Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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9. The culture concept

> In the twenty-first century, culture is a deeply compromised idea.[1]

In *Who Owns Native Culture?* Michael Brown makes the following observation:

> If we turn culture into property, its uses will be defined and directed by law, the instrument by which states impose order on an untidy world. Culture stands to become the focus of litigation, legislation and other forms of bureaucratic control.[2]

Here Brown makes a very important point. The danger of making culture property is in the unpredictable ways in which it will then become subject to classification, codification, legislation and legal intervention. This will effect how 'culture' can be understood, including the parameters set for inclusions and exclusions. It also impacts upon the extent that law becomes a central mechanism for reproducing functionalist frameworks for the interpretation of 'culture' and cultural products.

Whilst sympathetic to Brown's concerns, the presumption that 'making culture property' will be something 'new' that law does, misunderstands law and its cultural practices. Law is inherently cultural: it has been working on 'culture' (and vice versa) for some time. As discussed earlier in the book, the two are imbricated in each other in ways that are not always easy to discern. Perhaps it is because the terms of the debate have never been as explicit, or put so simply, that this function of law has escaped more considered attention. There is an acute need to be wary of assuming that this new kind of legalism is also something novel for indigenous people: indigenous people and 'ways of being' have been documented, classified, typologised, defined and directed by laws relating to personhood, location, sovereignty, citizenry, sociality and cultural objects (to name a few) for quite some time and as a direct result of various modalities of colonialisms and post-colonialisms, as well as national and international legal strategies of governing.

Certainly the translation of explicit claims for the ownership of culture into a context of intellectual property has generated particular demands on this body of law. In particular, indigenous claims have raised additional concerns and primarily these have manifested themselves through issues of ownership.[3] Yet the limited attention to the framing of the question of

ownership has narrowed the ways in which law is understood as operating. Altering the direction of the interrogation, however, results in an appreciation of the complex and often contested (social) negotiations occurring around law, knowledge, culture and property. Further, it prompts reflection on the new kinds of languages, paradigms and exclusions that are *always* produced through laws specifically designed to regulate and protect certain kinds of knowledge.

How indigenous 'culture' has come to be understood as 'owned' cannot be seen outside a contested history of empire, imperialism, colonialism, post-colonialism as well as legal and bureaucratic influence and determinacy. Nor can it be understood as existing outside early philosophical traditions of Enlightenment and Romanticism, notions of civilisation and progress, and the liberal democratic polity. The knowledge hunting and gathering about indigenous people and cultures has a particular history. Conversely, so do the current claims for restitution and control of these collections.[4] When claims to culture are made, they are also framed by these same historical relationships of power. Nevertheless, the current claims to the ownership of culture, as a particular kind of ownable object, have evoked problematic interpretations of culture, and in particular of indigenous cultures. This is part and parcel of the inherent volatility and indeterminacy of the term 'culture' itself. One clear problem is that in many interpretations of indigenous 'culture', most especially those found in intellectual property law, there is a (naïve) insistence upon homogeneity in the (global) category of the indigenous. In the making of Indigenous as Culture, binaries between indigenous and western cultures as bounded cultural entities, are perpetuated. These continue to feed interpretations of indigenous epistemology and existence, and consequently the governing strategies that are developed to target, for instance, indigenous interests in intellectual property. These are carried blindly from the legacy of earlier historical frameworks of knowledge interpretation. They thus continue to present considerable problems for action.

In much of the literature dedicated to addressing indigenous interests in intellectual property, a reading of the term 'indigenous intellectual property' assumes a distinct cultural derivation. Yet conceptualising relations between and through something named as 'culture' has, at least in the latter part of the twentieth century, become more attenuated to the fluidity and dynamism that often defies description in theory or in practice.[5] As an outcome of this growing understanding certain disciplines, namely anthropology, cultural studies and sociology, have responded by articulating the many ways in which the location of culture is disparate and moveable, being nowhere and everywhere.[6] Culture remains a deeply compromised idea.[7]

THE CULTURE CONCEPT

Raymond Williams has done much to foster understanding of the complexities and fluidities of the concept of 'culture', especially in tracing the trajectories of the term.[8] Utilised as a plural in the eighteenth century, the term 'culture' came to relate to the 'specific and variable cultures of different nations and periods, but also the specific and variable cultures of social and economic groups within a nation'.[9] The transition of the term also speaks to the change in conceptualising 'culture', where the term, as it was posited by Matthew Arnold in the nineteenth century, came to refer exclusively to intellectual and artistic expression.[10] Notably, in contexts such as indigenous interests in intellectual property, this perception of culture has shifted but has not totally disappeared from contemporary ways of appreciating 'other' cultures. Arnold's conception still resonates within our current situation. It returns in a modified way in reference to indigenous art and artistic expression, where in particular, the intellectual and artistic expression of Aboriginal and Torres Strait Islander people signifies and confirms the sense of indigenous 'culture'. A further complexity has emerged however, because this notion has come to be treated as if it were unified, bounded and singular both in law, politics and popular culture.

