Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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10. Community and culture/community claims

In Australia, two initiatives have been developed in order to work towards accommodating indigenous interests in intellectual property. They are the Labels of Authenticity and more recently the (draft) Communal Moral Rights legislation. Both potentially position Australia at the forefront internationally in terms of developing alternatives in response to indigenous requests for legal action. Importantly, they seek to enhance existing parts of current law: trademark law to help with relations with the art market, and moral rights as commensurate (in an odd way) with community rights within a derived work (communal moral rights).

The goodwill behind these initiatives can be taken at face value. There is a legitimate effort on behalf of policy makers and legislative drafters to address indigenous concerns. These are also governmental responses to broader social pressures that demand that indigenous issues be addressed – for instance, I have never come across any literature, academic or otherwise that argues *against* indigenous interests in intellectual property. These attempts should be seen as innovative: they really do try and tackle a difficult problem and provide remedy through the law. But certain difficult legacies remain, and these are implicitly contained within each initiative. They are evidenced in the very naming of the initiatives 'authenticity marks', 'communal moral rights', through to the inevitable effects of certain kinds of legal codification (the presumption of community as a stable legal object for example) and their accessibility and applicability to indigenous circumstance.

THE LABELS OF AUTHENTICITY

There are a variety of models of authenticity that circulate contemporary debate. However, in the context of Aboriginal art, authenticity is tightly tied to both originality and tradition (and primitivism).[1] In general terms this means that an Aboriginal artwork is not considered to be authentic if it is not an original work derived from an Aboriginal tradition. Unlike the dependency between originality and authorship, which is also upheld

in copyright statutes, an original and authentic Aboriginal artwork is dependent upon a marker of tradition before it is dependent upon the author.[2] As Stephen Gray has noted, '[n]on-Aboriginal law's fixation upon "traditionality" as the condition for determining which Aboriginal laws are capable of recognition is merely one symptom of a wider societal fixation upon the "traditional" or "authentic" Aboriginal person'.[3] Indeed, the pervasive emphasis on the 'authentic' elements of indigenous art and culture has functioned to the detriment of much contemporary indigenous art practice.

Given the entwined relationships between tradition, originality and authenticity within the context of Aboriginal art, it is thus curious that the key innovative idea developed to protect indigenous artistry within the market, the Labels of Authenticity[4], were not exposed to a more nuanced critique in regards to what kind of art they were, in fact, authenticating. Moreover, there was an assumption, at least on behalf of the bureaucrats behind the Labels, that all Aboriginal artists would embrace this national labelling system (and thus render it effective). Initial success gave way to a range of destablising issues that seemed somehow inevitable. What happened to the Labels remains an important lesson in assuming pan-Aboriginality: the presumed singularity of Aboriginal culture breaks apart in the reality of distinct contextual artistic practice. It also points to the complicated political aims and ambitions of indigenous organisations based in capital cities vis-à-vis the needs of indigenous communities based in more regional and remote areas.

The Labels of Authenticity were suggested as a legislative response in regards to the growing level of copying of Aboriginal style motifs and designs and the notable increase in reproductions of Aboriginal art circulating in tourist shops and markets, popularly described as the x-ray koala trade.[5] As a differential to copyright, which is more concerned with issues of production, the Labels of Authenticity were suggested as certification marks utilising trademark law. Trademark law is the marketing end of intellectual property law and consists of a sign or logo which is used to distinguish the commercial 'origin' of goods and services.

The Labels of Authenticity were specifically suggested as a labelling system 'to promote and market the *origin* and *authorship* of indigenous cultural products'.[6] As the Report *Our Culture: Our Future* explains,[7]

> A proposal raised in the early 1980s was to develop a national Indigenous 'authenticity trademark'. The idea is that an authentication mark would be reproduced on labels attached to *authentically produced Indigenous arts and cultural products*. The labels would help consumers identify genuine Indigenous arts and cultural products. This would hopefully encourage retailers to stock the products which have the labels, which would in turn benefit Indigenous artists.[8]

In Australian law trademarks require registration. A consequent to registration is that there is also clarity about the meanings of words certifying the purpose of the marks. The problem of legal definition comes back to haunt in very important ways. In this case, the primary word requiring definitional certainty was 'authentic': there needed to be a clear sense of what an 'authentic' Aboriginal cultural product was, and how it could be identified. This subsequently led to the National Indigenous Arts Advocacy Association (NIAAA) conducting research into how to define and identify such products.[9] Research conducted by Kathryn Wells suggested that for indigenous people in communities, 'authenticity' related to indigenous identity, belonging, knowledge, respect and responsibility.[10] It did not necessarily correspond with legal interpretations, namely individual authorship. Nor did it necessarily correspond with how the market had come to understand an authentic Aboriginal product: which was in reference to the 'truthfulness' of its origination in tradition.

