

THE POLITICS OF INDIGENOUS KNOWLEDGE: AUSTRALIA'S PROPOSED COMMUNAL MORAL RIGHTS BILL

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I INTRODUCTION

This article will highlight the complicated political contexts that underpin discussions of intellectual property and Indigenous knowledge within Australia. On one level it aims to provide some contextual information about the development of new intellectual property strategies for protecting Indigenous knowledge. At another level, it explores the inter-relation of global intellectual property development with local articulation of reform. It seeks to respond to an increasing disjuncture: where international discussions draw on national developments but remain distanced from the discrete political contexts informing their emergence and inevitably, their contestation.

Christopher May has noted the new global politics of intellectual property.¹ May's argument directs attention to how inequitable relations of power are disguised under the rubric of 'international standards': that 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. 'We are currently in a transitory period, where the global governance regime of [intellectual property rights] has been established but the political community on which the justification of intellectual property itself depends upon is far from globalised.'² Here May makes a pertinent point about the danger of assuming that the purposes derived from international discussions of intellectual property rights apply generally, in all the particular social and political contexts in which such discussions are adopted and utilised. As Aoki similarly notes, '[o]ne of the biggest mistakes one can make when considering the globalization of intellectual property law is to assume away the increasingly contentious politics of the

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1 Christopher May, 'Why IPRs are a Global Political Issue' (2003) 1 *European Intellectual Property Review* 1.

2 Ibid 4.

phenomenon'.³ The purpose of this article is to explore the interrelationships between national and international development of intellectual property strategies. It will argue that in the context of the development of legislation for communal moral rights more attention should be directed to the discrete local politics informing this approach and the consequential challenges that will arise for Indigenous communities, Indigenous individuals and intellectual property law.

Given the fluidity between local and global intellectual property strategies, it is increasingly important to discuss the broader national political contexts that give rise to new intellectual property directions, as these tend to involve quite specific agendas.⁴ Whilst there may be intersections in how these politics are generated and played out within local and global spaces, distinct political rationalities produce alternate understandings of the problems that intellectual property rights are being employed to 'solve'. This is, in part, due to the range of interest-holders involved in interpreting these problems and their solutions.⁵ It is also due to inherent difficulties with the translation of evolving cultural discourses into the categorical terms of the law.⁶

Within each nation state multiple subjectivities respond and interact with the circularity of local and global engagement. The presumption that power is vested in nation states, as bounded entities, contains a misunderstanding concerning the dynamics internal to these same states, for such individual subjectivities are intrinsic to the complicated relays, dispersions and resistances of power found in these national spaces. As Sarat and Simon have noted,

realist legal studies almost always operate within a political body, usually the nations, although this body is not often itself an object of realist 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.⁷

It is these embodiments and their representations that offer the opportunity of understanding differentiation within any specific country. 'Citizens' tend to make difficult legal subjects⁸ because there is no certainty in how individuals relate to the law – 'some are ignorant about legal matters, some disinterested, some are "too" interested, ... wanting to test legal limits and use legal venues to gain some

3 Keith Aoki, 'Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection' (1998) 6 *Indiana Journal of Global Legal Studies* 11.

4 Shane Greene illustrates the complexity of these interests nicely in his recent article on bioprospecting in Peru: Shane Greene, 'Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting' (2004) 45 *Current Anthropology* 211.

5 For a closer examination of the many interests of those participating in law and law making, see Kathy Bowrey, *Law and Internet Cultures* (forthcoming).

6 Paul Edward Geller, 'Copyright History and the Future: What's Culture Got to Do with It?' (2000) 48 *Journal of the Copyright Society of the USA* 209, 261.

7 Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism* (2003) 6.

8 Kathy Bowrey and Matthew Rimmer, 'Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law' (2002) 7(8) *First Monday: Peer-Reviewed Journal on the Internet* <http://firstmonday.org/issues/issue7_8/bowrey/index.html> at 2 September 2004.

strategic advantage'.⁹ For my purposes here, a discussion of legal subjects also provides an important insight into localised developments in intellectual property, for instance, the cultural and political factors that both inform national approaches and make such approaches problematic.

This article considers the interrelation of these issues in the context of the recent development in Australia of the draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth). It will explore the disjuncture between broader discourses of Indigenous intellectual property rights and the local political context where aspirations of reform circulate. The draft Bill has been posited as a solution to the issue of community ownership which was noted as a point of concern in earlier copyright cases.¹⁰ However, within the Australian context, the emphasis on 'community' and communal ownership presents considerable difficulties for the utility of this approach. Simply put, the differing needs, articulations, political representations and definitions of Indigenous 'communities' within Australia seriously compromise a singular legislative solution to the issue of community rights. Indeed, this issue raises important questions about how Indigenous peoples' needs have been constructed and are represented, and how these representations influence national and international attention to developing strategic approaches for protecting Indigenous knowledge through intellectual property law.

II THE AUTHORITY OF THE AUSTRALIAN EXPERIENCE

The concept of 'Indigenous intellectual property' is not an ahistorical category to which law responds.¹¹ Instead it has been produced by concomitant factors. In Australia it is a product of cultural sensitivities, changing political environments, governmental intervention through strategic reports and innovative instances of individual agency. These domestic experiences of identifying the problem of Indigenous knowledge and intellectual property, and judicially determining outcomes in terms of copyright protection for Aboriginal art, also feature as significant developments in international discussions of intellectual property and

9 Ibid. See also Jessica Litman's comments about how people also resist laws that they do not believe in: Jessica Litman, *Digital Copyright Prometheus* (2001) 195.

10 As French J noted in *Yumulul v Reserve Bank of Australia* (1991) 21 IPR 481, 'Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works that are essentially communal in origin': at 490. See also Gurdial Singh Nijar, 'Community Intellectual Rights Protect Indigenous Knowledge' (1998) 36 *Biotechnology and Development Monitor* 11.