Williams sketched the social definition of culture, where:

> culture is a description of a *particular* way of life, which expresses certain meanings and values, not only in art and learning, but also in institutions and ordinary behaviour. The analysis of culture, from such a definition, is the clarification of the meaning and values implicit and explicit in a *particular* way of life, a *particular* culture.[11]

This description has had a significant impact on a range of disciplines and influenced how many theorists conceptualise relations of culture in theory and practice as being a 'whole way of life'. The particularity pointed to by Williams also infers a singularly expressed spatiality and temporality.

Critiques of Williams, particularly for what Ian Hunter refers to as his evocation of Romantic aesthetics,[12] have generated alternative ways of talking about culture that include consideration of how culture is not just the 'whole way of life' of any given group, but also the way in which experience is shaped, mapped and interpreted. The very problem of the term is its inability to securely capture experience.[13] The (im)possibility of naming and claiming what a culture is, depends significantly on demarcations and identifications of what a culture is not.

The rethinking of categories of class, gender, race and ethnicity as being constitutive of culture has produced a shift in the way specific social groupings have been studied and understood. This shift has destabilised

the assumption that the notion of culture is 'shared' by all members of a given society. Postcolonial politics as well as substantial philosophical reflection suggest that through hierarchies of knowledge gathering, accumulation and classification, the parameters for 'sharing' have not always been experienced as equal flows.[14] Sharing between people, groups and communities depends significantly upon the power-relations operating within any locale.[15]

Conceptually, cultures are elusive and complex and defy simple definitions. Further, the differences within cultures and the multiple actors that structure and position themselves between and through different cultural spaces necessitates recognition of the fluidity and permeability of cultural exchange. The reality of the translocation of culture sits uncomfortably with definitions of cultures that emphasise the wholeness of groups. Cultures are also imagined, but it is as an imaginary, and an organisational conceptual tool that inevitably also lends power to the deployment of the term.[16]

As powerful factors – political, social and economic – produce images of culture as a heterogeneous unit, it is advantageous to think of culture as a theory, rather than a given category that describes the spatial parameters of social relations. Indeed it could be argued that culture is a political project of interpretation and reinterpretation, where no one meaning can fully maintain a grasp on the proliferation of the term.[17] 'Culture' as theory provides a lens through which the use of the term can signify the engagement of relations of power – for example, where distinct groups effectively emphasise their own cultural uniqueness. Such evocations invariably function in response to various fluctuations within society at any given period and are inextricably tied to renegotiating specific relations of power.

The point at which the consideration of 'culture' informs intellectual property law derives from a tension. This tension is between the fluid and the fixed concepts of 'culture'. While theories of culture and cultural production (that pay attention to the fluidity and dynamism of culture) circulate and proliferate, these are countered by an increasing number of social groups (and their advocates) demanding recognition of their cultural distinctiveness that is bounded by a distinctive and unitary 'culture' and inseparable from a unique cultural identity. As Michael Brown observes, 'the ongoing struggle for political and cultural sovereignty often leads indigenous activists to talk about culture as if it were a fixed and corporeal thing'.[18] With legal commentators and indigenous activists basing their arguments on an abstract notion of culture there is an ironic synthesis of perspective.

The concept of cultural appropriation deftly illustrates the tension. Some have argued (and been summarily publicly rebuked) that cultural

appropriation is no more than an exercise of cultural hybridity.[19] The counter argument is that cultural appropriation presumes an act of 'theft' whereby the dominant 'culture' adopts something 'belonging' to the 'minority' culture.[20] The conditions that lead observers to name cultural appropriation derive from multiple histories of colonisation, domination and subjugation.[21] Most importantly, inequitable relations of power often underpin claims of cultural appropriation. However, it is dangerous to assert that the process of cultural appropriation is as clear as the 'taking' by one culture of what is 'owned' by another.[22] Binaries between cultures can never be neat, and such a perception of cultural appropriation insists on a process of hegemony and subjugation that leaves little room for resistance and agency. Nothing is achieved in pitting colonisers against colonised; as Ann Stoler notes the perpetuation of such binaries speaks more to 'political agendas than to ambiguous colonial realities'.[23]

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

Power is fundamentally engaged within claims of cultural appropriation and claims to 'culture' – both in attempts to address historical imbalances, such as past histories of dispossession and colonisation and also in the renegotiation of contemporary positions within societies and nations for differing cultural and social groupings. Indeed there is no 'right' way of looking at culture, but rather a variety of ways that can illuminate the making of certain kinds of relationships as well as how these produce quite specific responses. This lends strength to an appreciation of culture as a theory that indicates multiple interests and projects of interpretation, including how relations of power are intrinsically imbued within evocations of cultural dominance. In this sense then, arguments regarding cultural appropriation can be understood as particular (and strategic)

responses to historical and cultural factors. The naming of the process of cultural appropriation reveals a struggle between relations of power.