The key problems with the Labels of Authenticity that ultimately contributed to their demise as an idea and a practical tool, relate to three areas. Firstly, the term 'authentic' resonated with a past romanticism utilised to identify indigenous people. In defining authenticity, it was difficult to escape historically informing categorisation and constructions of 'Aboriginality' that remained as remnant markers in the art world. This was most evident in the way that many Aboriginal artists, often utilising non-traditional styles and mediums, refused to be part of a national Aboriginal labelling system. Secondly, the Labels offered an overarching umbrella term that would refer to indigenous peoples' cultural products nation wide. As a consequence there was little room for an appreciation of indigenous individual, family, clan or community and/or cultural diversity within the Labels. There was legitimate perception that the Labels further homogenised indigenous cultural identity into a position of sameness for bureaucratic ease. As Brenda Croft, a foremost curator of Aboriginal art at the National Gallery of Australia, explained:

> With the greatest respect for NIAAA's intentions, I feel that an aspect of the Label of Authenticity is reminiscent of the old 'Dog Tag' system . . . As it currently stands, NIAAA's position on the Label is that the entire Indigenous visual arts/cultural industry requires a blanket approach.[11]

Additionally, certain indigenous communities already had their own identification marks, indicating the regional specificity and regional identity of the cultural products. These communities, for instance those on both Melville and Bathurst Islands (the Tiwi Islands), and the Ngaantjatjara, Pitjantjatjara, Yankantjatjara Women's Cooperative in Central Australia, already had their own unique style of labelling that associated the label

with the place of origin of the work. Within communities themselves, there was concern that the Labels were being imposed by bureaucrats in the eastern cities, without involvement or input from the diverse northern Australian indigenous communities.

The third problem was practical – who was to certify, distribute, regulate and police the Labels?

In an article explaining the purpose of the Labels, Leanne Wiseman identified the implicit complexities that remained as serious hurdles to overcome;

> The attempt to define authenticity with respect to Indigenous goods and services raises a number of complex issues. One issue that arises is how the notion of authenticity will relate to 'traditional' Indigenous art. Here the concern is that there is a tendency to see Aboriginal art that employs traditional techniques, materials and imagery, such as well known dot paintings, as if it alone were authentically Aboriginal. To see Aboriginal art in these terms does many artists a disservice and also reinforces public misconceptions about Aboriginal art. For urban and non-traditional artists, the way authenticity is defined raises the problem that they may be stigmatised for not being 'real' or 'authentic' Aboriginal artists.[12]

Certainly the labels represent a pragmatic approach and there remains a need for the market to differentiate genuine Aboriginal products from the fakes. Consumers themselves are demanding this. Nevertheless, the complexities that Wiseman identifies were always going to undermine the capacity for success and practical engagement with the Labels as a pan-Aboriginal strategy promoting 'authenticity'.

It is possible that ultimately the complexity and fluidity of indigenous subjectivity was a key element that undermined the success of the Labels – as they are no longer in operation.[13] At one level, the Labels endorsed a particular and partial version of Aboriginality that complimented the market and the styles of Aboriginal art that dominated the market – for instance more traditionally recognised raark bark paintings from Arnhem Land and 'dot' style art from Central Australia. However, many Aboriginal artists had nothing to gain by using the Labels, as they predominately sat astride the 'traditionalised' and marketable constructions feeding the demand for Aboriginal art. Questions were also raised about 'quality control': for example who was judging and overseeing the quality of the art (and the Aboriginality of the artists) being granted Labels. An additional bureaucratic problem, which signalled the demise of the Labels practically, was that the body designed to oversee their administration, the National Indigenous Arts Advocacy Association (NIAAA), was stripped of funding by both the Department of Communication, Information Technology and the Arts and the then Aboriginal and Torres Strait Islander Commission (ATSIC) because of allegations relating to significant misappropriated funds.

