoler, A. *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* University of California Press: Berkeley and London, 2002.

Strang, V. "Not so Black and White" Abramson, A. and D. Theodossopoulis (eds), *Land Law and Environment: mythical land, legal boundaries* Pluto Press: London, 2000.

Strathern, M. "Potential Property: Intellectual rights and property in persons" (1996) 4(1) *Social Anthropology* 17.

Strelein, L. "Members of the Yorta Yorta Aboriginal Community v Victoria *[2002] HCA 58 – Comment*" (2003) 2(21) *Land, Rights, Laws: Issues of Native Title* 1.

Sunder, M. "Intellectual Property and Identity Politics: Playing with Fire" (2000) 4(1) *Journal of Gender, Race and Justice* 69.

Sutton, P. "Linguistic Evidence and Native Title Cases in Australia" Henderson, J. and D. Nash (eds), *Language in Native Title* Aboriginal Studies Press: Canberra, 2002.

Tallbear, K. "Racialising Tribal Identity and the Implications for Political Cultural Development" Nakata, M. (ed), *Indigenous Peoples, Racism and the United Nations* Common Ground: Sydney, 2001.

Taylor, C. "Foucault on Freedom and Truth" Hoy, D. (ed), *Foucault: a critical reader* Basil Blackwell: New York and Oxford, 1986.

Taylor, C. "The Politics of Recognition" Gutman, A (ed), *Multiculturalism and the 'politics of recognition'* Princeton University Press: Princeton, 1992.

The Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Indigenous arts and cultural expression* Canberra, 1994.

The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. Written and adopted at the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatane, New-Zealand, 12-13 June, 1993.

Third World Network, *The Need for Greater Regulation and Control of Genetic Engineering: A Statement by Scientists Concerned about Current Trends in the New Biotechnology* Penang, Malaysia, 1995.

Thomas, N. *Possessions: Indigenous Art/Colonial Culture* Thames and Hudson: London, 1999.

Thomas, P. "The 1989 UNESCO Recommendation and Aboriginal and Torres Strait Islander Peoples' Intellectual Property Rights" Paper prepared by the Indigenous Cultural and Intellectual Property Task Force, Australia, 1989.

Thornberry, P. *International Law and the Rights of Minorities* Clarendon Press: Oxford, 1991.

Thornton, M. "Portia lost in the grove of academe wondering what to do about legal education" *Inaugural Lecture* La Trobe University Legal Studies, 3 June 1991.

Thornton, M. *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford University Press: London and Sydney, 1990.

Tickner, R. *Taking a Stand: Land Rights to Reconciliation* Allen and Unwin: Sydney, 2001.

"Top Museums unite to fight Aboriginal claims" *Sydney Morning Herald*, December 11, 2002.

Torgovnick, M. *Gone Primitive: Savage Intellects Modern Lives* The University of Chicago Press: Chicago, 1990.

Trioli, V. "Record damages for illegal Aboriginal images" *The Age*, 14 December 1994.

Tully, J. *A Discourse on Property: John Locke and his adversaries* Cambridge University: Cambridge, 1980.

Tully, J. "The Struggles of Indigenous Peoples for Freedom" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000.

Tully, J. *Strange multiplicity: Constitutionalism in an age of diversity* Cambridge University Press: Cambridge, 1995.

Tushnet, M. "Critical Legal Studies: A political history" (1991) 100 *The Yale Law Journal* 1515.

Unger, R. *Law in Modern Society: Toward a Criticism of Social Theory* The Free Press, McMillan Publishers: London and New York, 1976.

Unger, R. *The Critical Legal Studies Movement* Harvard University Press: Cambridge, Massachusetts, 1986.

Vaidhyanathan, S. *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* New York University Press: New York, 2001.

van Beek, W.E.A. and F. Jara, "'Granular Knowledge': Cultural Problems with Intellectual Property and Protection" Grosheide, F.W. and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Insentia Publishers: Antwerp, Oxford, New York, 2002.

Vandervelde, K. "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 *Buffalo Law Review* 325.

Walker, J. and D. McDonald, *The Over Representation of Indigenous Peoples in Custody in Australia* Australian Institute of Criminology – Issues Paper 47, August 1995.

Watson, I. "Indigenous Peoples' Law-Ways: Survival against the Colonial State" (1997) 8 *Australian Feminist Law Journal* 39.

Watson, I. "Nungas in the Nineties" Bird, G., Martin and J. Neilson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996.

Webber, J. "Beyond Regret: Mabo's Implications for Australian Constitutionalism" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000.

Weiner, J. "Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta" (2002) 2(18) *Land, Rights, Laws: Issues of Native Title* 1.

Weiner, J. "Protection of folklore: A political and legal challenge" (1987) 18(1) *International Review of Industrial Property and Copyright Law* 56.

Wells, K. "The cosmic irony of intellectual property and indigenous authenticity" (1996) 7(3) *Culture and Policy* 45.

Wells, K. "Authenticity-Promotion and Protection of Aboriginal and Torres Strait Islander Art" Paper on Research and Development – preliminary advice to NIAAA, 15 June 1995.

Wells, K. *Draft Discussion Paper on the Proposed Authenticity Trade Mark*, NIAAA, October 1996.

Wendland, W. "Intellectual Property and the Protection of Cultural Expressions: The Work of the World Intellectual Property Organisation" Grosheide, F.W. and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Insentia Publishing: Antwerp, Oxford, New York, 2002.