Meaghan Morris recognises that the term has been positioned within a framework that denotes a 'marauding' element of all forms of cultural exchange.[24] In this sense Morris has articulated 'appropriation' as a 'lexical mini-myth of power'.[25] By this she means that appropriation is a term that can be used strategically to evoke relations of dominance and that these disrupt familiar relations of property. However, the extent to which appropriation is, or could be, post-colonial resistance falls sharply from view when cultural appropriation is only seen through the lens of exploitation.

The language and framework of intellectual property law have been employed firstly by 'experts' and latterly by indigenous people to counter the notion of cultural appropriation and as a response to perceptions of loss of control over intangible cultural property.[26] Here there is a neat morphing of intangible cultural property into culture perhaps because the properties of both are difficult to identify and name, both in their capturing and their loss.[27] This context utilises a language of 'theft' and 'ownership', and extends the underlying assumptions to a broader evocation of culture as 'property'.[28]

But the positioning of a problem such as cultural appropriation within a *legal* framework is of profound importance. As Pat O'Malley has observed:

> The identification of a social problem as a legal need rather than some other sort of problem altogether is dependent on the place that the law occupies in the society concerned, and especially the extent to which legalism permeates social consciousness. To identify a problem as a legal need is to make a particular judgment about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution.[29]

Whilst the complexity of issues are not only legal in nature, law provides a space where political and ethical judgments echo an assumption that a wrong is being committed, enhancing the possibility (and indeed necessity) of the solution remaining within the domain of law. The gaze is turned away from any detailed consideration of the broader global political context of intellectual property law, and the subjugation of indigenous persons throughout its history. Instead law becomes almost self-congratulatory in its capacity to respond to a 'new' indigenous subject by making it an area of specialisation. This is instead of recognising that indigenous relations have always been imbricated in the laws.

As a response to the cultural appropriation of intangible subject matter, intellectual property law has positioned itself as the viable point for possible solutions. Here law is set a tough challenge: it must mediate

discrete indigenous (cultural) differences whilst also countenancing for the commonality of indigenous needs and interests, for example in demands for controls over knowledge circulation and use. Inevitably this has led to revelations of incommensurability between indigenous and legal value systems.[30] Yet the ambiguity of cultural appropriation effects how political influences can realistically engage in workable legal strategies that manage such a problem. As a result of an ill-defined context, the argument for intellectual property protection frustrates itself because it fails to clarify the purpose of employing intellectual property law. This creates a conflict for intellectual property law that arises for two reasons: firstly there is a mixed narrative of what realistically intellectual property is for and can achieve; and, secondly there is an expectation that it should be modified to accommodate the different interests of indigenous actors.[31] Thus intellectual property is imagined as a necessary mechanism that has the scope to respond to historical power imbalances in colonial relations, even though it doesn't even acknowledge its role within that very history.

Part of the tension between historical exclusion and later inclusion of indigenous interests within law specifically, comes from the (re)figuring of culture.[32] In Australia, like elsewhere, projects of Empire set culturally specific ways for understanding indigenous peoples.[33] Indigenous people were brought into the predominately European gaze through those early endeavours. Key philosophical traditions also helped shape what was being seen, and what was being understood about those peoples.[34] For example, romanticism helped make the noble savage, and it is significant for our current situation that subjectivity and practice were aligned more naturally with nature, than with 'culture'. Indigenous people were valued because of perceived associations with nature, but devalued within other contexts such science, progress and human improvement. Indigenous art wasn't even understood as 'art' until late in the twentieth century. Whilst knowledge that was garnered from indigenous people was incorporated into the scientific vision of the world, indigenous experiences remained 'other' to that vision.

The reality, of course, is that indigenous people were not 'fully' excluded from earlier colonial projects. But inclusion did have very specific parameters, and these included the frameworks for participation and recognition, as well as a very limited sense of freedom, subjectivity, choice and citizenry. So from our initial point of departure for projects that now 'include' indigenous needs within the intellectual property framework we are not working with very clear demarcations of the exclusion/inclusion of the indigenous subject. However, the early problem with aligning indigenous people with nature makes the current reliance and reification of indigenous 'culture', all the more difficult to deal with.

As has already been discussed at earlier points of this work, law doesn't address the exclusion, and latterly inclusion of indigenous interest by considering its own role in colonial projects. This prompts the question: how does the indigenous get recognised as a subject deserving inclusion at all?