On reflection it is always easier to point to the shortcomings of the Labels. But the current localised success of community labelling perhaps points to a way forward. Cultural identity, respect and responsibility, the key elements that Wells identified as what certain communities interpreted authenticity to be, can be delivered when each community is given certain tools to choose for themselves how the artists within the community are to be represented to the market. For many artists within communities, it is the association with familial relationships as well as the community itself that is fundamental to identity, respect and responsibility. Shifting these to an amorphous category named 'Aboriginal' was never going to work where people have (to say the least) pride and responsibility to the familial networks, clan relations, the broader community and importantly the land. As these localised systems of labelling remain in operation, it may be useful to give these re-invigorated support and to watch carefully to see how they are negotiated and developed, and how they are working for the artists, families and communities involved, as well as for consumers. Not having an overarching Label makes for a headache in policing and administrative terms, but there are legitimate questions as to how effective this would have been anyway. Instead, it is worth recognising that locally developed labels already have forms of regulation, and these conform to regulatory standards in operation within the communities themselves. Invigorating local decision-making capacity and determination around locally developed artistic practice should be a priority. After all, the artists, the representatives in art centres and members of local governing councils often have a comprehensive grasp of what is occurring in relation to artistic practice within their own context. With the increasing use of digital technology – they are also in a much better position to identify and locate instances of appropriation of styles or stories. Art centres and artistic communities need support when they identify instances of appropriation. Such support at a local level sends a clear message about who is listening to whom. This approach has the capacity to demonstrate that an individuated community does have a legitimate voice and as such can exercise control over the production and circulation of its cultural knowledge products.

Certainly the Labels of Authenticity provided a further means for the law to be seen as capable and responsive. It is interesting however, that the ultimate demise of the Labels is not really seen as a failure of the law – it is more a cultural and funding problem. Indigenous difference, in this instance within and between communities, clans, families and individuals, emerges as the feature characterising the failure of the Labels: an ironic twist given that the effort to provide practical legal mechanisms rendered silent the diversity of indigenous interests and positions. Whilst the intention is to be applauded, the failure of the tactic should also be understood for what it

is, and that these same problems, unless approached differently, will inhibit future attempts to find lateral solutions in law by using the fuzzy margins.

COMMUNAL MORAL RIGHTS

With these concerns in relation to the Labels in mind, it is time to move onto a consideration of a more recent development in Australia – that of the draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill* 2003. The Bill presents an opportunity to explore the disjuncture between broader discourses of indigenous intellectual property rights and the local political context where aspirations of reform circulate.

Specifically, the draft Bill has been posited as a solution to the issue of community ownership.[14] However, drawing from 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 Aboriginal 'communities' within Australia seriously compromises a singular legislative solution to the issue of community rights. Indeed this raises important questions about how indigenous peoples' needs have been constructed and are represented, and how these influence national and international attention to developing strategic approaches for protecting indigenous knowledge through intellectual property law.

Earlier in Part Two, it was argued that whilst there was some accommodation made for communal rights within the case law (the Bulun Bulun case) these were not really within the purview of copyright law.[15] 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.[16]

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, isolating the 'indigenous' interest in terms

of the one indigenous group – the Ganalbingu people. That the issue has been extended from one indigenous community to all illustrates the presumption of indigenous sameness, and conversely, difference in relation to intellectual property law. To this end 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.

Towards the end of the 1999 parliamentary debate on Australia's introduction of a Moral Rights Bill, as an amendment of 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 – the Parliament not having sufficient time to consider and debate the proposal), the Government did signal (and continues to reiterate) its commitment to developing a (regulatory) framework that would recognise the communal rights of indigenous people within law.[17]

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

> 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.[18]

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 (2003) will give Indigenous communities legal standing to safeguard the integrity of creative works embodying community knowledge and wisdom.[19]

In mid December 2003 copies of the draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill* 2003 were distributed to several organisations and one nominated individual for comment.[20] 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: significantly, 'the protection of Indigenous culture depends upon strong and effective copyright laws'.[21]

It should be acknowledged at the outset that moral rights do not provide ownership rights *per se*. Nor do they provide economic rights. In Australian law they involve: the right of attribution of authorship;[22] the right not to have authorship of a work falsely attributed;[23] and, the right of integrity of authorship in a work attributed.[24] However, a general precondition is that 'only individuals have moral rights'.[25] The draft bill directly sought to expand the precondition of individual rights to include communal rights.