Williams, B. (ed), *The Politics of Culture* The Smithsonian Institute: Washington DC, 1991.

Williams, P. *The Alchemy of Race and Rights* Harvard University Press: Cambridge and Massachusetts, 1991.

Williams, R. *Culture and Society 1780- 1950* Harmondsworth, Penguin Books: London, 1963.

Williams, R. *Keywords: A Vocabulary of Culture and Society* Fontana/Croom Helm: London, 1976.

Williams, R. *Politics and Letters* New Left Books: London, 1979.

Williams, R. *The Politics of Modernism: Against the New Conformists* Verso: London, 1989.

Williams, R. *The Long Revolution* Harmondsworth, Penguin Books: London, 1965.

Windshuttle, K. *The Fabrication of Australian History* Macleay Press: Sydney, 2002.

Wiseman, L. "The Labels of Authenticity: An Overview" (2000) 1 *Media and Culture Review* 3.

Wiseman, L. "The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity" (2001) 23(1) *European Intellectual Property Review* 14.

Woodmansee, M. "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author" (1984) 17 *Eighteenth Century Studies* 425.

Woodmansee, M. and P. Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* Duke University Press: Durham and London, 1994.

Wootten, H. "Deaths in Custody" Paper delivered at the Coronial Inquest Seminar, Sydney University Law School, 1992.

World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, Switzerland 2001.

World Intellectual Property Organisation, Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, Geneva, Switzerland, 13-21 June, 2002.

World Intellectual Property Organisation, Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore* Fourth Session, Geneva, Switzerland, 9-17 December, 2002.

Wright, D. *The Remedial Constructive Trust* Butterworths: Chatswood, 1998.

Wright, S. "Intellectual Property and the 'Imaginary Aboriginal'" Bird, G., G. Martin and J. Neilson (eds), *Majah: Indigenous Peoples and the Law* The Federation Press: Sydney, 1996.

Wright, S. *International Human Rights, Decolonisation and Globalisation: Becoming Human* Routledge: London, 2001.

Young, A. and A. Sarat (eds), (1994) 3(3) *Beyond Criticism: Law Power and Ethics*, *Social and Legal Studies* 1.

Young, I. "Hybrid Democracy: Iroquois Federalism and the Postcolonial Project" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000.

Young, I. *Justice and the Politics of Difference* Princeton University Press: Princeton, 1990.

Young, S. "The Trouble with 'Tradition': Native Title and the *Yorta Yorta* Decision" (2001) 30(1) *The University of Western Australia Law Review* 28.

Yu, P.K. "Four remaining questions about copyright law after Eldred" GigaLaw.com 2003 at www.gigalaw.com/articles/2003-all/yu-2003-02-all.html.

Yunupingu, G. "From the Bark Petition to Native Title" *Land Rights: Past Present and Future – Conference Papers* Northern and Central Land Councils: Canberra, 1997.

Ziff, B. and P. Rao, *Borrowed Power: Essays on cultural appropriation* Rutgers University Press: New Jersey, 1997.

List of Cases

British Cases

Millar v Kinkaid (1750) 4 Burr. 2319,Eng Rep. 210.

Tonson v Collins (1760) 1 Black. W 301, 96 Eng. Rep. 169.

Osborne v Donaldson (1765) 2 Eden. 328, 28 Eng. Rep. 924.

Millar v Taylor (1769) 4 Burr. 2303,98 Eng. Rep. 201.

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

Sayre v Moore (1785) 1 East 361 n., 102 Eng. Rep. 139.

Dodsley v Kinersley (1761) Amb. 403, 27 Eng. Rep. 270.

Cary v Kearsley (1802) 4 Esp. 168, 170 Eng. Rep. 679.

Spiers v Brown (1858) 6 WR 352.

University of London Press Ltd v University Tutorial Press Ltd (1916) 2 Ch 602.

Macmillan & Co Ltd v K & J Cooper (1923) LR 51 Ind. App. 109.

Australian Cases

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479.

Kalamazoo (Aust) Pty Ltd v Compact Business Systems P/L (1985) 5 IPR 213.

Milpirrum v Nabalco (1971) 17 FLR 141.

Foster v Mountford (1977) 14 ALR 71.

Coe v Commonwealth (1979) ALRJ 40.

Registrar, Accident Compensation Tribunal v FCT (1993) 178 CLR 145.

Pitjantjatjara Council Inc v Lowe (1983) Victoria Supreme Court, unreported.

Yanggarrny Wunungmurra v Peter Stipes (1983) Federal Court, unreported.

Muschinki v Dodds (1985) 160 CLR 583.

Mabo v *Queensland* [No1](1988) 166 CLR 186.

Bulun Bulun v Nejlam Pty Ltd, (1989) Federal Court, unreported.

Yumbulul v Reserve Bank of Australia (1991) 21 IPR 481.

Mabo v Queensland [No.2] (1992) 175 CLR 1.

Milpurruru v Indofurn Pty Ltd (1994) 30 IPR 209.

Wik v *Queensland* (1996) 187 CLR 1.

Bulun Bulun v R and T Textiles (1998) 41 IPR 513.

Katinyeri v The Commonwealth (1998) 152 ALR 540.

Members of the Yorta Yorta Community v *Victoria* [1998] FCA 1606.

Yanner v Eaton (1999) 166 ALR 258.

Bulurru Australia v Oliver [2000] NSWSC 58.