In part, indigenous issues are firstly rendered visible by expert knowledges, much more than through their own agency and articulation.[35] But the making of such visibility draws again from the same early colonial knowledge in order to justify the inclusion, whilst also emphasising a newly respected difference. Here the reification of (indigenous as) culture is of another order. For it is so tightly bound to conceptions of difference. The romantic appeal to natural, original existence also helps feed law's current fixation with indigenous culture's apparent static 'boundedness'. As already discussed, even WIPO for example, deals with 'culture' by isolating it as a peculiar indigenous trait.

Endless new categories and subsets are being created in order to accurately capture the difference. Yet in the constantly mutating categories, indigenous knowledge and indigenous people remain tied to a distinct, if not also unitary, heritage. Indigenous people as 'traditional knowledge holders' are imagined as existing somewhere outside modernity as they 'create, originate, develop and practice traditional knowledge in a traditional setting and context'.[36] This invariably plays into perceptions of indigenous identity – from both indigenous and non-indigenous perspectives.

Tying indigenous experience with concerns for culture, tradition and the value of nature and land (and the sacred) permits a very limited consideration of economics and indigenous interests in new audiences and new markets. However, the very real fluidity and dynamism of any culture means that the ascribed classification will always be shown to be arbitrary and partial. One way that this problem is managed by bodies such as the WIPO is by framing the primary mandate over indigenous inclusion as one of collection of 'facts'. Here the facts superficially suggest their own authority and capacity to represent a more complex reality.[37] The functionalism of law, that is, the imperative of the legal inquiry itself, is the very reason why indigenous culture is created as a 'special' problem with its own category and subsets.

Further, commentators on the nature of indigenous knowledge always emphasise its collective character thus leading to the assertion that in an indigenous context, intellectual property rights must accommodate group rights.[38] The presentation is one of a zero/sum game. 'A particular deficiency of the existing copyright regime . . . has been the refusal of copyright courts to allow indigenous communities to enforce communal intellectual property rights in those cultural expressions'.[39] The lack of clarity in how

to respond to differences between individual ownership and communal ownership (and the murky inbetween) has forced law to consider a world beyond its cultural borders. This has been enhanced by academic writing as well as the litigants themselves who insist on these issues being addressed.[40]

However, these representations of indigenous interests have also become synonymous with legal accommodation of communal rights. This familiar supposition warrants a little attention precisely because it has also generated troubling effects. For instance, Marilyn Strathern notes that group rights have become interpreted as cultural rights. She observes that,

> [w]hile fully cognisant of difficulties of assigning rights, advocates of IPR for indigenous peoples in resting their case on traditional knowledge rest it on collective possession. By conserving their cultural base, it is argued, people will have a core around which they will adapt for the future.[41]

But there is a circular argument here, communal rights are required to protect culture and culture becomes tantamount to the articulation of a communal identity, a whole way of life, provided through property rights. Where there is a neat fit with social circumstances there is no problem, but where communal identity has been fragmented through invasion, dispossession and the passage of time, a stable indigenous subject seems to fade from legal view. In order to develop flexible legal remedies, quite complicated cultural and social politics must be engaged. Is law equipped to do this?

Inescapably, in discussions about intellectual property and indigenous knowledge, 'culture' has come to occupy a central political position.[42] Concern for collective ownership, as a key characteristic of indigenous knowledge and hence representative of problems of protecting this subject matter, also functions as an identifier of difference. For collective ownership helps establish limits between what is understood to be indigenous knowledge and what isn't, what is understood to be indigenous culture and what isn't, what is within the competence of intellectual property law and what isn't.

Inevitably, discussions of collective ownership rely heavily upon a construction of 'community' and this raises corresponding concerns. As Frances Peters-Little explains,

> [t]he concept of community invokes notions of an idealized unity of purpose and action among social groups who are perceived to share a common culture. To some extent, 'community' and 'culture' are treated as synonymous, rather than principles operating at different levels of social realities. Indigenous culture is therefore seen to define Indigenous community. This, of course, is not so.[43]

One of the most obvious problems for the culture/community relationship is that community becomes the target of legal intervention. The institution of community (one not only experienced as peculiarly indigenous – other liberal strategies of governing target the 'community') as Nikolas Rose has persuasively argued, becomes 'a sector brought into existence whose vectors and forces can be mobilised, enrolled, deployed in novel programmes and techniques which encourage and harness active practices of self-management and identity construction, of personal ethics and collective allegiances'.[44] 'Government through community' means that a range of new techniques of understanding indigenous interests, and morphing them into a special category named as 'indigenous' is possible. But this is at the expense of appreciating indigenous subjectivity and expectations of intellectual property law, and of course provides little room for those indigenous people who do not identify directly with a 'community'.[45] Moreover, as community is not a stable concept, it also becomes a very difficult conceptual base upon which legal remedies are to be developed. This observation will be expanded in the following chapter, when discussion will turn to the latest Australian government endeavour to deal with collective indigenous interests in copyright law – *communal* moral rights.

