Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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5. Study of the bureaucratic agenda

With consideration of the way in which intellectual property law emerged as a unique cultural form, and the making of Aboriginal 'art', it is now time to explore the ways in which indigenous knowledge, within an Australian context, came into bureaucratic view as something that needed protection. To this end, I will look initially at the ways in which problems of protecting indigenous knowledge were raised and have subsequently been framed in Australia by governmental efforts in the form of bureaucratic response. What will become evident as I examine the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore* and secondly the 1994 *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.

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. 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 demands that they identify with an impossible standard of authentic 'traditional' culture.[1] A consequent of this is that indigenous people are presented with 'enormous difficulties both in making claims and negotiating positions'.[2]

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 certain 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?

IDENTIFYING THE PROBLEM

The argument in Part One proposed that law reduces cultural difference but also relies upon it to understand the differing demands brought for legal interpretation. The 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 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 to which it may otherwise have been blind. Because the challenge is set within the law's own terms of reference it must engage the challenge. Not to 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 is in considering 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 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.

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.[3] The policy shift to land rights was seen in the culmination of statutory land rights legislation in the Northern Territory and South Australia.[4]

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, and therefore as legal subjects.[5] One example of this rethinking of indigenous people in relation to the law was the recognition that there was and had historically been a parallel body of law for many indigenous people even though the authority of these customary laws remained unacknowledged within the dominant legal system.[6]

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 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 was in 'introducing conceptions of land ownership that were not only collective but based on spiritual and social connections to place'.[7] 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, an artist from Yirrkala, Arnhem Land in northern Australia 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.[8]

Wandjuk Marika is significant in this story as he became the key spokesperson in advocating for equal treatment for Aboriginal artists before the law and within broader art spaces. His is an important example of the way in which individuals can influence and shape new areas of legal and bureaucratic concern. Through his direct and indirect lobbying of arts councils and government bureaucrats, in 1973 the first National Seminar on Aboriginal Arts was convened. The seminar prompted renewed calls for consideration of Aboriginal art as legitimate 'art' in a western sense. It also provided the initial context for the eye of bureaucracy to focus, thus leading to the creation of a governmental working group to discuss possibilities for the protection of Aboriginal art, which culminated in the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*.

Notably, the 1960s and 1970s were a period in Australia when the distinct 'otherness' represented by Aboriginal cultures began to rupture.[9] 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. Despite the nascent primitivism and romanticism attached to indigenous people as a general category, certain indigenous spokespeople inevitably influenced the responsiveness of the government and the law in relation to these 'inappropriate' uses of indigenous imagery. For example, in 1976 and continuing his advocacy, Wandjuk Marika wrote in the *Aboriginal News* of his anguish at finding his art reproduced onto tea towels. Marika explained his position in the following way:

> 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.[10]

Marika was influential in prompting consideration of this issue, both within Federal Government and what was then called the Institute for Aboriginal Studies.[11] Marika's position on copyright was possibly informed by both the early confidential information case *Foster v Mountford & Rigby Ltd*[12] and even the land rights case, *Milpurrum v Nabalco Pty Ltd*[13], where the Yolngu people of Arnhem Land in northern Australia argued for land rights, presenting the now famous Bark Petition as evidence (and title) of knowledge, association and spirituality with the land.[14] Certainly because of the land rights cases, access to legal advice and legal advocates became somewhat easier in the Northern Territory. In a somewhat fluid political environment, indigenous issues of land rights, sovereignty and cultural control gained new points of leverage. It was thus also in this political environment that the Australian government turned attention to the protection of Aboriginal arts. Under these conditions, the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*[15] should be understood as operating within a context that: recognised the changing political environments which enabled new indigenous rights claims; was responsive to Marika and other Aboriginal artists' concerns about the use of cultural imagery; and realised the dangers and possibilities of the increasing market demand for indigenous artwork and design.