11 See Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* (D Phil Thesis, University of New South Wales, 2003).

Indigenous knowledge.¹² The Australian cases ‘sought to delineate the boundaries of the rights of Aboriginal peoples ... [and consequently] [t]his Australian jurisprudence will be of assistance in formulating the new intellectual property regime in this area’.¹³ The international attention given to this issue, demonstrated through the establishment of the World Intellectual Property Organisation’s (‘WIPO’) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, has been informed by instances of national jurisprudence.¹⁴ Participants in the international domain maintain a healthy interest in national initiatives as these provide both localised instances of development as well as successful instances of intellectual property promulgation.¹⁵

Despite international interest in ‘folklore’ (at least since 1976)¹⁶ it is important to recognise that Australia would have had the debate about Indigenous knowledge and intellectual property protection even without this early international influence. This is because of the distinct internal politics of Australia and the fact that these politics were instrumental to the initial copyright and Aboriginal art cases.¹⁷ The changing attitude to Indigenous peoples’ rights in terms of land ownership and property law from the late 1960s also had flow-on effects in the context of intellectual property. Intellectual property law became sufficiently self-conscious about its cultural underpinnings to consider what had been excluded from its domain. In addressing its historical exclusions, law

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- 12 In terms of international discussion I am referring particularly to those engaged by the World Intellectual Property Organisation. See *Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, World Intellectual Property Organisation, 3rd sess, WIPO Doc WIPO/GRTKF/IC/3/1–17 (2002); Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions World Intellectual Property Organisation* (2003), <http://www.wipo.org.int/tk/en/studies/cultural/minding_culture/studies/finalstudy.pdf> at 16 October 2004. For another instance of Australia’s experience being used as an example, see Amina Para Matlon, ‘Safeguarding Native American Art by Partnering Tribal Law and Equity: Applying *Bulun Bulun* to Navajo Sandpainting’ (2004) 27 *Columbia Journal of Law and the Arts* 211; Hugh Hansen et al, ‘Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources – Symposium: Global Intellectual Property Rights: Boundaries of Access and Enforcement’ (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 753.
 - 13 Michael Blakeney, ‘Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law – The Australian Experience’ in F Willem Grosheide and Jan J Brinkoff (eds), *Intellectual Property Law 2002: Articles on the Legal Protection of Cultural Expressions and Indigenous Knowledge* (2002) 152.
 - 14 WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)* (2001), <<http://www.wipo.int/tk/en/tk/ffm/report/final/>> at 16 October 2004.
 - 15 Wend Wendland, ‘Intellectual Property, Traditional Knowledge and Folklore: WIPO’s Exploratory Program’ (2002) 33 *International Review of Industrial Property and Copyright Law* 485; Wend Wendland, ‘Cultural Heritage, Archives and Databases, Intellectual Property and the Protection of Traditional Cultural Expressions’ (Paper presented at the International Association of Sound and Audiovisual Archives Annual Conference – Audiovisual Archiving: Memory and Society, South Africa, 22–26 September 2003).
 - 16 See, eg, United Nations Educational, Scientific, and Cultural Organisation (‘UNESCO’), *Tunis Model Law on Copyright for Developing Countries* (1976). See also WIPO and UNESCO, *Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Prejudicial Actions* (1982).
 - 17 See, eg, the account of this history by Wandjuk Marika: Wandjuk Marika, ‘Copyright on Aboriginal Art’ (1976) 3 *Aboriginal News* 7; Jennifer Isaacs, *Wandjuk Marika: Life Story* (1995).

remade itself as the primary field where remedy for these exclusions could be achieved. In addition, the cases were also developed and enhanced through bureaucratic initiatives such as the 1981 *Report of the Working Party into the Protection of Aboriginal Folklore*¹⁸ and the 1994 *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*.¹⁹ Whilst the former report was influenced by international attention to 'folklore', the latter was more attuned to the specific concerns at hand, namely incidents of consumer 'fetishism' in the reproduction and appropriation of Aboriginal art. Distinct political and social pressures, and individual action and agency, were dependent upon the identification of both localised developments 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. Yet the local experience provided the initial examples of differentiation of Indigenous intellectual property issues.²⁰ A particular and unique issue (the copying of imagery from North-East Arnhem Land onto tea towels) contributed to an identification of the 'problem' – that imagery may be copied and used in unauthorised and inappropriate ways. This identification led to the development of strategies whereby the needs and expectations of Indigenous people in relation to this type of problem, and as a special class of legal subjects, could be interpreted, managed and remedied. As Wandjuk Marika explained in 1976,

[i]t was then [on finding the tea towels] that I realized that I and my fellow Aboriginal artists needed some sort of protection ... 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.²¹

With the inevitable translation of the problem into a Western context of legal action, copyright suggested a possibility. Through the development of that subject-specific jurisprudence, copyright confirmed its legitimacy as a solution.

Though it is an area that has been the subject of very scant, if not negligible research, it is generally assumed that Australia lacks a distinctive history in the emergence of intellectual property law. However, the Aboriginal art copyright cases constitute a 'moment' in the emergence of intellectual property jurisprudence within Australia, which has exerted considerable influence internationally.²² The development of an intellectual property approach to

18 Commonwealth Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (1981).

19 Commonwealth Attorney-General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper (1994), <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/\(CFD7369FCAE9B8F32F341DBE097801FF\)~stopping+the+rip-offs-no+frame.pdf/\\$file/stopping+the+rip-offs-no+frame.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~stopping+the+rip-offs-no+frame.pdf/$file/stopping+the+rip-offs-no+frame.pdf)> at 16 October 2004.

20 The case *Bulun Bulun v Nejlam Pty Ltd* (Unreported, Federal Court of Australia, Olney J, 29 March 1989) was written up in the *European Intellectual Property Review* and thus received both national and international coverage: see Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 10 *European Intellectual Property Review* 346.

21 Marika, 'Copyright on Aboriginal Art', above n 17, 7.

22 Susan Sell and Christopher May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property' (2001) 8 *Review of International Political Economy* 467.