Unlike the automatic nature of moral rights for individual authors and creators, the draft Bill had five formal requirements that must be met before a community could claim an 'indigenous communal moral right'. Firstly (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). Secondly, the work must draw on the particular body of traditions, observances, customs or beliefs held in common by the indigenous community. Thirdly, 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 would 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 emphasis is on indigenous people and communities to initiate contact and negotiation with those interested parties. There is an implicit presumption that the community will know or will find out, possibly through the benevolence of the owner/creator, that the work is being created that draws upon that community's 'traditions, customs or practices'. Fourthly, there must be an acknowledgement of the indigenous community's association on or with the work. Finally, interested parties in the work need to have consented to the rights arising. There is no clarification of who constitutes an interest holder – and this consent must be provided through written notice. All of these requirements must be met before the first dealing (or first sale) of the work otherwise no rights arise.

CULT(URE) OF THE COMMUNAL OR A SOLUTION?

Besides it now being 2007 and there being reiterated statements by the Government that the Bill will be before Parliament this year, there is a peculiar

politics at play here. It is worth exploring this a little before continuing into the discussion of the Bill itself. Aboriginal and Torres Strait Islander people as well as those who work in Aboriginal political contexts and Aboriginal organisations in Australia have over the last six years, experienced new kinds of racism from the current Australian government's approach to the administration of Aboriginal and Torres Strait Islander affairs. The effects have been profound and will continue for sometime.[26] When the draft Bill was initially circulated in December 2003, the key indigenous body for advising the Government on indigenous affairs, the Aboriginal and Torres Strait Islander Commission (ATSIC) still existed. In March of 2005 this body's twenty-year function was revoked.[27] This matters because ATSIC functioned as the central agency through which consultation about the development of new laws and policies that would affect indigenous people occurred. There is a ten member, government selected council as replacement.[28] What this means is that indigenous people are effectively excluded from participating in decisions about the appropriateness or otherwise of legislation that will directly target and affect social relationships. These are matters of political importance, but they create a vacuum in terms of indigenous people participating in their own governance. The limited discussion around problems that indigenous people might be directly qualified to identify (for instance difficulties in relation to accessing legal advice and brokering agreements with external parties) inevitably suggests that matters of practicality have been displaced in favour of abstracted legal functionalism.

The draft Bill is illustrative of the persisting conflict between modern social theory and positivist legal approaches to particular problems. There is a tendency in law-making communities to assume that the most important issues revolve around what the law says, rather than the effects of the law.[29] This is contrary to how academics and academic lawyers understand law and legal processes as significantly impacting upon people, societies and cultural production – and often reflecting quite specific agendas. For instance, the draft Bill represents its key terms, such as 'community', as unproblematic. This is despite the wide body of academic work that is engaged in analysing such concepts and importantly the broader implications of codifying such terms.[30] The draft Bill sits astride contemporary research on the ambiguity and metamorphosis of the notion of community – thus also remaining unconcerned with the inevitable social and cultural impact of legally imagined conditions of identification.

For critical legal scholars it is not easy to divorce the creation of a specific law from the application and practical utilisation of that law by those whom it is purportedly for. Thus practical questions must be raised, directed primarily at how this law would be used, who could access it and through what means. These are crucial questions that are integral

to the development of solutions that are amenable to all stakeholders. Unfortunately the answers to these questions remain far from clear.

The Australian Institute of Aboriginal and Torres Strait Islander Studies provided substantive and technical comments on the draft Bill.[31] Recognising the potential impact on communities and those working in the Aboriginal arts sector alike, in the short period for responding (three weeks), the draft Bill was sent to as many regional Indigenous organisations and Land Councils as was possible in order to garner perspectives. There were limited responses because of the time period, and the lack of explanatory counsel. For those who did respond it was clear that there was confusion. Whilst many supported the basic idea behind the Bill, it was seriously compromised by the conditions under which a communal moral right would be recognised. For instance, it was unlikely that an indigenous community would be able to meet all the conditions necessary for the right to be recognised.

From 2004, there was an ironic secrecy about the new draft, with even fewer people being privy to its contents and revisions.[32] At a copyright symposium in Sydney in late 2006, the Attorney General again reiterated that the Bill would be presented to Parliament in 2007.[33] Junior legal officers are now in charge of the drafting and, through open conversations, appear very uncomfortable about the Bill. For not only have they never been in an Aboriginal community which therefore produces serious limitations in thinking about function and purpose of this new legislation, but they also appeared unsure about what the effects of the Bill would be. The imaginary Aboriginal community is everywhere apparent – particularly in bureaucracies. Unfortunately, the gulf between governmental imagination and reality is substantial. With few comments from Aboriginal and Torres Strait Islander people and/or communities and agencies being garnered, the utility and effectivity of the Bill appears somewhat compromised.