Political differences experienced at a local, regional or even at a national level are seldom articulated within the Australian discourse on intellectual property. For instance, what might be a workable strategy in one community or region of Australia is often inappropriate for another.[46] This can be due to differing social, cultural and/or economic circumstances, infrastructure, alternative interpretations of the issue and challenges in terms of representation. Whilst national legislation cannot necessarily be attuned to site and locale differences, it is nevertheless ironic that it is precisely these differences, which in themselves are highly political, that will undermine the affectivity of legislative strategies relating to indigenous people. As I shall discuss presently, the 'Labels of Authenticity' and the introduction of specific communal moral rights legislation explicitly illustrate how these problems of political differentiation, if noticed at all, are enhanced by the pervading emphasis on indigenous sameness in developing solutions within intellectual property law. It is therefore not surprising that these problems of differentiation and the contextual politics that they generate remain noticeably absent from the international discourse as well.

THE PROBLEM WITH 'CULTURE'

The problem with 'culture', as it is used in reference to indigenous people and their interests in intellectual property law, is that it becomes

an explanatory tool for difference. Through the emergence of claims to culture, as a discrete kind of object, the very concept has changed. As Benhabib explains:

> Culture has become. . . an identity marker and differentiator. Of course, culture has always been the mark of social distinction. What is novel is that groups now forming around such identity markers demand legal recognition and resource allocations from the state and its agencies to preserve their cultural specificities.[47]

In this sense, much contemporary politics today is an odd mixture of an anthropological view of the democratic equality of all cultural forms of expression, and the Romantic, Herderian emphasis on each forms irreducible uniqueness. Whether in politics or in policy, in courts or the media, one assumes that each human group 'has' some kind of 'culture' and that the boundaries between these groups and the contours of their cultures are specifiable and relatively easy to depict.[48]

From the specific moment of identifying an indigenous subject within intellectual property, complete with unique needs and expectations, indigenous people's cultures are reified as wholly separate entities. Overemphasising the boundedness and distinctiveness of all indigenous peoples risks omission of the internal heterogeneity of cultures, to the detriment of differences experienced within and between indigenous people and their communities. For law's interpretation of indigenous people in particular, culture and community become synonymous rather than concepts operating at different levels of social reality.[49] As Baxter emphasises: 'In placing a definition on what an Indigenous culture is' (and this is done from the UN, picked up throughout the international network and fed into more localised contexts) 'communities are forced to maintain a static entity containing the necessary attributes to retain the rights bestowed upon them as Indigenous'.[50] Irreducible uniqueness ironically enhances the contradictions of inclusion/exclusion within the indigenous knowledge category. For many, the constraining nature of this newly fashioned category of identity is too restrictive. It means that individuals and their work become classified in ways that engender specific meanings – that it is 'indigenous'. As discussed earlier in relation to the Aboriginal art marketplace of relations, Tracey Moffat is one Australian artist who seeks to transcend such restrictive elements in being labelled as only an 'indigenous artist'. Gordon Bennett is another.[51]

Interpretation of indigenous knowledge in intellectual property law is dependent upon a specific construction of 'indigenous as culture'. This is in relation to how indigenous knowledge is conceived but, importantly, also differentiated within a legal discourse. In Australia, like elsewhere,

there has been a tendency to imagine indigenous 'culture' in its singularity despite the myriad of experiences integral to knowledge and cultural production.[52] This means that indigenous issues relating to intellectual property are conceived as being relatively the same – that is different from standard intellectual property issues but the same in their identification as 'indigenous'. There is little space for differentiation within the 'indigenous' category. As Helliwell and Hindess have observed:

> concepts denoting unities that are both ideational and systematic serve the dual role of inscribing ideational *sameness* within a population, and *difference* between one population and another . . . [however] a stress on sameness or homogeneity is at the expense of the recognition of the disorder that can also be observed within a society or culture, and of the ideational diversity pertaining between its members.[53]

Whilst the community versus individual binary may appear to establish a starting point in considering the inclusion of indigenous interests within the intellectual property discourse, it actually diverts attention away from the inherent social and cultural complications informing the law. When the problem becomes presented as one of clear sociological and ontological otherness, inevitably there is a failure to account for those indigenous people who do not necessarily identify with distinct communities. There is a failure to consider the internal politics that confounds identification of the spatial unit that could be named as a 'community'. The focus on community versus individual ownership as the loci of the intellectual property and indigenous knowledge problematic relegates the diverse dynamics and relationships of control and ownership over knowledge within indigenous social and political contexts to the margins. It excludes recognition of indigenous people as 'individual' owners and at the same time it removes interrogation of the laws' own processes of categorisation, identification and marginalisation.