Indigenous subject matter, consolidated in case law, and more recently in legislative initiatives, positions Australia at the forefront internationally in this area. This is the case in regards to an interpretation of what the problem is, the identification of the problem as cultural/legal, and the proposal and development of legislative remedies. Australia has generated a significant amount of expertise in the area of copyright and Indigenous knowledge – both in mediating the rights of Indigenous people and in securing some tangible outcomes.²³

Australia also features as a key example in the international debate confirming the legitimacy of the legal approach. This legitimacy is highlighted in three ways: firstly, through the apparent success of copyright law in responding to Indigenous needs; secondly, through the engagement between the colonial state and Indigenous people, where Indigenous interests are not beyond the competence of the legal discourse; and thirdly, through the way in which Indigenous people have actively engaged and responded to the intellectual property domain, consequently reworking expectations of the law. As Blakeney notes,

one 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 able to define their own intellectual and cultural property and the way in which intellectual and cultural property is to be exploited.²⁴

The Australian experience demonstrates the possibilities in this area and, for this reason, captures international attention and influences international directions. The importance of the Aboriginal art and copyright cases lies in the reality that Indigenous aspirations, whilst modified and reworked, contribute to the broader intellectual property conversation.

III CULT(URE) OF THE COMMUNAL

Despite the above, the translation of the ‘problem’ into a Western context of intellectual property has generated particular demands on this body of law. Indigenous claims have raised differing concerns and these have manifested themselves primarily through issues of ownership.²⁵ Commentators on the nature of Indigenous knowledge always emphasise its collective character thus leading to the assertion that in an Indigenous context, intellectual property rights must

23 The case law demonstrates tangible outcomes in terms of economic restitution and the delivery up (supply) of carpets, material, T-shirts, etc, to the communities involved.

24 Hansen et al, above n 12, 762 (Michael Blakeney, speaker).

25 ‘A first cause of the differences in treatment of intellectual property is that forms of property ownership in these societies are different. Many indigenous societies are not organized around individuals as such but around a clan or other extended unit’: Ruth Gana, ‘Has Creativity Died in the Third World? Some Implications for the Internationalization of Intellectual Property’ (1995) 24 *Denver Journal of International Law and Policy* 109, 132.

accommodate group rights.²⁶ ‘A particular deficiency of the existing copyright regime ... has been the refusal of copyright courts to allow indigenous communities to enforce communal intellectual property rights in those cultural expressions.’²⁷ The lack of clarity in how to respond to differences between individual ownership and communal ownership has forced the law to consider a world beyond its cultural borders. This process has been extended by academic writing and the litigants themselves who insist that these issues be addressed.²⁸

The key representation of Indigenous interests as collective has also become synonymous with legal accommodation of communal rights. This familiar supposition warrants a little attention here precisely because it has also generated troubling effects. For instance, Marilyn Strathern notes that group rights have become interpreted as cultural rights. She astutely observes that,

[w]hile fully cognisant of difficulties of assigning rights, advocates of [intellectual property rights] for indigenous peoples in resting their case on traditional knowledge rest it on collective possession. By conserving their cultural base, it is argued, people will have a core around which they will adapt for the future.²⁹

But there is a circular argument here: communal rights are required to protect culture and culture becomes synonymous with the articulation of communal identity expressed in property rights. Where there is a neat fit with social circumstances there is no problem, but where communal identity has been fractured through invasion, dispossession and the passage of time, a stable concept of ‘Indigenous’ seems to fade from legal view. In order to develop flexible legal remedies, quite complicated cultural and social politics must be engaged.

As other commentators have also noticed, questions of (cultural) identity are increasingly being brought within the intellectual property discourse.³⁰ Inescapably, in discussions about intellectual property and Indigenous knowledge, ‘culture’ has come to occupy a central political position.³¹ This position of ‘culture’ illustrates nicely Sarat and Simon’s recent observation of the ‘turn to culture’ within law.³² Law has been forced to reflect upon its own historical contingencies through the emergence of specific cases where claims of

26 As Silke von Lewinski explains, ‘[i]n general the main obstacles to copyright protection of folklore are grounded in the fact that copyright protection is based on an individualistic concept as opposed to a collective one’: Silke von Lewinski, ‘The Protection of Folklore’ (2003) 11 *Cardozo Journal of International and Comparative Law* 747, 757.

27 Blakeney, ‘Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law’, above n 13, 152.

28 See especially comments by Gawirrin Gumana, Yangarriny Wunungmurra and Banduk Marika in Cathy Eatock and Kim Mordaunt, *Copyrites*, Australian Film Finance Corporation Limited (1997).

29 Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays in Persons and Things* (1999) 168.

30 Madhavi Sunder, ‘Intellectual Property and Identity Politics: Playing with Fire’ (2000) 4 *Journal of Gender, Race and Justice* 69.

31 See, eg, Michael Brown, *Who Owns Native Culture?* (2003); Michael Brown, ‘Can Culture Be Copyrighted?’ (1998) 39 *Current Anthropology* 193; Greene, above n 4.

32 See Sarat and Simon, *Cultural Analysis, Cultural Studies and the Law*, above n 7.

legal remedy also incorporate arguments regarding cultural identity.³³ Concern for collective ownership, as a key characteristic of Indigenous knowledge and hence representative of the problems of protecting this subject matter, functions as an identifier of difference. For collective ownership helps establish limits between what is understood to be Indigenous knowledge and what is not, what is within the competence of intellectual property law and what is not. But as collective ownership relies heavily upon a construction of ‘community’ this raises corresponding concerns. As Frances Peters-Little explains,

[t]he concept of community invokes notions of an idealized unity of purpose and action among social groups who are perceived to share a common culture. To some extent, ‘community’ and ‘culture’ are treated as synonymous, rather than principles operating at different levels of social realities. Indigenous culture is therefore seen to define Indigenous community. This, of course, is not so.³⁴

In a corresponding way, interpretation of Indigenous knowledge in intellectual property law is dependent upon a specific construction of Indigenous culture. This occurs in relation to how Indigenous knowledge is conceived but also, importantly, how it is differentiated within a legal discourse. In Australia, like elsewhere, there has been a tendency to imagine Indigenous ‘culture’ in its singularity despite the myriad of experiences integral to knowledge and cultural production.³⁵ This means that Indigenous issues relating to intellectual property are conceived as being relatively homogenous – that is, different from standard intellectual property issues but the same in their identification as ‘Indigenous’. This is also perpetuated in the academic writing on the cases, which fails to point out the specific and unique characteristics of the particular intellectual property cases, for example, that they evolved in North-East Arnhem Land in northern Australia where the specific communities have a unique history in relation to law, legal mediation and legal strategies.³⁶ This allows little room for differentiation within the ‘Indigenous’ category. As Helliwell and Hindess have observed,

concepts denoting unities that are both ideational and systematic serve the dual role of inscribing ideational *sameness* within a population, and *difference* between one population and another ... [however] a stress on sameness or homogeneity is at the expense of the recognition of the disorder that can also be observed within a society or culture, and of the ideational diversity pertaining between its members.³⁷

33 Austin Sarat and Jonathan Simon, ‘Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship’ (2001) 13(35) *Yale Journal of the Humanities* 1, 6.

