

ECONOMIC RIGHTS, CULTURE CLAIMS AND A CULTURE OF PIRACY IN THE INDIGENOUS ART MARKET: WHAT SHOULD WE EXPECT FROM THE WESTERN LEGAL SYSTEM?

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Exploitation by unscrupulous commercial operators in the high art and tourist trades has long been rife. One recent Australian response to this problem, specifically as it is manifest in the Indigenous art sector, came in the form of a Senate inquiry in 2007: 'Indigenous Art – Securing the Future: Australia's Indigenous Visual Arts and Craft Sector'.¹ A recommendation to emerge from the Indigenous Art Inquiry that has already been adopted is for a new code of conduct to reign in rogue operators, (hopefully) accompanied by appropriate resources and a willingness to enforce it.² Copyright law has also been constructed as part of the problem. It has long been suggested that copyright does not and cannot serve Indigenous interests, especially because of the way private ownership is legally attributed and infringement is determined.³ A *sui generis* law to address the perceived shortcomings of copyright was recommended by the Indigenous Art Inquiry, but there is no draft proposal for a *sui generis* law under consideration by the Australian Government.⁴

This article questions the efficacy of these measures for redressing exploitation of Indigenous people and culture. The analysis is based upon reflection on the significance of submissions by Indigenous persons to the Indigenous Art Inquiry. Unlike lawyerly and government readings of the situation, community-based complaints did not identify contracts and exploitation by rogue dealers in the art market and problems with copyright as distinctive or unrelated issues. Nor was economic or trade regulation treated as separate to claims for political rights or separate to rights to culture. Exploitation was firmly and deeply identified as part and parcel of the colonial experience, related to a history of past injustice, to ongoing unfair treatment by government and to the dynamics of the art market as they impact on communities.

In Part One, drawing on a discussion of the history of the well known Papunya Tula Artists organisation and submissions to the Inquiry, I argue that dissection of Indigenous experience into concerns and legal responses that can be readily assigned to existing bureaucracies and frameworks is problematic. In the process of translating Indigenous complaints into the more limited terms that the Western legal and political order can manage, much of the message communicated by Indigenous subjects is blunted or lost. We need to more carefully account for the limitations that come with filtering Indigenous experiences of injustice and responding through the confines of Western categories of law and expert knowledges. When there is no public acknowledgement of what is lost in the translation of Indigenous insights into policy action, policy failure is likely to follow – and Indigenous communities are likely to be blamed for failing to succeed in Australian society despite goodwill, costly inquiries and reforms.

The development of the Indigenous art market needs to be more broadly understood as part of Australia's colonial heritage. This history makes it very difficult to separate contemporary 'identity' questions and injustices surrounding Aboriginal art, the market and the law, from past and present governance projects affecting Indigenous persons. From the perspective of management of Indigenous demands on the state, it may be politically convenient to draft new commercial codes and potentially even to celebrate postcolonial respect for Indigenous culture by engaging with Indigenous consultation in development of new Indigenous-specific provisions. However, what always needs to be kept uppermost in mind is a realistic assessment of the strengths and limitations of Western categories of law.

In Part Two I turn to copyright and revisit its perceived limitations for Indigenous artists. I am particularly concerned

with the political expectations wrapped up in the turn to culture and calls for *sui generis* rights. In looking for an alternative to copyright, the presumption seems to be that Indigenous cultural and intellectual property ('ICIP') laws could and should serve political reconciliation – affirming culture and identity and establishing new entitlements of post-colonial Indigenous citizenship. What is held out as a political and legal possibility is the future development of laws that appropriately reflect Indigenous perspectives and cultural identity. This is incredibly problematic.

With no treaty or bill of rights, human rights have, at best, an indeterminate presence in the Australian legal order.⁵ More generally Western law does not formally represent, express or proscribe a cultural identity for any of its citizens. All Australian laws are arguably based on a wrongful foundation, denying any strong or clear leadership role for Aboriginal law in the Australian legal system. As Irene Watson notes:

The old people told of a moment when the law and its song stories were sung into the land. Our laws were born as were the ancestors – out of the land. ...⁶

As my ancestors walked over the land, they walked in the law. Today it is difficult to walk that law in a car park that lies on your ancestors' graves or in a derelict and toxic mine site that has replaced ceremonial and gathering places where songs were sung across the land.⁷

It is not at all clear how any new ICIP law could move beyond this situation. Interpretation of any new law vests, not with Indigenous communities, but with the Australian courts and associated legal personnel. Any new form of law must be made to fit in alongside and interact with existing Western intellectual property law, which is overwhelmingly economic in focus. While cultural sensitivity is most important, pursuing a political agenda of new 'culture laws' risks marginalising Indigenous people and diverting energies and talents.