So besides questions of utility, what are the problems with the Bill? What is the matter with making Aboriginal community a legal object? Why is making a new law to remedy a complex social, cultural and economic problem never that simple? Why is it necessary to think about the effects of laws before we make them?

From a practical perspective, the presumption of action implicit in the draft Bill is that communities will enter formal agreements. This forgets difficulties of language access, legal translation and legal mediation. As the *Yumbulul* case (1991) aptly demonstrates, acknowledging and understanding contractual obligations can be a cause of substantial conflict between parties.[34] In this case, the key tension was between the Aboriginal artist, and the agency representing him. The artist claimed that he wasn't informed, and therefore didn't consent to the use of his artwork in the context of a new $10 note. The Aboriginal Agency argued that he had been informed

several times and had consented on each occasion. It turned into a dispute about legal translation not copyright infringement, which the second party to the case, the Reserve Bank of Australia settled out of Court. With difficulties in simple service delivery for remote and rural communities, it is important to recognise the extent that accessing legal advice on copyright matters remains a substantial challenge for the communities that are the target of the draft Bill. There is no overarching framework to help in this process, and very few people working in communities and regional organisations who understand the intricacies of intellectual property in general or copyright in particular.

Broader critical questions concern presumptions made in the draft Bill that a 'community' – so defined – will follow the direction of the law. In presuming rational legal actors, law also presumes to know how communities will behave as legal 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 legal direction is problematic given the requirements that the community must reach – for instance the voluntary agreements.

This returns us to discussions about the intersections between law and culture – or, more specifically, the implications of cultural production in the shape that the law takes. The inevitable engagement of law with practical cultural functions or challenges is, in part, due to the difficulty of people as legal subjects who do not necessarily behave in a predictable manner for law or governance. Thus one of the difficulties for law is that it must constantly be dealing with the complexity of individuals and how they perform as legal subjects. For it is almost impossible to speculate upon the specificity of action undertaken by individuals as legal subjects. In short, there is no certainty in how individuals relate to the law, and this makes for complex legal subjects. These observations also hold when talking about indigenous communities, which are made up of individuals that the law enacts influence upon. But each community will act differently before the law – and also challenge law in terms of legal subjectivity, not only community subjectivity but also individual. 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'.[35]

Beyond these practical problems with the draft Bill, there are larger more substantial questions with legislating 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.[36] The rationale behind the draft Bill presumes there is no substantial problem in making 'community' a legal object. This is despite other areas of law being overrun by disputes about what constitutes a 'community'.

For instance in the native title Yorta Yorta case,[37] 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.[38] In the case, which ran for ten years, native title and ownership of land was eventually denied to the Yorta Yorta claimants. The rationale for denying the Yorta Yorta people rights to their country was based heavily on the records of an early colonist. Because indigenous accounts of their own history and experience did not fit the framework established for justifying claims to land ownership, Yorta Yorta people were caught in a legal contest that, from the outset, privileged certain kinds of information, descriptions of community and sociality and historical narrative over others.[39]

Indeed native title law in Australia (itself an instance of *sui-generis* law) 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.[40] Alternatively, the cases regarding the construction of the Hindmarsh Island Bridge demonstrate the divisions that can exist within a community and the politics of representation over who can speak and to whom as well as who is entitled to know about certain types of knowledge.[41] 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. This also requires consideration of the way that 'Aboriginal people have actively played the community game to their own advantage'.[42]

The politics of community arise precisely because communities are not static or bounded, but instead dynamic and changeable. Communities come together for different purposes, in different contexts and split, coalesce or develop over time. The issue 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 around the term makes its very use open to contest and dispute. Communities are notoriously difficult to define – as

the abstract identification is likely to bare little resemblance to the practical sociality at a given space and time. The key point being that the category of 'community' is anything but stable and thus a difficult notion to rest legislative remedies upon.