34 Frances Peters-Little, ‘The Community Game: Aboriginal Self Definition at a Local Level’ (Research Discussion Paper No 10, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998) 4.

35 See also Shelley Wright, ‘Intellectual Property and the “Imaginary Aboriginal”’ in Greta Bird, Gary Martin and Jennifer Neilson (eds), *Majah: Indigenous Peoples and the Law* (1996); John R Bowen, ‘Should We Have a Universal Concept of “Indigenous Peoples” Rights? Ethnicity and Essentialism in the Twenty First Century’ (2000) 16(4) *Anthropology Today* 12.

36 It was in North-East Arnhem Land that the significant land rights case against the Nabalco Mine was initiated in 1971: *Milpirrum v Nabalco Pty Ltd* (1971) 17 FLR 141. Wandjuk Marika, also from North-East Arnhem Land, had been arguing for copyright protection since 1976, so it is likely that legal remedy was conceived as a possibility very early in the region. Whilst *Milpururru v Indofurn Pty Ltd* (1994) 54 FCR 240 also involved Pintupi artists from Central Australia, the case was driven by the Yolngu artists.

37 Christine Helliwell and Barry Hindess, ‘“Culture”, “Society” and the Figure of Man’ (1999) 12(4) *History of the Human Sciences* 1, 2.

Political differences experienced at a local, regional or national level are seldom articulated within the Australian discourse on intellectual property. For instance, what might be a workable strategy in one community or region of Australia is often inappropriate for another.³⁸ This can be due to differing social and cultural circumstances, alternative interpretations of the issue and challenges in terms of representation. Whilst national legislation cannot necessarily be attuned to site and locale differences, it is nevertheless ironic that it is precisely these differences, which in themselves are highly political, that will undermine the efficacy of legislative strategies relating to Indigenous people. As I shall discuss later in this paper, the difficulty of introducing community-specific moral rights legislation explicitly illustrates how these problems of political differentiation, when noticed at all, are exacerbated by the pervading emphasis on Indigenous homogeneity in developing solutions within intellectual property law. It is therefore unsurprising that these problems of differentiation and the contextual politics that they generate, remain noticeably absent from the international discourse as well.

IV COMMUNAL OWNERSHIP IN AUSTRALIAN CASE LAW

The copyright cases of the 1980s and 1990s were indicative of a changing political approach to Indigenous rights in Australia.³⁹ However, it has since been noted that corresponding cultural and political rights are yet to see full recognition.⁴⁰ In terms of the present discussion, Indigenous people and academics have argued that there still remains a substantial gap between what Indigenous people want from intellectual property law and what intellectual property law has been able to deliver.⁴¹

Whilst also present in earlier cases, a key expectation that was centrally engaged in the second *Bulun Bulun* case, *Bulun Bulun v R & T Textiles Pty Ltd*⁴²

38 Debates about the best way of tackling the issue of alcohol and its effects in Aboriginal communities illustrate the multiple strategies that must be engaged, and that a 'one fix' solution is inappropriate.

39 *Wunungmurra v Peter Stripes Fabrics* (Unreported, Federal Court of Australia, 1985); *Bulun Bulun v Nejlam Pty Ltd*, (Unreported, Federal Court of Australia, Olney J, 29 March 1989); *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurururu v Indofurn Pty Ltd* (1994) 54 FCR 240; *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244; *Buluru Australia Pty Ltd v Oliver* (2000) 49 IPR 384. See also Colin Golvan, *Aboriginal Art and Copyright – An Overview and Commentary Concerning Recent Developments* (2001), <<http://www.golvanarts.com.au/copyright.html>> at 2 September 2004.

40 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 is understood as being indicative of this changing approach to Indigenous rights. Issues of sovereignty and self-determination remain central issues to contemporary Aboriginal and Torres Strait Islander politics. See also Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003).

41 See, eg, Terri Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights*, Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (1998); Michael Dodson, 'Indigenous Peoples and Intellectual Property Rights' (Paper presented at the Ecopolitics IX Conference, Darwin, 1–3 September 1995).

42 (1998) 86 FCR 244.

(‘*Bulun Bulun*’), was the recognition of communal rights.⁴³ Thus *Bulun Bulun* provides a picture of the broader context of the debate about communal ownership, and is significant because it also reveals the cultural politics of the law.⁴⁴ The argument put by counsel for the applicants was that rights in the artwork, *Magpie Geese and Water Lilies and the Waterhole*, extended beyond the individual and were, in fact, vested in the community as a whole. The rights that *Bulun Bulun* acquired by painting the artwork were special rights conferred on him by his community and, by virtue of this manifestation, the community also had a direct interest in what happened to the work. Highlighting the primacy of this association, the action was brought by both *Bulun Bulun* as the artist and *Milpurruru* acting on behalf of the *Ganalbingu* community. However, soon after proceedings were issued the fabric company went into administration. Copyright infringement was admitted before proceedings began, with arrangements being made between the parties for damages.⁴⁵

Nevertheless, *Milpurruru* pursued his claim on his own behalf 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 had equitable ownership of the copyright in *Bulun Bulun*’s painting and that the artist owed a fiduciary duty to the *Ganalbingu* people in relation to the copyright.⁴⁶ In essence, the argument was that the ownership of imagery depicted by *Bulun Bulun* was not held, in the Western sense, solely (or individually) by *Bulun Bulun*, but that it was ‘held in trust’ for the *Ganalbingu* people. If an infringement occurred and the artist failed to act, the *Ganalbingu* people could claim copyright in the work. The argument was one where the Court was directed to how the copyright infringements affected interests beyond those of the copyright owner. This directly flowed from the acknowledgement in the previous copyright and Aboriginal art case, *Milpurruru v Indofurn*⁴⁷ (‘*Carpets Case*’), that the community held a legitimate position in relation to the infringement of an artwork.⁴⁸

In the *Carpets Case*, Colin Golvan, counsel for the artists, argued that the harm sustained by the artists from the infringement of their work on carpets was

43 The previous case, *Milpurruru v Indofurn Pty Ltd* (1994) 54 FCR 240, had ruled that the damages be divided equally amongst the eight artists party to the case and these damages included the new remedy of ‘cultural harm’ – ie, that the infringement also affected each artists’ community where the infringement potentially and significantly displaced the continuity and significance of the role and function of the artist: at 280.