In Part Three I explore the potential of new mobile forms of intellectual property rights recently afforded to owners of Western culture and discuss what similar laws might achieve for Indigenous owners. Assessment of the limitations of copyright in meeting the needs of Indigenous persons relies on an outdated reading of the principles of copyright law, ignoring significant legal changes since the Aboriginal art

cases of the late 1980s and 1990s.⁸ Since then, developments have significantly advanced protection of multinational owners as part of the response to global piracy. There has been a loosening of evidential requirements for proving ownership and infringement. Whilst controversial and provocative, similar reforms could be of great assistance to Indigenous artists and communities in negotiating the art market. However, because the current debate in Australia and internationally is preoccupied with cultural rights,⁹ the potential economic significance of these developments for Indigenous communities has been overlooked. There is a need to reassess 'received wisdom' about the strengths and limitations of contemporary copyright in an Indigenous context. Copyright law provides for very strong empowerment of owners, and as such this legal foundation should not be discounted too quickly. When there is already longstanding acknowledgement that 'piracy' of Indigenous art is a problem,¹⁰ broadening current intellectual property discourse around digital piracy to also encapsulate Indigenous experience is not 'a big ask' of government. As such it is surely a legal and political strategy well worth considering more closely.

I The Market for Aboriginal Art

Aboriginal art and craft has a long history as a distinctive regulatory object in Australia. Regulation has been tailored to serve past policies and practices of colonialism and, perhaps, postcolonial governance.¹¹

The 'market' is not simply the mechanism through which value is assigned to Aboriginal paintings; it is also understood as involving a specific attitude toward kinds of cultural value as enmeshed in debates about value. It emerged at least partly in relation to self-conscious planning and policy concerns on the part of the state, which attempted to integrate a range of political social and economic goals.¹²

A brief account of the origins of probably the longest running and most successfully run Aboriginal art centre, Papunya Tula Artists, demonstrates how difficult it is to separate production and regulation of art from governance of Aboriginal subjects. Whilst the story of Papunya Tula is relatively well known, intellectual property debates tend to ignore the broader political and economic context in which art comes to be produced, and the way economic value is constructed in relation to the art market. Community expectations of copyright and problems with rip-offs should

be considered in relation to the broader forces at play that produce paintings for sale and service collector/consumer demand in the first place.

A Papunya Tula Artists

Western Desert acrylic art has been highly successful in achieving the status of high art, and for some it occupies an exclusive status as 'authentic' Aboriginal art.¹³ The Papunya paintings that first started to circulate in the art market in the 1970s came from an Aboriginal settlement in the Northern Territory maintained by the government, and originated from collaboration between Aboriginal men living there and a schoolteacher-artist, Geoffrey Bardon.

The four tribal groupings I found at Papunya in 1971 were like four great faces of consternation ... Most of these Aboriginal people ... had been forced, or unsubtly persuaded, by the white authorities to live at Papunya as part of an ongoing assimilationist policy of the Federal Government in the 1960s. ...

The Aboriginal people at Papunya needed permission from the administration of the Federal Department of the Interior through the Welfare Branch to leave the settlement, although they were a nomadic people who seemed to me to need to travel in order to be physically whole.¹⁴

Bardon encouraged the men to produce art for sale as an avenue for expression of cultural identity and pride, to try and prevent the total Europeanisation of the children he taught, and to provide some income streams into the community. Following some success in obtaining small arts grants and sales, he helped to set up 'an aboriginal company along cooperative lines' in 1972 to control future operations: Papunya Tula Artists Pty Ltd. His vision of an Aboriginal management structure was frustrated by the settlement superintendent and the Welfare Branch who utilised their powers to control the movement of Aboriginal persons, the selection of Aboriginal spokespersons, the authorisation of who could translate legal affairs for the artists, and Bardon's employment status, in order to impose a different structure that maintained oversight and control by Welfare and former superintendents.¹⁵ In 1972 the blunt view was that '[t]hey're Government Aborigines, therefore they're Government Paintings.'¹⁶ Conversely, Myers notes that,

[i]n the early phase of acrylic painting's invention in Papunya and then Yayayi, many painters understood the paintings as being 'given [*yungu*] to Canberra,' to an entity understood undifferentiatedly as 'the government'.¹⁷

Myers goes on to suggest that the act of giving carried with it political expectations:

This giving – at once a declaration of one's own value and an engagement with the recipient – represented the insertion of the paintings into an existing (if problematic) flow of goods, money, and services between Aboriginal people and the state.¹⁸

It is beyond the scope of this paper to go more into the development of Papunya Tula Artists Pty Ltd and readings of this 'traditional' art and its international success.¹⁹ But it is worth noting that the art centre's recent submission to the Indigenous Art Inquiry acknowledged that successful management of the arts centre had enabled annual returns to be distributed to artists. Funds have been utilised to provide important services to the community including a renal dialysis unit, staff and vehicles associated with providing patient care, a community swimming pool, funeral costs, support for ceremonies, and school equipment and excursions. The artists' concern, however, was that

[t]he company's ability to provide this assistance and support is currently under threat, as the main artists are being targeted by private operators and the money being generated taken away from the community. ...