Despite its persuasive name, the draft Bill does not actually offer realistic protection for knowledge held communally. But the power of the title *Copyright Amendment (Indigenous Communal Moral Rights) Bill* is that unless one actually reads the draft Bill (and there are only a few that have been distributed) it would superficially appear to break new ground in the field of indigenous interests in intellectual property. In its general appearance, the draft Bill suggests that the Government is responsive to indigenous rights. Yet it presents considerable, and possibly overwhelming, practical difficulties. Indigenous communities would be in no better situation than they were before the draft Bill. Besides being practically difficult to access – interpretation will need to be mediated by legal experts, the legislation ostensibly reduced to a 'lawyer's playground'.[43] Further, the requirements to be met before the rights can be granted mean that infringements are unlikely and remedy almost impossible.

That infringements would be unlikely is one of the more insidious implications of the draft Bill. For once the law is passed it will be very difficult to amend. This is because without litigation highlighting the difficulties there will be no examples showing the shortcomings of the law.

As mythical images of indigenous people and communities are constructed in national and international intellectual property forums, so too are their 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.[44] 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 that, in Australia at least, communities are far from neat linear models, but exist as contested spaces with dynamics that expose multiple positions and levels of agency and action. Thus it is important to encourage reflective critique of the range of interests and actors within communities and a consideration that these shape decision-making processes.[45]

CONCLUSION

Indigenous people are invited participants when they affirm the legitimacy of the discourse to account for what indigenous people want and how they expect the law to function. In this sense the authority of the law is maintained

in intellectual property forums and indigenous perspectives are incorporated when they confirm the authorised conception of the problem and correspondingly, the nature of the proposed solution. The dynamics of these relations of power mean that indigenous participants are included when they comply with particular assumptions about the legal nature of the problem (indigenous culture) and the legal discourse governing future solutions.

It is important 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. In certain other national jurisdictions, for instance, a communal moral rights bill might be usefully developed. In the context of Australia, and with regard to the particular history and politics, it is dangerous – dangerous in what law takes an indigenous community to be, and how identifications of that legal community are played out. Without attention to these elements there remains a risk 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 their practical articulation and continual metamorphosis. Thus a central challenge for intellectual property law remains grasping the changing dynamics of indigenous differentiation and adequately accounting for the moments of locality.

A very real possibility that would be advantageous to government and community alike would be to develop some kind of sound road-test for the Bill before it became legislation. This is possible, and given the complex terrain that it is seeking to navigate perhaps advisable. It might be that given time and the space for direct negotiation over expectations and needs for protection, other avenues may be uncovered. Given my reservations about new laws, and their effects on conceptions of identity, group definition and membership, the new kinds of authorities that are established, the problems of service delivery and the very real capacity to act as well as the complexity of the situation from community to community, there needs to be the possibility of there being something useful beyond law. Practicing the politics of cultural inclusion in intellectual property necessitates the recognition of the social and cultural contexts in which people make claims, identify needs, and generate expectations.

NOTES

1. Marcia Langton has written extensively about the inter-dependencies of these terms. See: M. Langton, 'Dreaming Art' in N. Paprastergiadis (ed) *Complex Entanglements: art, globalization and cultural difference*, Rivers Oram: London 2003; M. Langton,

'Aboriginal Art and Film: the politics of representation' in Grossman, M. (ed) *Blacklines: Contemporary critical writing by Indigenous Australians*, Melbourne University Press: Victoria, 2003.