44 Whilst there is a wealth of academic literature that has discussed this case, recent experience suggests that it should not be assumed that an audience is necessarily familiar with this literature. For this reason exploration of this case has been included in the article.

45 *Bulun Bulun* (1998) 86 FCR 244, 247.

46 This was a very specific and strategic framing of *Milpurruru*’s claim, raising interesting questions about the translation of Indigenous claims into a legal framework of understanding. For instance, ‘equitable ownership’ and ‘fiduciary duty’ would not have been terms that *Milpurruru* would have used himself. Counsel for the case, Colin Golvan, was very aware of this difficulty. See Anderson, above n 11, Appendix A, ‘Interview with Colin Golvan’.

47 *Milpurruru v Indofurn Pty Ltd* (1994) 54 FCR 240.

48 This was explicitly recognised in the remedy of ‘cultural harm’ that was developed by von Doussa J: *Milpurruru v Indofurn Pty Ltd* (1994) 54 FCR 240, 280.

more profound than could be possibly understood and recognised in Western law. This was because the effects of the infringement 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 role and function of the artist.⁴⁹ Thus in *Bulun Bulun* the Court was asked to recognise the rights of the Ganalbingu people in the artwork, owing to the effects upon the community caused by the infringement, thereby disrupting the traditional legal notions of authorship and ownership.⁵⁰

Ultimately in *Bulun Bulun*, determining the issue of copyright infringement was a secondary element, for this had been admitted and *Bulun Bulun* had ceased to be a party. Instead, the case focused on the way in which copyright law conceived of an 'owner' and, importantly, on the different constructions of ownership that could arise from the different cultural positions held by Indigenous people, represented by Milpurrurru and the Ganalbingu people. 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 expanding the classification of 'joint-authorship' to incorporate 'community-ownership'.

In so far as the current *Copyright Act 1968* (Cth) ('*Copyright Act*') is concerned, s 35(2) states that, by virtue of that Act, the *author* of an artistic work is the *owner* of the copyright – the two are implicated in each other. It follows that a work of joint-authorship is a work that has been produced through the collaboration of two or more authors where 'the contribution of each author is not separate from the contribution of the other author or the contribution of the other authors'.⁵¹ Citing precedent, the presiding Judge, von Doussa J, explained that the *Copyright Act* therefore effectively precluded any notion of group ownership in a work, unless it was within the meaning of joint-ownership as defined in the Act. Yet 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 transmit the imagery into material form.

Consequent upon Justice von Doussa's finding in relation to the construction of 'joint ownership', counsel for the applicants argued that the Ganalbingu community had an equitable interest arising out of *Bulun Bulun*'s copyright. 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 into 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, but rather that of the whole community. In the claim of equitable interest, a claim that sat astride copyright law, von Doussa J had to consider whether an express trust could be found and whether *Bulun Bulun* held the copyright as a fiduciary.

49 See the affidavits of Banduk Marika and Tim Payunka Tjapangati in *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240, 246, 262. See also Banduk Marika's comments in Eatock and Mordaunt, above n 28.

50 *Bulun Bulun* (1998) 86 FCR 244, 247.

51 *Ibid* 258.

Justice von Doussa found that while there was no express trust, an artist's fiduciary obligation did exist and 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 this infringement. This does not grant the community any direct equitable interest in the copyright; rather the community's primary remedy is its right to force the fiduciary to act. Justice von Doussa left open the issue of in what circumstances the community may be able to act.⁵²

Owing to its progressive nature, the case has sparked discussion amongst academic communities.⁵³ However, whilst it made some accommodation for communal rights, these were not really within the purview of copyright law. For instance, the community's interest was only recognised via equity, thus skirting around the issue of ownership and the economic and other rights enjoyed by copyright owners. As Kathy Bowrey notes:

Here equity was used to ameliorate the harshness of the current definition of joint-ownership. Justice can be seen to be done, although given the circuitous mechanism provided for binding third parties, its practical application might be quite limited. The redress to equity for justice relegates the issue of indigenous intellectual property claims to the category of unexpected personal problems, at least until there is appropriate legislative action. That equity can offer some solace reinforces the assumption that no major reform of copyright law is necessary.⁵⁴

In her analysis, Bowrey makes note of how the case illustrated the cultural politics of law and how law justifies its own competence to manage the field. I would add to this by suggesting that the case set the parameters for the localisation of difference, that is, defining the 'Indigenous' interest with reference to one particular Indigenous community – the Ganalbingu people. That the interests of the Ganalbingu people have been extended from one Indigenous community to all illustrates the presumption of Indigenous homogeneity, and conversely, Indigenous difference in relation to intellectual property law. In this way, the case has had a significant impact in consolidating what was understood as a key expectation of intellectual property law held by Indigenous people: the ownership rights of the community. But it is the presumption of the *stability* of 'community' that presents the fundamental problem for developing any legislative strategy addressing communal ownership.

52 Ibid 263–4.

53 See, eg, Michael Blakeney, 'Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions' (1998) 1 *Journal of World Intellectual Property* 985; Michael Blakeney, 'Protection of Traditional Knowledge under Intellectual Property Law' (2000) 22 *European Intellectual Property Review* 251; Justice Ronald Sackville, 'Legal Protection of Indigenous Culture in Australia' (2003) 11 *Cardozo Journal of International and Comparative Law* 711; Brown, *Who Owns Native Culture?*, above n 31.