Chapman v Luminis Pty Ltd and Others [2001] FCA 1106.

Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd [2001] FCA 612.

Members of the Yorta Yorta Community v State of Victoria [2001] FCA 45.

Members of the Yorta Yorta Community v State of Victoria [2002] HCA 58.

De Rose v South Australia [2002] FCA 1342.

Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited [2002] FCAFC 112.

List of Statutes

Copyright Act 1968 (Cth)

Aboriginal Heritage Act 1972 (WA)

National Parks and Wildlife Act 1974 (NSW)

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Pitjantjatjarra Land Rights Act 1981 (SA)

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Protection of Moveable Cultural Heritage Act 1987 (Cth).

South Australian Aboriginal Heritage Act 1988

Native Title Act 1993 (Cth)

Native Title Amendment Act 1998 (Cth)

Copyright Amendment (Moral Rights) Bill 1999 (Cth)

International Conventions and Treaties

Paris Convention for the Protection of Industrial Property 1883

Berne Convention on the Protection of Literary and Artistic Works 1886

Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

Convention Establishing the World Intellectual Property Organisation 1967

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970

Tunis Model Law on Copyright for Developing Countries 1976

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982

Draft Declaration on the Rights of Indigenous Peoples 1994

WIPO Performances and Phonograph Treaty 1996

WIPO Copyright Treaty 1996

Appendix A

Interview with Mr Colin Golvan
19 June 2002
Owen Dixon Chambers, Melbourne

The development of the law

Jane Anderson– I would like to start by asking how you became involved in the copyright cases involving Aboriginal art in the 1980's?

Colin Golvan–I got involved in Aboriginal copyright through a contact I had with Lin Onus. Before that I had nothing to do with Aboriginal matters at all. I was starting my career at the Bar and wasn't sure how I was going to get by and heard a report on AM Radio National in 1988. It was about the problem with copying T-shirts. Lin was quite prominent then with these type of matter and said that what the Aboriginal people needed to rectify this particular problem was specific legislation. I happened to hear this and I thought to myself why wouldn't copyright answer the problem? I rang AM, which I haven't done prior to or since, and said I had heard someone being interviewed and there might be a much simpler solution to the problem than they had identified.

The instinctive response as an interpreter was for dispossessed peoples to think of a new law. That is, that there is no law in the current regime that would work. The people at AM said, 'if you're so clever you can speak to him'. So they put him in contact with me.

Lin (Onus) was very interested in all of this and he organized for me then to meet with the artists who were affected in Arnhem land. I got the brief to go up to Arnhem land from

NALS, (Northern Aboriginal Legal Service). This case was almost one of the first things I did at the bar, to take instructions from traditional artists in Arnhem land to bring a case for copyright infringement on T-shirts by Flash Screen-printers. That is how the case proceeded.

Martin Hardie, who was working on the campaign, met me in Darwin. We then went to Maningrida and from there to an outstation called Garmedi where John Bulun Bulun lived. We spent some time with him and talked to him about his work and watched him working. We even filmed him to verify the originality of his work. This probably seems a strange thing to say today, but at the time there was quite a lively discussion in copyright circles about whether Aboriginal artists could claim to be original authors of traditional artworks. There was some thinking that because it was a traditional art form - a kind of anthropological kind of thinking - that the artist couldn't claim copyright in it as all they were doing was simply copying an age old image. We ascertained quickly that there was a lot of authorial content in what otherwise appeared to the untrained eye as simply being traditional art. For example, it wasn't hard to see that what was described as traditional act was in fact quite contemporary and so that's how I got involved.

JA- So when you went up to Arnhem land was copyright on the artist's minds or was it through you that copyright became the vehicle of the law?

CG- We introduced the copyright. They understood it, Bulun Bulun and his associates understood it readily because it squares with concepts in Aboriginal culture that only certain people have the right to reproduce certain images. For example, Bulun Bulun was the custodian of the particular images that appear in the artwork which was called 'At the Waterhole' and so he was a custodian. We interpreted him as a custodian of the right to reproduce this image which gave him a quasi copyright right within his own culture.

JA- The notion of videoing Bulun Bulun to establish originality is interesting. Did you end up using that video in the proceedings?

CG- We certainly dealt with the content of it in an affidavit but I don't think we actually exhibited the actual video which was of him making a different painting. But he gave evidence and the affidavits would be on the court file. They are referred to in things that I and other

people have written. Other artists were concerned as well, so we talked to them and got to understand that they were doing quite different things. Although in some ways because they came from the same area they were largely concerning themselves with similar traditions and similar story telling, they had quite different ways of expressing it. For example, there was a contrast between central Arnhem land artists like Bulun Bulun, George Milpurrurru, the artists of Oenpelli and few others. Then again, the artists of the eastern side of Arnhem land in particular had contact with Banduk Marika. Each of them were senior people so they were very receptive to a legal solution. They were very interested to know about it, and also interested in the idea of winning protection and confirming both respect and integrity.

JA – So they were happy with the result?

CG- Yeah and they ended up getting a lot of money.

We had to devise a system for distributing the money. There was a meeting that happened after the case was finished. I went up again and met with the various artists concerned. I can't remember the number but it is in the articles I have written. You would distribute it under western law by taking a pro rata basis on the number of t-shirts that were made. This was rejected because the Aboriginal people said, 'No, no we'll work on the basis that we have all been similarly harmed by what has happened,' so they divided the money equally.