REPORT OF THE WORKING PARTY ON THE PROTECTION OF ABORIGINAL FOLKLORE

In December 1981 the *Report of the Working Party on the Protection of Aboriginal Folklore* was released.[16] 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 Aboriginal art.[17] The Report was initiated in 1973 following the first National Seminar on Aboriginal Arts where a key resolution to the newly formed Aboriginal Arts Board was that procedures should be developed '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'.[18] 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'.[19] 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.[20]

The Report's 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.[21]

The Report began with a preliminary discussion of the concerns regarding the 'use of Aboriginal designs taken from the original works by Aboriginal artists'.[22] The examples utilised focus exclusively on contexts where designs were used for commercial gain.[23] The Report highlights the 1976 case *Foster v Mountford & Rigby Ltd* where photographs of a secret/sacred nature were included in an anthropologist's publication.[24] 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'.[25] It is important that from the outset, the Report espoused an inclusive nationalist objective. The purpose was not solely to consider means to protect indigenous imagery, but also mechanisms that allow non-indigenous peoples to access and use (predominately in a commercial 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 issue was terminology and consequently the inability to differentiate adequately 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.[26] 'Folklore'

was considered a sufficiently vague term to recognise the 'traditions, customs and beliefs that underlie forms of artistic expression'.[27] The key difficulties of the term (beyond that it was not technically legal) however, were acknowledged in the following way:

> 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.[28]

From the first bureaucratic initiative, the legal discourse was instrumental in directing the way in which interests in indigenous knowledge (at this stage understood as folklore) were to be phrased. Whilst the term had no legal basis, its repetition in various international legal forums served to create a quasi precedent which then legitimised its use within the national context. 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' and its sense of inferiority in relation to other cultural forms, which has been widely commented on by indigenous spokespeople, would have excluded it from becoming the key term used to identify forms of indigenous knowledge within legal frameworks.[29]

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'[30] or whether the aim of the legislation was to protect the economic interests of Aboriginal people.[31] While the two purposes were not necessarily mutually exclusive, the Working Party understood that the rationale underpinning each would take the policy objectives in different directions.[32] The key problem with the difficulty of purpose that characterised the Report was dually the use of the term 'folklore' which could not help but convey a perception of 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 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 reinforced such myths regarding the location of indigenous people and the unchanging nature of tradition. This continues to influence current debates over who is legitimately entitled to claim 'ownership' of culturally specific knowledge. Despite its best intentions, the Report is part of a historical continuum where difficult negotiating positions are created for indigenous people who want to participate within the discourse.[33]

The disjuncture between economic interest and the preservation of cultural identity and integrity within the Report destabilised the expectation and function of intellectual property law with regard to indigenous knowledge as new subject matter. In this sense, while advocating the possibility of using laws of intellectual property, notably copyright, the Report strongly emphasised the limitations of these laws.[34] As Colin Golvan, the Barrister responsible for running all the Aboriginal art and copyright cases in the courts, observed, 'the Working Party concluded that the reliance on copyright was not appropriate in order to protect Aboriginal folklore'.[35] This was, in part, because 'folklore' was a vague descriptive term with no suitable legal equivalent. There also remained significant difficulties in determining ownership, originality and authorship as the very term excluded these kinds of categories. To this end, indigenous cultural expression remained unidentifiable for the requirements of copyright protection. 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. Here we find the first proposal for *sui-generis* legislation.[36] Whilst the Report ostensibly failed to envisage what form a law to protect the amorphous category of folklore would take, it did make an important contribution to the development of laws protecting certain aspects under the rubric of folklore, for instance tangible indigenous material such as sites and artifacts through the Heritage Acts.[37] However, the intangible and invisible dimensions of 'folklore' remained problematic, as the only kind of strategy available that protected rights in knowledge were laws of intellectual property.

The Report emphasises 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 Commissioner would be a governmental representative and, by implication, non-indigenous –

another bureaucracy for the administration of indigenous affairs with little or no indigenous participation. 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 as it reaffirms the legislative and administrative approach as the dominant way of considering any solution to Aboriginal issues – in this case the problem of protecting indigenous knowledge.[38]

Throughout the Report, indigenous people are defined as either 'customary users' and/or 'traditional owners'. Through this narrow view an homogeneity of Aboriginality is imposed. Whilst indigenous concerns are central, indigenous voice is absent.[39] This position of exteriority also creates a barrier for Aboriginal people to engage actively with its recommendations. Indigenous culture, in the singular, is romanticised and represented as a unitary phenomenon. Whilst this is a product of various kinds of historically informing discourses, it matters precisely because the romanticised vision of Aboriginal culture, and indeed cultural difference, is repeated and enhanced in each following governmental and legal initiative. It becomes harder and harder to account for Aboriginal experience that does not fit within the space of romantic Aboriginality. The legislative approach seeks to order specific cultural practices through assuming that these practices and how they relate to imagery are unified.[40] Normative assumptions regarding indigenous cultural practice overwhelmingly preclude the recognition of the diversity of indigenous practices and the multiplicity of positions and attitudes by indigenous peoples to the use of cultural imagery.