As a primary site where the reductionist sociology of culture makes a significant impact on what indigenous interests are considered to be, and how they are expected to be addressed, intellectual property law has, so far, provided little room to move and gives little ground. New possibilities for regulatory frameworks need more considered attention, not only to what they comprise but also the effects of new kinds of codifications, classifications and legislation. Law is not benign. It exerts a range of effects upon how we relate in the world, what kind of frameworks are privileged over others as well as how identities are shaped and experienced. As the ground upon which intellectual property seeks to tread is actually a fault line of significant proportions that involves colonial conflict, politics, power, economics and histories of human relationships, all of which are minimised

or omitted from laws' account of itself, to what extent can this body of law offer emancipatory potential for indigenous interests?

NOTES

1. J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art,* Harvard, University Press: Cambridge MA, 1988.
2. M. Brown, *Who Owns Native Culture?*, Harvard University Press: Cambridge MA, 2004 at 8.
3. 'A first cause of the differences in treatment of intellectual property is that forms of property ownership in these societies are different. Many indigenous societies are not organized around individuals as such but around a clan or other extended unit.' R. Gana, 'Has Creativity Died in the Third World? Some Implications for the Internationalization of Intellectual Property', (1995) 24 (1) *Denv. J. Int'l. L. & Pol'y* 109 at 132.
4. J. Anderson, 'Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use', American Library Association and The MacArthur Foundation, Columbia University, New York, May 5–7, 2005.
5. See for example: R. Williams, *The Long Revolution*, Penguin Books: Harmondsworth, London, 1965; R. Williams, *Keywords: A Vocabulary of Culture and Society*, Fontana/Croom Helm: London, 1976; E. Said, *Orientalism*, Penguin Books: London, 1985; T. Bennett, *Culture: A Reformer's Science*, Allen and Unwin: Sydney, 1998; N. Dirks, G. Eley and S. Ortner (eds), *Culture/Power/History: A Reader in Contemporary Social Theory*, Princeton University Press: Princeton, New Jersey, 1994.
6. See: H. Bhabha, *The Location of Culture*, Routledge: London and New York, 2004.
7. J. Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art*, supra n.1 at 10.
8. See: R. Williams key works: *Culture and Society 1780–1950*, Penguin Books: Harmondsworth, London, 1963; *The Long Revolution*, Penguin Books: Harmondsworth, London, 1965; *Politics and Letters*, New Left Books: London, 1979; *The Politics of Modernism: Against the New Conformists*, Verso: London, 1989.
9. R. Williams, *Keywords: A Vocabulary of Culture and Society*, supra n.5 at 87.
10. See in M. Arnold, *Culture and Anarchy: An Essay in Social and Political Criticism*, Bobbs-Merrill: Indianapolis and New York, 1971. See also: E. Gellner, *Culture, Identity and Politics*, Cambridge University Press: Cambridge, 1987.
11. R. Williams, *The Long Revolution*, supra n.5 at 41.
12. I. Hunter, 'Aesthetics and Cultural Studies' in Grossberg, L., C. Nelson, P. Treichler (eds), *Cultural Studies*, Routledge: New York and London, 1992.
13. For a good discussion see: T. Bennett *Culture: A Reformer's Science*, Allen and Unwin: Sydney, 1998.
14. See for instance: B. Cohn, *Colonialism and its Forms of Knowledge: The British in India*, Princetown University Press: New Jersey, 1996; E. Said, *Orientalism*, Penguin Books: London, 1985; N. Dirks, *Castes of Mind: Colonialism and the Making of Modern India*, Princeton University Press: Princeton, 2001 and; M. Heidegger, *Being and Time*, Basil Blackwell: Oxford, 1962; H. Arendt, *The Human Condition*, University of Chicago Press: Chicago and London, 1958. J.L. Nancy, *The Experience of Freedom*, Stanford University Press: Stanford, 1993; J. Derrida, *Writing and Difference*, Routledge: London, 1993.
15. H. Caygill, 'Philosophy, Violence, Freedom' in *On Jean-Luc Nancy: The Sense of Philosophy*, Sheppard, D., S. Sparks and C. Thomas (eds), Routledge: London and New York, 1997; H. Arendt, *The Human Condition*, ibid. at 205.
16. B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism,* Verso Publishing: London, 1983. With critical attention to the term 'culture', more recently 'community' has come to circulate similar characteristics previously associated

with 'culture': that is 'community' has come to represent homogenous spatial structures. Arun Agrawal and Clark Gibson have drawn attention to the growing body of work that emphasises the 'wholeness' of communities. Agrawal and Gibson argue that it is essential for initiatives involving communities to recognise the multiple interests and actors within communities and how 'these actors influence decision making and the internal and external institutions that shape the decision making process.' A. Agrawal and C.C. Gibson, 'The Role of Community in Natural Resource Conservation', Gibson, C., M. McKean, E. Ostrom (eds), *People and Forests: Communities, Institutions and Governance*, Massachusetts Institute of Technology: Massachusetts, 2000 at 2.