The harm was to the integrity of the image and had a kind of quasi religious association. The owners were worried that ceremonies that surrounded the making of the particular artworks would be impeded, and also that their custodial functions were not being honoured, and that they might be seen by others in the clan group as not being proper custodians. There is competition over these things as the custodial right brought with it status to the individual. All those things were terribly important.

Of course there were also huge linguistic gulfs and cultural gulfs and as much as we could understand each other, it was only in passing that we did. There were people who said that the cases were incorrectly reduced to western legal positions, and that the concepts are much more complex and ought not have been reduced, and that copyright was a compromise and shouldn't have been tried in the first place. But I considered the artists as clients and they were

looking for a result and no one in the camp was critical or took the political position that we had misunderstood something. The people were satisfied with what we were doing …

JA – I guess that it is only in hindsight as well that these points have been questioned?

CG – … and because the cases are interesting and attract comment and review. It's easy enough by way of comment or review to say that the people doing this have completely misunderstood what they should be doing and I've not taken that criticism seriously. People like Stephen Gray were among the critics. I never thought it was anything other than an interesting observation about what was going on. At the end of the day, my brief was to take a legal point of view and we've only got the legal system to deal with. It's not perfect and maybe it was less that perfect in this case.

JA – Was the judgment of von Doussa J in the 'Carpets case', in regards to the distribution of damages to the artists, a result of the outcome in the earlier T-shirts case?

CG – Yeah, he knew about that. He informed himself about everything that had happened in the past. He was very concerned that the case was being put at a cultural level and responded to all those things. His approach to remuneration for exemplary relief had a lot to do with his perception that a cultural harm was caused. That was not something he made up but was part of the evidence of the case which was challenged, there was cross examination of people asserting they had been harmed and he was prepared to accept that it was a serious and well made point.

JA – That certainly became one of the key features of that case.

CG – Yeah, perhaps the most interesting was his analysis of cultural harm and how to compensate for it because the infringement was very interesting too in a way. In part interesting and in part not because some of the infringements were very straight forward and some of them weren't and his analysis of substantial reproduction was greatly influenced by his cultural appreciation of the artwork being reproduced.

JA –I have certainly noticed, especially when the works are put side by side as in Vivien Johnson's 'Copyrites' exhibition catalogue that in certain cases it is by no means easy to decide on the 'significant reproduction' of certain works.

CG – Yeah you see it very clearly. I've often done this when I've spoken about the cases and say to people this is by no means an obvious reproduction. This is shown by the artwork of the Python painting by Wititj, similarly in the 'Emu Dreaming' painting. Just looking at Wititj for the moment, the judge took some trouble to understand the content aspects of the artwork and appreciated that what might appear to be simple artistry was more complicated. For example, the parts that were copied included the idea of cross-hatching, which was part of the totemic imagery and he wanted to deal with that. I think the most interesting artwork he had to deal with was 'Kangaroo and Sheild Dreaming' by Tim Payuka and the problem he had in looking at the version that only had a border feature. It turned out that what appealed to him in respect to that kind of infringement was that the lines and circles followed the same order to that of the artwork and was actually identified by Vivien Johnson when she gave evidence.

JA – What do you see as being the major achievements of these cases?

CG – Certainly recognition. One of the achievements is reflected by the fact that I do very little of this work now. I regard that as an achievement. The level of public awareness is such that people won't do these things anymore, at least not within my hearing. I was a bit more in touch with things a few years ago, but I haven't heard of any major infringements for quite some years so it has put in train a kind of warning to not do it. Although in recent years I have been involved in other cases involving Aboriginal art; forgery and fakes. It might even show the development of the art form itself from one which could be readily copied by making cheap tourist items for sale to one now of replication for sale in the environment of the fine art market but giving the impression that a particular artist has made a work when they haven't. That's come up a few times with artists like Clifford Possum and Rover Thomas and Ginger Riley. That is also a problem that affects western artists, for example, I know that it has come up with artists like Blackman and Nolan as well.

JA – Another important part of the 'Carpets case' was related to the breach of the Trade Practices Act in regards to the tags that were attached to the carpets.

CG – Yeah, from memory they were suggesting the authenticity of the carpets.

JA – The tags said that the Aboriginal artists would have woven the rugs themselves as this was a 'traditional' form of expression, except for their size. Thus implying the carpets' authenticity.

CG – Something to do with authenticity, when in fact they weren't approved. The respondent knew this because he sought permission and didn't get it, but continued the activity. It was tricky because the carpets were quite beautiful and they had strong consumer appeal but it had a bit to do with the fact that the images that were reproduced were important and interesting images so that was why they infringed ownership. It was quite smart in one sense.

JA – They used images from the National Gallery catalogues.

CG – Yes now you see quite a disappointing range of work in tourist shops simply because they have been custom made for that market and are nothing like the quality of the work of the top level artists, who wouldn't want to be associated with work of this kind; and if they did, it would be done in their own way and on their own terms. So I think that has been something worthwhile out of all this – raising consciousness. I also think finding a way of marrying two different ways of thinking was of lasting value because from a western legal point of view we were thinking very differently from the way our clients were thinking. So somewhere in all of that we had to meet one another and by and large I think we developed a strategy for doing that. But things have moved on a bit, a number of these artists have died and the sort of concerns don't seem to be as apparent today.

...

JA – Was there any point where you thought that arguing copyright infringement wouldn't work?