2. It is only recently that debates around authorship – individual authorship in particular – have been developed in relation to Aboriginal art. These have developed from instances where non-indigenous people have tried to 'pass-off' their work as Aboriginal, and controversy that works by famous Aboriginal artists have not actually been executed by that individual artist. On the former problem see: S. Gray, 'Going Native: Disguise, forgery, imagination and the European Aboriginal', (2003) 170 *Overland* 34. On the latter see: C. Adler, 'The Aboriginal Art Market: Challenges to Authenticity' *Aboriginal Art Online*, www.aboriginalartonline.com/forum/articles6.php.
3. S. Gray, 'Squatting in the Red Dust: Non-Aboriginal Law's Construction of the "Traditional" Aboriginal Artist', (1996) 14 (2) *Law in Context* 29.
4. Established under the *Trade Marks Act 1995* (Cth).
5. See: M. Langton, C. Anderson, J. Sutherland, A. Garnett, N. Theiberger, S. Titchen, *Valuing Cultures: Recognising Indigenous cultures as a valued part of Australian heritage,* Australian Government Publishing Services: Canberra, 1994; S. Gray, 'Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land', (1993) 3 (63) *Aboriginal Law Bulletin* 6. Also see comments by B. Bancroft and T. Janke in the documentary by C. Eatock and K. Mordaunt, *Copyrites,* Australian Film Finance Corporation Limited, 1997.
6. M. Annas, 'The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin', (1997) 3 (90) *Aboriginal Law Bulletin* 4 at 6 [emphasis mine]. The plan was for two labels: one for indigenous artists and another for works produced collaboratively. See: L. Wiseman, 'The Labels of Authenticity: An Overview', (2000) 1 *Media and Culture Review* 3.
7. It is significant that in this report, culture is articulated in its singularity.
8. T. Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights* [produced for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission], Michael Frankel and Company Solicitors: Surry Hills, 1998 at 197 [emphasis mine].
9. See: K. Wells, 'Authenticity-Promotion and Protection of Aboriginal and Torres Strait Islander Art' Paper on Research and Development – preliminary advice to NIAAA, 15 June 1995; K. Wells, *Draft Discussion Paper on the Proposed Authenticity Trade Mark*, NIAAA, October 1996. Also see: K. Wells, 'The Cosmic Irony of Intellectual Property and Indigenous Authenticity', (1996) 7 (3) *Culture and Policy* 45.
10. M. Annas, 'The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin', supra n.6 at 5. Also see: T. Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights*, supra n.8 at 202.
11. B. Croft, cited in D. Mellor and T. Janke, *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*, National Association for the Visual Arts: Sydney, 2001 at 46. The 'dog tag' system to which Croft refers, functioned between 1943–1964 in NSW. Aboriginal people who were deemed to be 'deserving and superior' by the Aborigine Welfare Board were awarded exception certificates, otherwise known as 'dog tags' – which ostensibly afforded these select Aboriginal people similar citizenship rights to that of other Australians. Mark McKenna has described this as 'yet another bureaucratic devise aimed at exerting control over the behaviour of Aboriginal people and depriving those who failed to meet the Welfare Board's standards of their basic human rights. In the eyes of the government, Aboriginal people could only be accepted as equal citizens if they shed their culture.' M. McKenna, *Looking for Blackfella's Point: An Australian History of Place*, University of New South Wales Press: Sydney, 2002 at 168.
12. L. Wiseman, 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity' (2001) 23 (1) *European Intellectual Property Review* 14 at 20.
13. See: D. Jopson, 'Aboriginal seal of approval loses its seal of approval', *Sydney Morning Herald*, 14–15 June, 2002.

14. As Justice French lamented in *Yumbulul v Reserve Bank of Australia* (1991) 2 IPR 490 '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.' See also: G. Singh Nijar, 'Community Intellectual Rights Protect Indigenous Knowledge', (1998) 36 *Biotechnology and Development Monitor* 11.
15. See Part Two Chapter 3.
16. K. Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture', (2001) 12 *Law and Critique* 75.
17. I. McDonald, 'Indigenous communal moral rights back on the agenda', (2003) 16 (4) *Australian Intellectual Property Law Bulletin* 47.
18. Australian Federal Government, *Arts for All*, Australian Government Publishing Services: Canberra, 2001.
19. Department of Communication Information and Technology, Department of the Attorney General and Department of Immigration and Indigenous Affairs, *Indigenous Communities to Get New Protection*, Joint Press Release 19 May 2003.
20. Introductory letter for the Draft Bill (on file with author).
21. P. Ruddock, 'The Government's Copyright Policy Agenda', Conference Paper delivered at *The Eleventh Biennial Copyright Law and Practice Symposium*, Darling Harbour, Sydney, November 2003.
22. Section 193 *Copyright Act 1968* (Cth).
23. Section 195AC *Copyright Act 1968* (Cth).
24. Section 195AI *Copyright Act 1968* (Cth).
25. Section 190 *Copyright Act 1968* (Cth).
26. This politics cannot be understated. For those not familiar, see the submissions to the parliamentary inquiry into the administration of Aboriginal affairs at www.aph.gov.au/Senate/committee/indigenousaffairs_ctte/submissions/sublist.htm. This site provides perspectives about the effects of eliminating the Aboriginal and Torres Strait Islander Commission – the central agency for the management of Indigenous affairs with an elected Aboriginal Council. In rendering ATSIC defunct, the Australian government effectively silenced the representative voice for Aboriginal and Torres Strait Islander people, and with it the capacity to make comments on policy and legislation that directly affects Aboriginal and Torres Strait Islander people.
27. ATSIC was formally abolished at midnight on March 24, 2005. Both major parties and both houses of Parliament supported the legislation.
28. The National Indigenous Council is now responsible for advising the Australian Government on Indigenous Issues. See www.atsia.gov.au/NIC/default.aspx.
29. For an articulate exploration of this shift see: K. Bowrey, *Law and Internet Cultures*, Cambridge University Press: Cambridge, 2004.
30. For recent work see: P. Sullivan, 'Searching for the Inter-cultural, Searching for the Culture', 2005 75 (2) *Oceania*; A. Agrawal, and C.C. Gibson, 'The Role of Community in Natural Resource Conservation' in Gibson, C., M. McKean, E. Ostrom (eds), *People and Forests: communities, institutions and governance*, Massachusetts Institute of Technology: Massachusetts 2000; A. Agrawal, 'The Regulatory Community: Decentralisation and the Environment in the Van Panchayats (Forest Councils) of Kumaon, India', (2001) 21 (3) *Mountain Research and Development* 208.
31. 'Copyright Act Amendment (Communal Moral Rights) Bill 2003', Submission to Attorney General's Department on behalf of Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004.
32. It is an ironic twist that the Australian government is using secrecy as a tool against indigenous interests, when secrecy still functions as an important part of certain indigenous cultural practices.
33. *Twelfth Biennial Copyright Law and Practice Symposium*, Australian Copyright Council, Darling Harbour, Sydney, 18 November 2006.
34. See: *Yumbulul v Reserve Bank of Australia & Others* (1991) 21 IPR 481. While the case was initially about the use of Yumbulul's Morning Star Pole design by the Reserve Bank on the bicentennial $10 dollar note, it predominately was revealed as a dispute over