54 Kathy Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 *Law and Critique* 75.

V THE DEVELOPMENT OF COMMUNAL MORAL RIGHTS

Towards the end of the 1999 parliamentary debate on Australia's introduction of a moral rights Bill as an amendment to the *Copyright Act*, Senator Aden Ridgeway introduced the proposal that Indigenous communities should be provided with special communal moral rights within the legislation. Whilst this proposition was rejected (explained as bad timing, in that the Parliament would not have sufficient time to consider and debate the proposal), the Government did signal its commitment to developing a framework that would recognise the communal rights of Indigenous people within law.⁵⁵

In 2001, this commitment was reiterated in the Government's pre-election arts policy 'Arts for All':

The Coalition will take steps to protect the unique cultural interests of Indigenous communities and the cultural works that draw upon communal knowledge in conjunction with relevant Indigenous arts groups and ATSIC. Amendments to the moral rights regime will give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.⁵⁶

In a joint media release of May 2003 it was further stated that

Indigenous communities will be able to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material under new legislation proposed by the Government. Amendments to the *Copyright Act*, to be introduced into Parliament later this year will give Indigenous communities legal standing to safeguard the integrity of creative works embodying community knowledge and wisdom.⁵⁷

In mid-December 2003 copies of the draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 were distributed for comment. Australia again showed itself as a key player in developing innovative provisions for the incorporation of Indigenous rights within the frameworks provided by intellectual property. The Attorney-General, Philip Ruddock, explained how copyright law extended beyond purely economic considerations, in that it could play a vital role in fostering and protecting our Indigenous and cultural heritage: 'the protection of Indigenous culture depends upon strong and effective copyright laws'.⁵⁸

It should be acknowledged at the outset that moral rights do not provide ownership rights per se. In Australian law they involve the right of attribution of authorship;⁵⁹ the right not to have authorship of a work falsely attributed;⁶⁰ and

55 Ian McDonald, 'Indigenous Communal Moral Rights Back on the Agenda' (2003) 16 *Australian Intellectual Property Law Bulletin* 47.

56 Liberal Party of Australia, *The Howard Government: Putting Australia's Interests First: Election 2001 – Arts for All* (2001) <<http://www.liberal.org.au/documents/arts.pdf>> at 16 October 2004.

57 Department of Communication Information and Technology, Department of the Attorney General and Department of Immigration and Indigenous Affairs, 'Indigenous Communities to Get New Protection for Creative Works' (Press Release, 19 May 2003).

58 Philip Ruddock, 'The Government's Copyright Policy Agenda' (Paper presented at the Eleventh Biennial Copyright Law and Practice Symposium, Sydney, November 2003).

59 *Copyright Act 1968* (Cth) s 193.

60 *Copyright Act 1968* (Cth) s 195AC.

the right of integrity of authorship of a work attributed.⁶¹ However, a precondition is that ‘only individuals have moral rights’.⁶²

Unlike the automatic nature of moral rights for individual authors and creators, the draft Bill proposes five formal requirements that must be met before a community could claim Indigenous communal moral rights. First, (as per the existing moral rights legislation) there must be copyright subject matter – literary, dramatic, musical or artistic works and cinematograph films (sound recordings are excluded). Second, the work must draw on the particular body of traditions, observances, customs or beliefs held in common by the Indigenous community. Third, an agreement must be entered into between an Indigenous community and the creator of the work (the copyright holder). This is a voluntary agreement, which could be oral in nature. The presumption here is that at the time of executing a work the individual artist will first attend to their legal affairs and formally consider the question of communal moral rights management, presumably in anticipation of commercial potential in the reproduction of the work. Since Indigenous communal rights cannot exist without this agreement, the onus is on the Indigenous people and communities to initiate contact and negotiation with those parties, such as other artists, film-makers, broadcasters or corporate organisations, who may have an interest in the work. There is an implicit presumption that the community will know, or will find out, possibly through the benevolence of the owner/creator, that a work is being created that draws upon that community’s ‘traditions, customs or practices’. Fourth, there must be an acknowledgement of the Indigenous community’s association with the work. Finally, interested parties in the work need to have consented to the rights arising, and this consent must be provided through written notice. There is no clarification in the legislation of who constitutes an ‘interest holder’. All of these requirements must be met before the first dealing with the work, otherwise no rights arise.

From a practical perspective, the presumption of action implicit in the draft Bill is that communities will enter formal agreements. This does not take into account difficulties of language access, legal translation and legal mediation. As *Yumbulul v Reserve Bank of Australia*⁶³ aptly demonstrates, acknowledging and understanding contractual obligations can be a cause of substantial conflict between parties. With difficulties in basic service delivery for remote and rural communities, it is important to recognise the extent to which accessing legal advice on copyright matters will be a substantial challenge for the communities that are the target of the draft Bill.

Broader critical questions concern presumptions made in the draft Bill that a community will follow the direction of the law. In presuming rational legal actors, the law also presumes to know how communities will behave as legal

61 *Copyright Act 1968* (Cth) s 195A1.

62 *Copyright Act 1968* (Cth) s 190.

63 (1991) 21 IPR 481. While the case was initially about the use of Yumbulul’s Morning Star Pole design by the Reserve Bank of Australia on the bicentennial 10 dollar note, it was revealed to be predominantly a dispute over contractual authority and the rights that Yumbulul believed he still retained in his work as opposed to those he had assigned.

subjects, for instance, that the community will follow the directions set out in the communal moral rights Bill. But with language issues, questions of translatability and legal mediation, the presumption of community behaviour seems to be at odds with the reality of legal subjectivity. Why would communities behave in rational and predictable ways before the law when individuals themselves do not? Moreover, this presumption of following legal direction is problematic given the requirements that the community must fulfil, for instance, the voluntary agreements.