CG – No I was pretty pragmatic about it, for all of the underlying interests in the cases they were still copyright cases and we were running pretty well established copyright principles. It was more in the last case that I did, Bulun Bulun v R&T Textiles that we were faced with a few

problems and were trying there to address entitlements of traditional owners, or beneficiaries. We constructed Bulun Bulun as a kind of trustee and tried to link in the copyright concept of equitable ownership although the Judge tended to think that it probably raised the issue of constructive trust and equitable ownership of copyright. I know that it has been said by lots of commentators that copyright is an inadequate remedy but an inadequate remedy for what? I mean, you have to ask yourself what was the problem the court sought to solved and I myself am a bit critical of solutions to problems that don't have an obvious purpose to me at least, you know you can be a bit too pristine about Aboriginal culture in some contexts, try and pack it in cotton wool. I mean it is a vibrant living culture and doesn't need to be dressed in band aids and highphilooting legislative schemes, which to me often simply mean setting up new bureaucracies like the folklore commission or things like that. I have often thought that that is totally inappropriate and I don't see why the existing legal system hasn't solved the problem that the people themselves were seeking to address.

The one shortcoming that was obvious to me was financial. There just wasn't the resources around, and one of the tragedies of this is that it showed that whatever resources are available for Aboriginal aid, it is largely spent on criminal law and that there is very little left for commercial law. When I was running a case and was funded by legal aid, it meant that, to those responsible for funding if there was a criminal case my case might not get funded at all. The result was that in an environment where the cases were put to test one another, that is the criminal cases v the commercial cases, the decision was taken not to fund any more commercial cases. That would explain why they were fazed out, not that we were being paid very much in truth, but there were no resources to pay for anything and the cases required quite a lot of infrastructure. People had to be flown around and nothing flows easily at the Top End, and gathering evidence is very time consuming and very expensive.

...

CG – The business of preparing affidavits is tricky too because that is a classic example of the reduction of knowledge. Clearly the affidavits were drafted by western lawyers. If you left the Aboriginal people to explain their story you'd get a totally different style of analysis about what is being said. I mean, assuming that you could directly translate what was being said. You would have a whole different content which would be totally unusable for legal proceedings. But that is part of the nature of clashes in cultures, problems with integrating one system of knowledge with another.

JA – And because it is going through the law, that then influences its structure.

CG – Law isn't very forgiving, you know it has its own parameters and you have to come into our parameter. Often even in commercial legal matters, which is my usual field of legal practice, we ask questions of witnesses as if they have a legal insight, and act as if some answer that is contrary to legal insight will show that person to be a liar or stupid, when in fact the legal analysis is not what is understood. Sometimes Judges astutely say, 'Look, the person that you are asking the question is not a trained lawyer, so how are they meant to know that Clause 15 is not consistent with Clause 3, even though you think it is obvious?' So all this is to do with the compromise that goes into the process of determining and resolving disputes. It is very much a compromise of the process. When cases get criticized because copyright is not the right mechanism, I say welcome to the real world....

Future directions

JA – ... I am also interested in how government has responded to the cases.

...

CG –I have found that the government agencies that I have dealt with very responsive, really keen to assist. I never thought there was a case that wasn't attended to for lack of government support, not meaning by my comments to be partisan to one side of politics or the other, everyone has links with Labor party members and people such as Peter McGauran who's a National Party Minister for the Arts. Everyone was very positive about it. The shortcomings were in the lack of resources within the Aboriginal community itself, in particular ATSIC lacking the capacity to properly assist Aboriginal communities in developing viable businesses.

Part of this is about business, I mean it is not often the joyous part of it, but this keeps people going at a business level it is the one industry that actually worked. You know you can go into Arnhem Land and see all sorts of attempts to set up factories to make things and this comes from within. It needed some infrastructure and the arts scene has always been problematic for infrastructure you know, the people who were going out and managing art centers had no experience as managers of art. They often came from an anthropological type background then sometimes have problematic relationships with the artists and the artists would clash with the art centers and all those things would happen, then you would observe easily enough the sales

occurring in the cities for vastly larger amounts than was ever going back out to the bush and how was that going to be solved. Should the art centers set up shops in the cities? Should they stay where they are? Should the artists deal directly with the dealers in the cities. It all became problems of the market. Now attempts to try and get a unified approach to the problem ostensibly failed. One illustration is that Aboriginal art mark of authenticity. I haven't seen that been all that successful.

JA – No it hasn't been.

CG – I think that is because there is no such thing as a homogenous Aboriginal community anyway. Aboriginal people are as diverse as anyone else. It was nicely illustrated for me when we were doing the carpets case, when the people involved in the case. Some of them in the photograph come from Top End places and were quite familiar with dealing with western things and spoke a bit of English and had a fair degree of savvy, some of them mostly from desert places were very unfamiliar with the whole thing, spoke not a word of English and were terribly out of their place in Darwin. Not just out of place in Darwin, but also out of place with their Aboriginal co-parties as they had no common language. They couldn't speak to each other at all. They could not exchange a word to each other. Let's not kid ourselves that because they were black, they were all brothers, they were just people from different places.

JA – No reason that they would get along either.

CG – No, nor that they should share a homogenous view of their culture either. In some ways the descriptions of people coming from different nations is not inappropriate because they had different language groups and different historical experiences, quite different cultures and I've seen that again when I have been in the Kimberley and that's again a place where you get a lot of common themes running through communities like you do in Arnhem Land, but you wouldn't liken the Aboriginal community in the Kimberley to that in Arnhem Land or in the desert or anywhere else, it is quite different. So that is partly why homogenous approaches for addressing what is perceived as a common problem are going to fail. A lot of pride is attached to becoming a famous artist, you don't necessarily want to share everything about what you do with every other community throughout Australia.