The *Report of the Working Party* establishes the precedent in regards to managing indigenous cultural material in Australia. The *Report of the Working Party* can be seen as a strategic way of making reality thinkable and practicable.[41] The Report is an attempt to make the problem of protecting Aboriginal 'folklore' open to remedy. It also functions to legitimate indigenous knowledge as a specific area of governmental and hence legislative and administrative attention. For our current purpose it illustrates how certain frameworks 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 management.

Consequently, the following Report, *Stopping the Rip Offs* shores up the legal and administrative boundaries and in doing so forecloses alternatives

beyond law. Significantly through *Stopping the Rip Offs*, the distinct space of 'indigenous intellectual property' is consolidated, where the process of managing the problem of indigenous knowledge generates its own form of language, logic, rhetoric and possibility. The *Report of the Working Party* was an important precursor, but it is really *Stopping the Rip Offs* that secures the production of the legal category, fleshing out governmental ambition and marginalising questions about politics, indigenous rights and alternative indigenous subjectivities.

STOPPING THE RIP OFFS: INTELLECTUAL PROPERTY PROTECTION FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

In October 1994, the Federal Government released the Issues Paper *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*.[42] The intention of the paper was to improve the *legal* protection for Aboriginal and Torres Strait Islander 'arts and cultural expression'.[43] The release of the Issues Paper occurred prior to the final hearing and decision in the case *Milpurruru v Indofurn* (1994).[44] 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. It was reactive, as evidenced in the title, and timely in relation to the case then before the Federal Court. It was 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.[45] Contrary to the opinion expressed in the *Report of the Working Party*, copyright was functioning as a viable tool for the protection of Aboriginal art. In this sense, 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 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 rights and questions associated with self-determination. This political environment reaffirmed the authority and primacy of the law to act 'on behalf' of indigenous people. Thus intellectual property law, as a legitimate vehicle for successful protection became the central theme for the Issues Paper.

In order for 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.[46] In the Issues Paper, the central characteristics of intellectual property law are utilised to position 'indigenous knowledge' as a natural subject of the law. To this end, the intangibility of the new 'indigenous knowledge' subject matter is made recognisable through established forms of classification. For instance, 'art', 'dance' and 'song', all culturally specific categories and established in copyright law are used to identify elements of indigenous knowledge. Through the deployment of these categories onto indigenous knowledge, a legal logic is imposed in both how indigenous knowledge is understood and how it can be dealt with. Nevertheless, the 'cultural' nature of indigenous knowledge continues to exert influence on these categories undermining its closure as a naturally occurring legal subject.

Two elements of the Issues Paper are fundamental for the future (re)production of indigenous knowledge within intellectual property law. Firstly, the position of indigenous people as a homogenous group residing within 'traditional communities' is reconfirmed. This facilitates the construction of indigenous knowledge as bounded and therefore 'different' from any other kind of knowledge that intellectual property has historically had to deal with. Secondly, by virtue of existing within 'traditional' communities and therefore 'naturally' not modern, vulnerability is presumed which reaffirms the need for (paternal) bureaucratic authority. '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 expression 'which are based on custom and tradition"'.[47] The danger is that in combination, these elements replicate constructions of indigenous people produced through colonial, anthropological and primitivist discourses. Indigenous people are denied access to contemporary practices of modernity, sovereignty and subjectivity. Like the art, Aboriginal people are produced as timeless, authentic communitarian and ahistorical.