17. As Ziff and Rao have suggested, 'the term culture is as indeterminate as any within the social sciences. It therefore cannot be relied upon to set clear limits'. B. Ziff and P. Rao, 'Introduction to Cultural Appropriation' in Ziff, B., and P.V. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation,* Rutgers University Press: New Jersey, 1997 at 2.
18. M. Brown, 'Can Culture be Copyrighted?', (1998) 39 (2) *Current Anthropology* 193 at 197.
19. In Australia, three cases illustrate the difficulty in determining what is, and what is not, cultural appropriation. These also hint at the complexity of regulating representations of Aboriginality in fiction and art. See for instance: Marlo Morgan's book (*Mutant Message Down Under,* Harper Collins: New York, 1995) where she records a meeting with the last (and lost) Aboriginal tribe and is initiated into the tribe revealing tribal 'secrets' of the Dreamtime in the (fiction) book; Elizabeth Durack painting as an Aboriginal man named Eddie Burrup and winning the prestigious Telstra Indigenous Art Award, ('Male Aboriginal artist turns out to be woman with Irish descent' *Australian Associated Press*, 7 March 1997); and Satchi Amyettere arguing Arrente cultural identity and painting a church in 'Aboriginal' styles and adopting an Aboriginal name. These instances were widely reported in the Australian media. Stephen Gray considers these three cases in more detail in his article, 'Black, White or Beyond the Pale: The Authenticity Debate and Protection for Aboriginal Culture', (2001) 15 *The Australian Feminist Law Journal* 105. See also: Fred Myers, *Painting Culture: The Making of an Aboriginal High Art*, Duke University Press: Durham and New York 2003 at 330–336.
20. See a consideration in: L. Lippard, *Mixed Blessings: New Art in Multicultural America*, Pantheon Books, New York, 1990; C. Nicholls, *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art Exhibition Catalogue*, March 2000. See also: H. Fourmile, 'Some Background to Issues Concerning the Appropriation of Aboriginal Imagery', in Cramer, S. (ed), *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery: Forum Papers*, Institute of Modern Art, Brisbane, 1989; H. Fourmile, 'The Aboriginal Art Market and the Repatriation of Aboriginal Cultural Property', (1989) 8 (1) *Social Alternatives* 19; H. Fourmile, 'Cultural Survival v Cultural Prostitution', Paper presented at the Cultural Tourism Awareness Workshop, Cairns, Queensland, 1993; L. Behrendt, 'In Your Dreams: Cultural Appropriation, Popular Culture and Colonialism', (1998) 4 (1) *Law, Text, Culture* 256.
21. See generally: S. Cramer (ed), *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery: Forum Papers, Institute of Modern Art*, Brisbane, 1989.
22. For another discussions of the tensions between cultural appropriation and law see: S.E. Merry, Tenth Anniversary Symposium: New Direction: 'Law Culture and Cultural Appropriation', (1998) 10 *Yale Journal of Law and the Humanities* 575.
23. A. Stoler, *Race and the Education of Desire: Foucault's* History of Sexuality *and the Colonial Order of Things*, Duke University Press: Durham and London, 1995 at 199.
24. M. Morris, 'Tooth and Claw: Tales of Survival and *Crocodile Dundee*', (1987) 25 *Art and Text* 267.
25. Ibid., at 267.
26. There are a range of intersections between debates on tangible cultural property and intangible cultural property. For instance, the making of the problem and then its articulation in law and through international bureaucracies is just one similarity. The production of the tangible cultural property discourse could be unpacked in the same

way as this undertaking on the intangible. At the moment, this remains another project, and is not engaged in this discussion.