...

CG – ... in the Kimberley for example, they have established a kind of art mark and that's how it was going to work. That's another example in the failures of understanding, that from a bureaucratic standpoint sitting in Canberra or Sydney of Melbourne you think yeah these people look black, they look the same as they swagger down the street, they're susceptible to the same solutions - what a mistake. I think one of the great strengths of Aboriginal society is that it is so different. But I would love to see a serious investment in the Aboriginal cultural industry. It comes about from time to time. Another one of the ironies here is that you almost can't stage a large public event defining Australia with Aboriginal visual input certainly and probably performing input too, the Olympic Games is classic. That gives Aboriginal people a certain amount of power, saying we will cooperate on certain conditions or something like that.

JA – Setting the terms for negotiating.

CG – It might only be financial but you're in a good negotiating position. There are certain artists who are almost rung up as a matter of course to associate with public events and I happen to be associated with one of them, Bronwyn Bancroft from Sydney and she is very happy to be involved in projecting Aboriginal culture to the broader world. But it is a nice problem that we have got ourselves into as a society where we pretend this Indigenous culture is part of us when in fact we do so much to reject it. Or we have in the past, maybe we are trying to do something about it now.

JA – Perhaps the lens isn't as broad as it could be.

CG – Yeah well, Noel Pearson says look it is time it's taken for the Aboriginal people to stand up for themselves, to stop being addressed as victims, or as always in need of assistance, needing social welfare and so on and I happen to endorse that, I think it is precisely the right analysis. Really it's where the investment approach might come in to it where people can see investment opportunities and look upon part of the art as biodiversity, bio-usage things that might provide a serious economic opportunity. A lot of the people I dealt with just needed resources and the art was a mechanism to provide opportunity and pride and skills. Learning and move away from the state of boredom that preoccupies so many younger people so often to something that is going to be productive and useful.

JA – I think that is precisely the case in a place like Papunya, a former mission, where now through the sale of the artwork communities have been able to return to their land and set up outstations.

CG – Exactly, and that was the story of Bulun Bulun really. He lived for many years in Maningrida and Maninginni but as part of the outstation movement established itself, and as they were becoming established as artists, he went out to his own country. I was very interested in that aspect of it- the relationship of these artists with their country.

Often they were totally disassociated from their country even though it looked to me as though they were living in remote places, they weren't actually living on their country. It was nicely illustrated when we were doing R&T Textiles case and we decided to go and look at the sight that was subject to the painting. These were the waterhole paintings right, and I thought this waterhole was like, down the street, and it turned out was in the most remote. . . the waterhole that he (Bulun Bulun) depicts, and has depicted through out his artistic career and others have depicted too, was in fact a site he had never actually been to. I thought wow that is interesting. It had never dawned on me before that for some of these artists, the first time that they ever saw the waterhole they were depicting was with me, from an airplane when we finally located it, using maps to locate it. We never landed, couldn't land there. It was in the most remote place it was many, many days walk from outstations and there was no road access in, there was no airport, not even a rough bush airport. And I only realized then that what they were depicting was from their own sense of, you know their own imagery, as if the artist was drawing a picture of Moses crossing the red sea. That they had incorporated it into their own sense of the present and the real something they didn't even (literally) know at all. There was some nice stuff done about that with some of the desert painters who live around Hall's Creek. They did a show on TV and it was a fabulous show about the artists going back to their country. It was a show on TV, but a lot of senior artists who were drawing their country had left it as children and never gone back. The person who made the program had realized this and had decided to see what would happen if you took them back. It was amazing, that aspect of the Bulun Bulun case was amazing. I only realized that day that he had not actually been to the waterhole.

. . .

One of the problems with running the cases was to try and find dialysis treatment, everyone was in constant need of dialysis treatment. It was pretty depressing sight with nothing much to commend it, and everywhere I have been in Aboriginal Australia, having been to remote parts of Australia time and time again, it's very confronting and this includes the most celebrated and well known artists who suffer from these illnesses. In the case of Bulun Bulun he had trachoma, so he had great difficulty keeping his eyes open.

...

JA – Two weeks ago I was at the High Court listening to the native title appeal by the Yorta Yorta peoples. It was really interesting to hear the considered discussions about the notion of tradition. Tradition is such a complicated concept that can't necessarily be argued in a linear mode, and yet that was precisely how the government was arguing the concept.

CG – Well you see copyright has been a relatively easy thing in one way for courts to deal with because it is so attractive and in terms of copyright who speaks against Aboriginal art? No one. Whereas in native title there is a whole political dimension which is very complex which we all wanted to foster and aid Aboriginal art, visual arts and dance, theatre culture, we wanted it to grow and develop. And that's why the courts, putting von Doussa, J aside as he was a special person, the courts are generally very receptive. I couldn't think of one judgment which would not greet with enthusiasm and interest a claim of Aboriginal copyright and problems of infringement. I've never encountered any prejudice in the responses I received or any ignorance or lack of understanding or anything like that.

JA – It might be interesting in the future if, say, issues of biodiversity and bioprospecting raise those political issues because it is not so clear where that knowledge connection actually exists.