Despite approximately three thousand copies of the Issues Paper being distributed to Aboriginal and Torres Strait Islander Commission (ATSIC) Regional Councils, Regional Offices, Aboriginal Legal Services, Land Councils, indigenous media associations, Aboriginal art centres, copyright interests and art interests, only eleven responses were received.[48] This illustrates starkly fundamental issues of access, for instance how the actual 'problem' as well as intellectual property law, was made intelligible to indigenous individuals and community representatives. The issue of access to the law continues to be a significant oversight in enabling (and encouraging) indigenous people to make decisions about the possibility

of utilising and developing benefits from an intellectual property regime. Laws of intellectual property still remain exclusionary in practice, even though considerable effort has been made to locate indigenous knowledge within an intellectual property regime.[49]

Positioning itself comfortably within legal and bureaucratic authority, *Stopping the Rip Offs* effectively facilitates the extent to which 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. Through the language and classifications of intellectual property law, indigenous knowledge is rendered thinkable and amenable to intervention. Legal discourse maintains its dominance by channelling discussions of the 'object' of concern through itself. For '[t]he 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'.[50]

In using a dominant western regulatory mechanism of law, relations of power are exerted, for power is made possible through a 'plurality of relationships'.[51] 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 engage 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 are imagined. The 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.

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, albeit one wrapped in difference. Significantly both reports consolidate the problem of the unauthorised use of Aboriginal art, design and knowledge as amenable

to governable strategies of description, intervention and normalisation. Inevitably this has affected how remedial solutions have been developed and the way in which the law has sought to accommodate indigenous cultural differences. Both reports secured a very particular kind of governable space, replete with regimes of truth (for instance under what conditions indigenous knowledge is recognisable), including who is authorised to speak and under what circumstances.

As the position of indigenous people in the above mentioned Reports highlights 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 actively to 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' – the trope used 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 highlights 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 these agenda generate, even though they have both been produced and phrased within the intellectual property discourse.[52] The contradictions and ambiguities remain concealed behind the face of bureaucracy.

In order to understand these difficulties more completely, and how they impact on the ways in which indigenous knowledges are identified within the law and how difference is understood beyond an abstract uniformity, it is imperative that we now explore these problems in the context of the case law.[53] What will now be considered is the way that in the specific cultural and political circumstances that generate instances of case law, indigenous individuals 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 category is produced and legally secured.

NOTES

1. E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Duke University Press: Durham and London, 2002.
2. S. Wright, 'Intellectual Property and the "Imaginary Aboriginal"', in Bird, G., G. Martin and J. Neilson (eds), *Majah: Indigenous Peoples and the Law*, The Federation Press: Sydney, 1996 at 140.
3. Citizenship rights for Aboriginal people were established through the 1967 Referendum – however it took another decade for these to be fully recognised throughout the country.
4. See: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Pitjantjatjarra Land Rights Act 1981* (South Australia).
5. See for example: A. Curthoys, 'Citizenship, Race and Gender' in 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.
6. An attempt to understand indigenous customary law prompted the Australian Law Reform Commission Report, *The Recognition of Aboriginal Customary Laws* 1983. Between 2000 and 2006, the Law Reform Commission of Western Australia reinvestigated the role of customary law. The *Final Report: The Interaction of WA Law with Aboriginal Law and Culture*, 2006, made 131 recommendations for legislative and policy reform.
7. V. Strang, 'Not so Black and White' in Abramson, A. and D. Theodossopoulis (eds), *Land Law and Environment: Mythical Land, Legal Boundaries*, Pluto Press: London, 2000.
8. W. Marika, 'Copyright on Aboriginal Art', (1976) 3(1) *Aboriginal News* 7 at 7.
9. This rupture was also produced through an emergent black rights movement that adopted and reinterpreted strategies from the civil rights movement in the United States.
10. W. Marika, 'Copyright on Aboriginal Art', supra n.8 at 7.
11. 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.
12. *Foster v Mountford & Rigby Ltd* (1977) 14 ALR 71. In this case, the Pitjantjatjarra Land Council went to Court to stop the publication of the book *Nomads of the Desert* by Charles Mountford. The claim was that the book contained secret/sacred material and exposure to this material could fracture the social fabric of the Pitjantjatjarra people. The claim was successful and the book was withdrawn from publication until the material was removed.
13. *Milpirrum v Nabalco Pty Ltd* (1971) 17 FLR 141.
14. G. Yunupingu, 'From the Bark Petition to Native Title' in *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.
15. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore,* Canberra, December 1981.
16. Ibid.