This returns us to discussions about the intersections between law and culture or, more specifically, the influence of culture upon the shape that the law takes. The inevitable engagement of practical cultural functions in law is, in part, due to the difficulty of people being conceived as stable legal subjects when, in fact, they do not necessarily behave in a predictable manner for law or governance. Thus, one of the difficulties for law is that it must constantly deal with the complexity of individuals and how they perform as legal subjects. In short, there is no certainty in how individuals relate to the law. These observations are also relevant when talking about Indigenous communities, which are made up of individuals upon whom the law exerts influence. Each community will act differently before the law, and will also challenge the law's ability to respond subjectively to elements that are unique to particular communities and individuals. As Peters-Little reflects, 'Aboriginal people are individuals and need to be respected as such and not pressured into thinking that they are speaking on behalf of a race, community, organisation and doctrine, which I usually find is a relief for many'.⁶⁴

Beyond these practical problems with the draft Bill, there are larger, more substantial concerns with legislating for community rights. On one level, these are obviously related to difficulties with definition and the inherent instability of 'community' as a legal object. On another level, they concern the increasing tendency to deal with Indigenous differences before the law, especially intellectual property law, in terms of community relief.⁶⁵ The rationale behind the draft Bill presumes that there is no substantial problem in making 'community' a legal object. This is so despite other areas of law being overrun by disputes about community. For instance, in the native title claim in *Yorta Yorta Aboriginal Community v Victoria*,⁶⁶ a fundamental tension revolved around whether the Yorta Yorta people were the same community of people who had demonstrated continuity with customs and traditions that had survived British sovereignty. Indeed, native title provides an excellent illustration of the difficulties in the codification of community – this is not only in relation to problems of legal definition and identification, but also the effects that these legal processes of codification have on communities, individuals and the resulting social and political relations. Alternatively, the cases regarding the construction of the Hindmarsh Island Bridge demonstrate the divisions that can exist within a

64 Peters-Little, above n 34, 3.

65 This is also reflected in sui generis proposals.

66 (2002) 214 CLR 422.

community, and the politics of representation, in terms of who can speak, and to whom, as well as who can be a party to certain types of knowledge.⁶⁷ With such recent examples, surely intellectual property law cannot be naïve about the reality of difficult and often political intersections that inform communities. Moreover, it is also worth reflecting upon the role that legislation and governmental policy has had in formulating concepts of Aboriginal ‘communities’ and their contemporary social organisation, geographical boundaries and cultural identities.⁶⁸

The politics of community arise precisely because communities are not static or bounded, but instead are dynamic and fluid. Communities come together for different purposes and in different contexts; they split, coalesce or develop over time. The point here is that there is no clear consensus about the markers to be used in identifying a community or membership of a community. The intense politics that surround the term make its very use open to contest and dispute. Communities are notoriously difficult to define, as the abstract identification is likely to bear little resemblance to the practical social reality at a given space and time. The key point is that the category of ‘community’ is anything but stable and is thus a difficult notion upon which to rest legislative remedies.

VI INTERNATIONAL DEVELOPMENTS

It is fair to say that, whilst there has been some interest in the implications of community ownership, international attention in the area of Indigenous issues has been directed towards addressing issues of terminology. In a very clear way, such concerns about terminology illustrate the multiple and overlapping agendas and agents involved in speaking for, and about, Indigenous concerns in intellectual property.⁶⁹ The disjuncture between the needs of particular states and the differing embodiments that constitute those states becomes explicit in discussions about appropriate terminology. Questions of representation, of who is speaking, to whom, and for whom, are central to these political contests. The increasing mobilisation of Indigenous agendas within the global polity inevitably produces these questions of representation. Significantly, whilst problems of language and identification persist, it is notable that there is now a permanent forum within WIPO itself illustrating the visibility of Indigenous concerns.⁷⁰

Part of the dilemma in such international discussions is that Indigenous needs and expectations of protection often exceed the parameters of the traditional intellectual property discourse. ‘Authorship’ and ‘originality’ are the most

67 For a summary of the cases and the political challenges, see *Chapman v Luminis Pty Ltd* [2001] FCA 1106 (von Doussa J). For further discussion about the politics of knowledge within a community, see Diane Bell, *Ngarrindjeri Wurrurarrin: A World That Is, Was and Will Be* (1998).

68 Peters-Little, above n 34, 4.

69 For an example of the numbers of interested parties acting internationally, see *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Report*, WIPO, 6th sess, Annex 1, WIPO Doc WIPO/GTRKF/IC/6/14 (2004).

70 For the articulation of such problems, and thus the difficulty in developing international instruments, see the comments by America, Canada and Egypt: *ibid*.

commonly cited categories that demonstrate the ill fit between Indigenous peoples' interests and the standard laws of intellectual property. In recent years this has meant that Indigenous peoples' demands for better protection of cultural knowledge have also found voice outside WIPO in other international forums. For example, in the context of Indigenous knowledge of biodiversity, discussions centre on the United Nations *Convention on Biological Diversity*, which recognises each state's control over access to biological resources.⁷¹ With lucrative national and international markets for biological resources, the hope of establishing an international instrument of influence through a change in forum is not particularly surprising.⁷²

In terms of Australia's contribution to this (growing) international intellectual property dialogue, the work of Terri Janke has been the most notable and significant. Beyond the actual cases, the additional commentary has been predominately supplied by, and sought from, Janke. Besides the (Australian specific) 1998 Report *Our Culture: Our Future*,⁷³ Janke was also commissioned to write a special report on Australia's experiences for WIPO, entitled *Minding Culture*.⁷⁴ This Report is representative of Australia's position, detailing the cases cited above as well as including other case studies such as the development of a national labelling system for Aboriginal art. As the Director General of WIPO, Kamil Idris, explains in his introduction:

The Case Studies provide factual and practical information, based on specific cases, on actual and attempted use of the existing intellectual property system by Indigenous Australians and legal and practical lessons learned therefrom. ... These Studies will be a useful resource for policy makers at the international, regional and national levels, private legal practitioners, Indigenous and other local communities and other stakeholders.⁷⁵

Janke's case studies offer a descriptive rendering of issues experienced within Australia. They provide WIPO with points for reflection and are important precisely because they illustrate the extent to which intellectual property can be meaningful for Indigenous people and can be employed to successful ends. Yet Janke remains distanced from the politics of some of these initiatives even when political differences are directly involved in their demise and failure, the most

71 Article 8j of the *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32 (entered into force 29 December 1993) suggests that bioprospecting should entail benefit sharing with any local or indigenous populations whose knowledge contributes to the development of products. See also Rosemary Coombe, 'Preserving Cultural Diversity through the Preservation of Biological Diversity: Indigenous Peoples, Local Communities and the Role of Digital Technologies' in Tony Bennett, *Differing Diversities: Transversal Study on the Theme of Cultural Policy and Cultural Diversity* (2001); Lauren Godshall, 'Making Space for Indigenous Intellectual Property Rights under Current International Environmental Law' (2003) 15 *Georgetown International Environmental Law Review* 497.