CG – Yeah I mean, patents are problematic because you can't get a patent for something that has been prior published, depending on what 'prior published' means and what the inventive aspect is but there might be built in a mix. It might be a nice cultural statement here, that between combining something that is traditionally known, with a new process, that there might be potential for patenting. But putting that to one side there is also the natural interest in things that come from the land and are indigenous. From a cosmetics point of view it will always have a special appeal if something is truly non-synthetic and is truly indigenous like herbal medicine. I mean that's happening isn't it?

JA – Yeah I know that Coles has just signed an agreement with an Aboriginal community in Queensland for bush foods.

CG – I actually have a client who was developing a cosmetics range. A white person working with Aboriginal people. They were actually, embarking on the farming of Indigenous products for the first time so they were making growing and farming the basis of the ingredients for the cosmetics.

JA – And in a way, setting up a new infrastructure. Terri Janke mentioned that she is doing a lot more work in setting up contracts for Indigenous people rather than working specifically on intellectual property issues such as copyright.

CG – I think that for people making individual agreements, lawyers are a lot better trained and there is a lot of legal advice that is quite useful and, more often than not, free. For example, through the Copyright Council or the Arts Law Centre generally, there is some very good pro bono work done in the legal community for Aboriginal people. I think that the legal community has been terrific, by and large, in dealing with these sorts of problems. Lawyers generally thought that that was part of their responsibility, in particular, the Melbourne Bar has a long tradition of support and affiliation with Indigenous causes and interests and there is quite a number of our judges in the Supreme Court in fact who spent time working in the Northern Territory working mostly in criminal law for Aborigines and learnt a lot of their legal practice in that kind of environment. The native title work itself comes from here, you know Ron Casten and Bryan Keon Cohen who were in a sense the inventors of the concept of native title and you know a lot of what Mabo ended up as was the work of Ron Casten who brought it up and really gave it the impetus that it had and did the hard yards, unfortunately he died, but he was a terrific fellow. These people had an impact on me and other people have gone on to the judiciary or the bench and spent a long time working in Aboriginal areas and have all had a big influence. So that has been positive.

One of the other reasons why I don't have much work to do in this area any more is because there are so many other people who can do it. At the time I may have been one of the first in

copyright because it took time to understand what people were talking about. I had to go out into the field and luckily enough I had the opportunity to go out which I grabbed.

The international context

JA – I find that one of the interesting issues is the assumption of an identifiable homogenous community and that all communities have traditional knowledge and that this assumption is not only national but international as well. The problems that then emerge in defining Indigenous knowledge, the issues associated with where traditional knowledge takes place, resonate particularly in the latest WIPO report.

CG – Sure. I have had a bit of an encounter with that.

JA – What did you think?

CG – Oh I heard a speaker talk about protocols for managing Indigenous culture and it just occurred to me that it was a bit reductionist, you know. Just because people come from Indigenous backgrounds doesn't mean they share Indigenous backgrounds. Just as we were talking earlier about how there is not necessarily a common thread between Indigenous people in different places. It misses some of the qualities that go with diversity. It is not necessarily something you think of when you are sitting in the Max Plank Institute. It is interesting that such a centre for learning can also be reductionist.

...

JA – How do you consider the international influence on the national?

CG – Ironically, people tend to look to us for a legal approach and what has happened in the copyright sphere has been commented on a lot internationally and I have talked to a lot of international teachers in the field who think what has happened here has been advanced, compared to experiences they might have had in say the USA, maybe even Canada, though Canada might be a like example. I am not aware of any developments myself that impact on the way we approach copyright treatment of this issue. In fact, to some extent there is a bias against it because we have copyright by virtue of the Berne Convention and the Berne Convention in particular says that you can't discriminate between types of authors. Pursuant to the Berne Convention we cannot have specific copyright law dealing with Aboriginal authors

and that is one of the essential planks of the Berne Convention and that rather weighs against a separate copyright division in the copyright act, say an Aboriginal division in the copyright act. I don't see that as being such a bad thing. There are laws that are specifically designed to protect Aboriginal cultural heritage and as far as I understand they work as well as laws in that kind of area can, especially when dealing with remote artworks in places where it is hard to manage the protection of artworks. But there is a good deal of heritage protection and there is protection against export and seem to provide some of the additional solutions to copyright.

...

I suppose that my overriding view is that Aboriginal art, the movement as such is in about as good as position as it has ever been in terms of recognition, respect, identification of value on the market, non infringement, respect for integrity through moral rights, things we were talking about and when I said that maybe we were on the cusp of something developing, maybe that is what is developing, we'll see more and more the establishment of that movement.

JA – I guess we might see that extend itself further out into that infrastructure as well.

CG - Sure sure and a kind of enfranchising of people associated with it who were a bit on the outer, particularly living in remote places but in some ways, as Noel Pearson says, it is for the people out there to sort those kind of issues out for themselves and I can write suggestions for what people might do but they have to be adopted and become part of regimes out there – rather than regimes that are radiated out from some center.

It's a big job though, a very big job and you know the other side of that coin is that so often you see people on the cusp of cultural annihilation when you go out to these communities, you wonder how they are going to survive from one generation to the next, that is, physically survive. They are so sick, so depleted, so addicted, eating so badly, so flawed with domestic problems and child abuse and all sorts of things like that, that you wonder how on earth this culture could possibly survive. But to solve that problem is something that needs to be discovered from within and I don't know if we as advisors have that role to play particularly. And maybe through re-enforcing the theme of the protection of the right of integrity is an issue that is thrown out to those in the community to say look, your work is protected, you are doing meaningful important stuff, appreciate how important you are and hopefully there is a message in all of that.