contractual authority and the rights that Yumbulul believed he still retained in his work as opposed to those he had assigned.

35. F. Peters-Little, 'The Community Game: Aboriginal Self Definition at a Local Level', (1998) AIATSIS *Research Discussion Paper 10*, at 3.
36. This is also reflected in *sui generis* proposals.
37. *Members of the Yorta Yorta Community v State of Victoria* [1998] FCA 1606; *Members of the Yorta Yorta Community v State of Victoria* [2001] FCA 45 and *Members of the Yorta Yorta Community v State of Victoria* [2002] HCA 58.
38. See the High Court judgment: *Members of the Yorta Yorta Community v State of Victoria* [2002] HCA 58.
39. V. Kerriush and C. Perrin, 'Awash in Colonialism', (1999) 24 (1) *Alternative Law Journal*, 3; S. Young, 'The Trouble with "Tradition": Native Title and the *Yorta Yorta* Decision' (2001) 30(1) *The University of Western Australia Law Review* 28; J. Weiner, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta', (2002) 2 (18) *Land, Rights, Laws: Issues of Native Title* 1; 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.
40. See also: E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Duke University Press: Durham, 2002.
41. For a summary of the cases and the political challenges see the judgment by von Doussa J: *Chapman v Luminis Pty Ltd and Others* [2001] FCA 1106. For further discussion about the politics of knowledge within a community see: J. Weiner, 'Culture in a sealed envelope: the concealment of Australian Aboriginal heritage and tradition in the Hindmarsh Island Bridge Affair', (1999) 5 (2) *The Journal of the Royal Anthropological Institute* 193. D. Bell, *Ngarrindjeri Wurruarrin: A World That Is, Was and Will Be*, Spinifex Press: Melbourne, 1998.
42. F. Peters-Little, 'The Community Game: Aboriginal Self Definition at a Local Level', above n.35 at 4.
43. I. Eagles, 'New Zealand Moral Rights Law: Did Something Get Lost in Translation?', (2002) 8 *New Zealand Business Law Quarterly* 26 at 27.
44. See for instance: M. Blakeney, 'Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions', (1998) 1 (6) *Journal of World Intellectual Property* 985; R. Grad, 'Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia', (2003) *Duke J. Comp. & Int'l. L.* 203.
45. A. Agrawal and C.C. Gibson, 'The Role of Community in Natural Resource Conservation', in Gibson, C., M. McKean, E. Ostrom (eds), *People and Forests: Communities, Institutions and Governance*, Massachusetts Institute of Technology: Massachusetts, 2000.