72 Amongst the extensive literature on this subject, see Rosemary Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge in the Convention of Biodiversity' (1998) 6 *Indiana Journal of Global Legal Studies* 59; Peter Drahos, 'Indigenous Knowledge, Intellectual Property and Biodiversity: Is a Global Bio-Collecting Society the Answer?' (2000) 6 *European Intellectual Property Review* 245; Paul Heald, 'The Rhetoric of Biopiracy' (2003) 11 *Cardozo Journal of International and Comparative Law* 519.

73 Terri Janke, *Our Culture: Our Future*, above n 41.

74 Terri Janke, *Minding Culture*, above n 12.

75 Ibid Foreword.

obvious example being the Labels of Authenticity.⁷⁶ *Minding Culture* is digestible reading for policy makers, illustrating the key elements that the global discourse can glean from the Australian experience.

To some degree, political and cultural contexts are rendered explicit in the identification of Indigenous subject matter within intellectual property frameworks. The debates about terminology remind us that politics is never far away from these discussions. But rather than finding a stable legal object, the recognition of explicit 'cultural' components also influences 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, in the case of Indigenous knowledge, the interest in the concept of the 'Indigenous' exceeds that particular discursive legal framework. For the more traditional legal scholar, the lack of stability 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 them that characterises the position of Indigenous knowledge within both Australian and global systems of intellectual property.

The attention directed to international forums for outcomes is often turned directly back to national initiatives. This is as much 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 in the process, whereby 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. As Aoki has explained, 'dichotomizing the international and the national implies an illusionary separation between the two that obscures the constitutive role of sovereign nation

76 The Labels of Authenticity were established under the *Trade Marks Act 1995* (Cth) to promote and market the origin and authorship of Aboriginal and Torres Strait Islander cultural products. They were administered through the National Indigenous Arts Advocacy Association ('NIAAA'). Putting aside theoretical problems of authenticity and defining authenticity within law, the Labels raised a further question about representation. This was because as a national labelling system, the Labels were to 'capture' all Indigenous products. This created problems because certain communities already had their own discrete community and/or regional labelling systems. Practical problems of administration of the Labels were also raised, especially given the remoter regions of Australia that were to be part of this approach. An additional bureaucratic problem which signalled the demise of the Labels was that the body overseeing them, the NIAAA, was stripped of funding by the Department of Communication Information Technology and the Arts and by the Aboriginal and Torres Strait Islander Commission because of allegations relating to misappropriated funds. For information on the Labels, see Leanne Wiseman, 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity' (2001) 23 *European Intellectual Property Review* 14; Marianna Annas, 'The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin' (1997) 3(90) *Aboriginal Law Bulletin* 4. See also Debra Jopson, 'Aboriginal Seal of Approval Loses its Seal of Approval' *Sydney Morning Herald* (Sydney), 14–15 June 2002.

states in constructing and participating in these supranational arenas'.⁷⁷ To this end, global discourse remains informed by the national. There is an 'interpenetration' of strategies which is why, in the case of current legislative initiatives, the possible introduction of communal moral rights is also being watched outside Australia.

VII CONCLUSION

As images of Indigenous people and communities are constructed in national and international intellectual property forums, so too are Indigenous peoples' needs and expectations. In many cases these are set against the current intellectual property framework. This is most noticeable in the insistence of communal ownership versus individual ownership arguments.⁷⁸ The search for a differential creates a binary that masks the fluidity between these categories. The unity and agreement assumed of 'community' is problematic given the extent to which, in Australia at least, communities are far from neat linear models, but rather exist as contested spaces with dynamics that expose multiple positions and levels of agency and action. Thus it is important to encourage reflective critique of the range of interests and actors within communities and recognition that these shape decision-making processes.⁷⁹ Whilst the communal versus individual binary may appear to establish a starting point in considering the inclusion of Indigenous interests within the intellectual property discourse, it actually diverts attention away from the inherent social and cultural complications informing the law. The problem comes to be 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 with the internal politics confounding identification of the spatial unit that could be named as a 'community'. The focus on the community versus individual ownership issue as the locus of the intellectual property and Indigenous knowledge problem relegates the diverse dynamics and relationships of control and 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 law's 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

77 Keith Aoki, 'Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property and the Internet' (1998) 5 *Indiana Journal of Global Legal Studies* 443, 469–70.

78 See, eg, Blakeney, 'Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions', above n 53; Rachael Grad, 'Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia' (2003) *Duke Journal of Comparative and International Law* 203.

79 Arun Agrawal and Clark Gibson, 'The Role of Community in Natural Resource Conservation' in Clark Gibson, Margaret McKean and Elinor Ostrom (eds), *People and Forests: Communities, Institutions and Governance* (2000).

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 the nature of the proposed corresponding solution. The dynamics of these relations of power mean that Indigenous participants are included when they comply with particular assumptions about the legal nature of the problem and the legal discourse governing future solutions.

This draws us back to May's comments, at the start of this paper, that there are often diverse sets of politics that underpin both national and global developments in intellectual property law. Thus the point of this article has been twofold: to highlight the internal national politics imbued within the development of a communal moral rights Bill, and to bring to the fore of international discussions particular localised contexts where meaning, expectation and anticipation remain fluid and contested. Without giving attention to these elements, there remains a danger of replicating ineffective remedies that appear influential and pander to the rhetoric at international levels, but are practically unusable because they remain based on imagined communities that bear little resemblance to the actual communities to which they are directed. Thus a central challenge for intellectual property law remains grasping the changing dynamic of Indigenous differentiation and adequately accounting for the moments of locality.

Practising the politics of cultural inclusion in global intellectual property frameworks necessitates the recognition of the political 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 categorisation of Indigenous knowledge as 'traditional' knowledge is made possible. In this sense the subject 'Indigenous knowledge' is produced in such a way as to allow for global systems of management to be endorsed. This is at the expense of appreciating the differences between Indigenous people, their expectations of intellectual property law and the political dimensions that are inherent to the identification of the legal category of 'Indigenous knowledge'.