Appendix B

Interview with Terri Janke
Terri Janke Solicitors, Rosebery, Sydney
11 June 2002

- On how *Our Culture: Our Future* was commissioned?

Our Culture was a report that was put out to tender and that the company that Terri worked for Michael Frankel and Co. won the tender to research and write the report. The report was in response to concerns raised by the Indigenous Reference Group but also a response by ATSIC to *Stopping the Rip Offs*. Initially there was the Discussion Paper which provoked discussion of the issues canvassed in the Report. There were eighty three submissions from the Discussion Paper that contributed to the Report

The Report specifically contained broader terms of reference than *Stopping the Rip Offs* and was trying to open up areas of law especially where there had been the feeling that law can provide protection as opposed to ideas that law acts as a hindrance. As such the subject matter was very broad and this strategy was deliberate because while the issues in the Report are national issues they do vary from region to region.

- The process of consultation

A major part of the consultation was with a national Indigenous reference group. Additionally the Discussion Paper was sent to every Aboriginal organisation for comment, it was posted on the internet, Terri herself went touring around Australia, the Indigenous Reference Group advocated the Report and the media picked it up. All of these areas contributed to its circulation in Aboriginal communities. Terri also noted that she wrote a variety of articles for

lots of different organisations, magazines and journals, effectively addressing different audiences for the different elements of the Report.

- Questions of definition in the Report.

Terri used the definition provided by Special Rapporteur Erica Irene Daes, although there were additions made. We spoke about the difficulty of terminology such as Indigenous knowledge and indigenous intellectual property. It was Terri's view that just focusing on the terminology means that there is little space for action. It hedges the debate. Just talking about the definition means that not much gets done for example one of the problems with WIPO is the conflict over definition and as a result there is very little action.

Terri pointed out that the definition needed to be a flexible definition in order to cater for the differing attitudes and responses, not only nationally but internationally. In this way the definition can take account of the fact that other countries use different words. The example that folklore was used thirty years ago highlighted this point. Overall Terri thought that the WIPO report writers were essentially diplomats.

- Responses Terri had to the Report.

Overall Terri thought the most important part of the Report was that it was educative. In that sense she felt it was a good piece of work for educating more people, especially more Indigenous people about intellectual property and traditional knowledge. However Terri did note that the Report did not achieve what she hoped for in legislative response. At the beginning of writing the Report Terri was 'pro' legislation, however now Terri wants to be clear about what that legislation actually is. Overall the educative element was the most significant success of the Report and was really necessary as the indigenous community is much more in favour of using intellectual property that it was ten years ago. The shift in education is the first step.

Formally there was no response to the Report from the Government. Terri saw this as a little disappointing. Several policy changes have been made by government departments on an ad hoc basis. For instance AIATSIS responded by adopting a Research Code of Ethics; ATSIC

set up a task force unit, but this is no longer operative and did not achieve the results it had hoped to.

- Problems with implementing the Labels of Authenticity?

Primarily Terri saw the problem of implementation of the Labels as a lack of government and industry support. The NIAAA is a small agency that required substantial funding and support to set up or implement the Labels. There is also the difficulty that each regional art center has its own marks. Thus the problem of policing the marks is also a problem of political will. Terri thought that the success of the marks requires a funding body and that essentially there was the need to give value to the industry and for the government to act.

- Production of the Report.

Terri replied that the Final Report came out in September 1999. The Discussion Paper was released in July 1997, Terri then completed the Final Report in March 1998 and it was publicly released in September 1999.

- The WIPO fact finding missions and how Terri responded to these international developments?

Terri notes that she had difficulty meeting the representatives from WIPO as she was very busy at the time. At this point Terri drew attention to the differences between the practitioners work load and the bureaucrats. However Terri did send a copy of the draft of Our Culture to those working on the WIPO Report. Terri noted that the representatives also met with ATSIC, as the governmental body that had commissioned the Report.

- The introduction of moral rights into Australian legislation in 2000?

Terri sees moral rights as providing a good opportunity for indigenous people to use when seeking protection. This is especially the case because they can be used to protect against derogatory treatment of artwork. Terri did note however that it is still difficult to run a dispute as there is yet to be a case, thus the case law in this area is weak.

- What was Terri currently working on?

Terri is particularly working on contracts for indigenous people. Particularly individual people are coming to her to sort out contracts; to arrange agreements. Terri is also the NAVA protocols where she is working to set up protocols between groups which is also a rare area between practitioners. Terri feels that the most important thing is to start from the point of understanding Indigenous needs. Terri also notes that major industries are starting to develop standard accords and that it is important to encourage industry to see the value of these, especially as they have the potential to convey the importance of indigenous views of law.

- Whether the international arena is an important site for fostering better protocols for indigenous intellectual property?

While Terri thought that the international level can be useful, at a practitioners level it is difficult to educate. Terri also notes the difficulty of educating industry about the value of developing the international arena. Specifically Terri notes that it is important to make sure there is a flow between the big picture and the filtering down process. Terri also suggested looking at the recent WIPO World Feasibilty Studies where she had contributed by writing the 'Minding Cultures' papetrs. This was specifically to do with art. Additionally Kamal Puri was working on a south pacific model law.

This is a typed summary from notes taken during the interview.