27. Remembering the importance of loss and its measurement, both in early intellectual property law (Part One, Chapter 2) and in the Aboriginal art and copyright cases (Part Two, Chapter 3).
28. See for example: T. Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and Aboriginal and Torres Strait Islander Commission [ATSIC]), Michael Frankel and Company Solicitors: Surry Hills, Sydney, 1998.
29. P. O'Malley, *Law, Capitalism and Democracy*, Allen and Unwin: Sydney, 1983 at 104.
30. See: J. McKeough and A. Stewart, 'Intellectual Property and the Dreaming' in Johnstone, E., M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law*, Cavendish: Sydney, 1996; M. Blakeney, 'Protecting the cultural Expressions of Indigenous Peoples under Intellectual Property Law – the Australian Experience', in Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge*, Intersentia Publishers: Antwerp, Oxford, New York, 2002; T. Davies, 'Aboriginal Cultural Property?', (1996) 14 (2) *Law in Context* 1; K. Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture', (2001) 12 *Law and Critique* 75.
31. There is an assumption that indigenous people require a 'wholly different' structure of the law. This misunderstands the divergent histories and experiences of indigenous peoples within Australia and throughout the world.
32. The following discussion draws from J. Anderson and K. Bowrey, 'The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas are Being Advanced?', *Con/Texts of Invention: Creative Production in Legal and Cultural Perspective*, Case Western Reserve University, Ohio, 20–23 April 2006.
33. See: T. Bennett, *Pasts Beyond Memory: Evolution, Museums, Colonialism*, Routledge: London and New York, 2004; T. Bennett, 'Exhibition, difference and the logic of culture' in I. Karp and C. Kratz (eds) *Museum Frictions: Public Cultures/Global Transformations*, Duke University Press: Durham, North Carolina, 2006; T. Mitchell, *Colonizing Egypt*, University of California Press: Berkeley, 1988.
34. Silvia Sebastiani considers the manifold ways in which race and gender were considered by key thinkers of the Scottish Enlightenment. See: S. Sebastiani, ''Race', Women and Progress in the Scottish Enlightenment' in Knott, S. and B. Taylor (eds) *Women, Gender and the Enlightenment*, Palgrave Macmillan: London, 2005.
35. In the Aboriginal art and copyright cases in Australia, expert evidence was fundamental to explaining indigenous artistry to the Court. Indigenous perspectives were incorporated, but these were treated as 'background' material rather than 'facts' which were supplied through 'experts'.
36. World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge, 1998–1999,* Geneva, 2001 at 26.
37. M. Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society*, Chicago University Press: Chicago, 1998.
38. As Silke von Lewinski explains: 'In general the main obstacles to copyright protection of folklore are grounded in the fact that copyright protection is based on an individualistic concept as opposed to a collective one.' S. von Lewinski, 'The Protection of Folklore', (2003) 11 *Cardozo Journal of International and Comparative Law* 747 at 757.
39. M. Blakeney, 'Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law – The Australian Experience' above n.30 at 152.
40. In particular see comments by G. Gumana, Y. Wunungmura and B. Marika in Eatock, C. and K. Mordaunt, *Copyrites*, Australian Film Finance Corporation Limited, 1997.
41. M. Strathern, *Property, Substance and Effect: Anthropological Essays in Persons and Things*, The Athlone Press: London, 1999 at 168.
42. For instance see: M. Sunder, 'Intellectual Property and Identity Politics: Playing with

Fire', (2000) 4 (1) *Journal of Gender, Race and Justice* 69; M. Brown, *Who Owns Native Culture?*, Harvard University Press: Cambridge MA, 2003; M. Brown, 'Can Culture be Copyrighted?', (1998) 39 (2) *Current Anthropology* 193; S. Greene, 'Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting', (2004) 45 (2) *Cultural Anthropology* 211.

43. F. Peters-Little, 'The Community Game: Aboriginal Self Definition at a Local Level', (1998) 10 *AIATSIS Research Discussion Paper* 1 at 4.
44. N. Rose, *Powers of Freedom: Reframing Political Thought*, Cambridge University Press: Cambridge, 1999, at 176.
45. Indeed the contests that can arise around who is and who isn't a member of a community are often conveniently ignored – the contests are not understood as an inevitable effect of the category but as an altogether separate issue.
46. Debates about the best way of managing alcohol consumption in Aboriginal communities illustrates the multiple strategies that must be engaged – and that a 'one fix' solution is inappropriate.
47. S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press: Princeton, 2002 at 1.
48. Ibid., at 4.
49. F. Peters-Little, 'The Community Game: Aboriginal Self Definition at a Local Level', supra n.43.
50. J.E. Baxter, 'Commentary on "Fear, Hope and Longing for the Future of Authorship and Revitalized Public Domain in Global Regimes of Intellectual Property"', (2003) 52 *DePaul Law Review* 1235 at 1237.
51. As Gordon Bennett has explained: 'I didn't go to art college to graduate as an "Aboriginal Artist". I did want to explore my Aboriginality, however, and it is a subject of my work as much as colonialism and the narratives and language that frame it, and the language that has consistently framed me. Acutely aware of the frame, I graduated as a straight honours student . . . to find myself positioned and contained by the language of "primitivism" as an "Urban Aboriginal Artist".' G. Bennett, 'The Manifest Toe' in McLean, I., and G. Bennett, *The Art of Gordon Bennett*, Craftsman House: Australia, 1996 at 58.
52. See also: Wright, S., '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; J. R. Bowen, 'Should We Have a Universal Concept of "Indigenous Peoples' Rights"? Ethnicity and Essentialism in the Twenty First Century', (2000) 16 (4) *Anthropology Today* 12.
53. C. Helliwell and B. Hindess, '"Culture", "Society" and the Figure of Man', (1999) 12 (4) *History of the Human Sciences*, 1 at 2.