17. 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 February 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.
18. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, supra n.15 at 3.
19. Ibid., at 3.
20. Ibid., at 4.
21. Ibid., at 4.
22. Ibid., at 5.
23. 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.
24. *Foster v Mountford & Rigby Ltd* (1977) 14 ALR 71. See also *Pitjantjatjara Council Inc & Peter Nganingu v John Lowe & Lyn Bender* (1983) Victoria Supreme Court, unreported – noted in (1982) 4 *Aboriginal Law Bulletin* 11.
25. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, supra n.15 at 6.
26. Ibid., at 7. Despite repeated concerns about the pejorative connotations of the term, 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, 9–17 December 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.
27. 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.23 at 6.
28. Ibid., at 7 [emphasis mine].
29. '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' *Ecopolitics IX – Conference Papers and Resolutions*, Northern Land Council: Sydney, 1996 at 35.
30. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, supra n.15 at 11 [emphasis mine].

31. '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.23 at 6.
32. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, supra n.15 at 11.
33. 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 denied native title because their traditions and the community had changed over time. The key argument for the Government was that the Yorta Yorta people could not prove 'continuity' to their land (because of changes in tradition and community) 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.
34. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, supra n.15 at 13–17.
35. C. Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 10 *European Intellectual Property Review*, 346 at 347.
36. In international as well as national jurisdictions, sui-generis legislation constitutes the main option for accommodating intellectual property rights and indigenous interests. In Indonesia in 2007, for example, there are three sui-generis laws for the protection of traditional knowledge being drafted. For recommendations for one of these see: J. Anderson, L. Aragon, I. Haryanto, P. Jaszi, A. Nababan, H. Panjiatan, A. Sardjono, R. Siagian, R. Suryasaladin, *Traditional Arts: A Move Towards Protection in Indonesia* (forthcoming).
37. 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* (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.
38. For work that explores the significance of administrative intervention in the history of Australian colonial relations see: T. Rowse, *White Flour, White Power: From Rations to Citizenship in Central Australia*, Cambridge University Press: Cambridge, 1998; T. Rowse, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination*, Australian National University: Canberra, 1992; R. Folds, *Crossed Purposes: The Pintupi and Australia's Indigenous Policy*, University of New South Wales Press: Sydney, 2001; P. Batty, 'Private Politics, Public Strategies: White Advisors and their Aboriginal Subjects', (2005) 75 (33) *Oceania* 209.
39. Knowledge about Aboriginal people is provided through anthropological expertise – indigenous people are rendered as 'subjects' of the report.
40. Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, supra n.15 at 19.
41. P. Miller, and N. Rose, 'Governing Economic Life', (1990) 19 (1) *Economy and Society* 1.
42. Attorney General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples,* Australian Government Publishing Service: Canberra 1994. In 1994, the Federal Government was a Labor government under the leadership of the Prime Minister Paul Keating.

43. Ibid., at ii.
44. *Milpurrurru & Others v Indofurn Pty Ltd*, (1994) 30 IPR 209.
45. 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 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.
46. J. Gaines, *Contested Culture: The Image, the Voice and the Law*, The University of North Carolina Press: Chapel Hill, London, 1991 at 15.
47. 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.
48. C. Hawkins, 'Stopping the Rip-offs: Protecting Aboriginal and Torres Strait Islander Cultural Expression', (1995) 20 (1) *Alternative Law Bulletin* 7 at 10.
49. See: J. Anderson, *Indigenous Knowledge and Intellectual Property: Access, Ownership and Control of Cultural Materials – Final Report*, Australian Institute of Aboriginal and Torres Strait Islander Studies: Canberra (forthcoming).
50. J. Boyd White, *Justice as Translation*: *An Essay in Cultural and Legal Criticism*, University of Chicago Press: Chicago and London, 1990 at 262–263.
51. M. Foucault. 'Clarifications on the Question of Power', *Foucault Live: Collected Interviews, 1961–1984* (ed. Lotringer, S.) Semiotext(e): New York, 1989 at 260; M. Foucault, 'The Subject and Power' in Dreyfus, H. and P. Rabinow (eds), *Michel Foucault: Between Structuralism and Hermeneutics*, Harvester Press: Brighton, 1983; M. Foucault, 'Truth and Power' (Gordon, C. (ed)), *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, Pantheon: New York, 1980.
52. See the work of Terri Janke. 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.
53. C. Helliwell and B. Hindess, 'The "Empire of Uniformity" and the Government of Subject Peoples', (2002) 6 (1&2) *Cultural Values* 139.