Since the industry 'explosion' in recent years, the recognised artists, that is those with a high industry profile and whose work sells easily, have become targets for private operators intent on making quick cash and riding on the back of industry success.²⁰

In remote Indigenous communities art is not just a source of employment (where there are few other options) or a form of cultural expression or validation of Indigenous identity. Where available, market returns can be used to provide basic health, education, transport and welfare services. Art production *remains* part of the 'problematic flow of goods, money, and services between Aboriginal people and the state' identified by Myers as originating in the 1970s. To carve out this production as part of the regular 'culture industries'²¹ suppresses this heritage and its ongoing significance.

Elders, and especially those that have achieved international recognition such that their works are sought after for investment, have been 'cherry-picked' by private dealers. Not all arrangements with private dealers are necessarily considered problematic – reputable private dealers have also contributed to building the industry. However, not all private dealers are reputable. The most exploitative arrangements noted in submissions to the Indigenous Art Inquiry occur where family crises caused by endemic poverty come to be 'managed' by a private art dealer. Often this involves the dealer trespassing on land to approach artists, paying for food, servicing other debts or providing four-wheel drives necessary for travel in remote communities, in exchange for painting services using canvas and paint provided by the dealer. In the most extreme cases, artists are taken to a hotel on promise of free accommodation and a place to paint, and are then charged for the (segregated) accommodation where they can only service the debt by producing more works, which subsequently incurs more accommodation costs.²² That across the sector a common form of payment for significant paintings has come to be provision of four-wheel drive motor vehicles points to the peculiarities of the market incentives at play in Indigenous communities.

Arts and community centres are looked upon as a layer of governance for keeping in check predatory practices facing individuals inexperienced in managing market relations. They also provide a source of community financial management. Whilst government has, to date, only provided funding for centre infrastructure mainly in remote communities in the Northern Territory, Western Australia, and South Australia,²³ the Indigenous Art Inquiry recommended the provision of more support for the development of art centres because of their key role in communities in supplying canvas and paint, liaising with galleries and other buyers, and administering government education and training programs for unemployed Indigenous people.²⁴ Painting is also recognised as providing people with a purpose and activity that assists in minimising petrol sniffing, alcohol consumption and other drug-taking, especially by youth. However, as one submission to the Indigenous Art Inquiry warns:

Another reality check we must consider is that – even for successful operation such as Papunya Tula Artists – is that it is virtually impossible for this successful centre to cater to all the artists' desires and needs, or at least satisfy the demands made upon them for money, canvas, advances, support, travel assistance and administrative and social support.²⁵

The notion that the government should provide or facilitate basic access to essential medical care, transport and education has been watered down with the neoliberal shift towards privatisation and user-pays models in urban and regional Australia. However, for remote Indigenous communities, it is precisely the lack of these services and support that creates particular vulnerability to the most predatory behaviour by unscrupulous dealers. Further, based on the submissions to the Indigenous Art Inquiry, the only realistic expectation for basic service delivery is accepted as coming in conjunction with some sort of 'self-determined' action, supported by government programs at community level. It is thus very hard to separate the lack of means to redress the historical denial of basic entitlements to Indigenous citizens from the incentives to produce artworks for sale and from the important contemporary cultural and economic roles of art centres. This context in turn makes it difficult to separate expectations about art sales and copyright from broader political, economic and social problems affecting communities and ongoing governance of Indigenous people.

As Myers notes, historically there have been three distinct but related roles or expectations carved out in relation to Indigenous artistic practice – 'art as enterprise', 'art as cultural and spiritual renewal' and 'art as Aboriginal identity'.²⁶ Translated into policy areas and laws, these generate different discourses and directions. However, in none of these approaches is delivery of basic services directly in focus as the primary responsibility of the government. Rather, the presumption is that Indigenous 'communities', wherever they have ended up being located, are themselves responsible for seizing the initiative to develop their own resources and expertise through painting or whatever other virtues they possess to provide for themselves.²⁷ Government's role is thus simply to assist with the exercise of community responsibility for 'resolving' problems of past and ongoing colonialism.

Arguments for industry regulation to clamp down on exploitation and for stronger copyright protection need to be understood in light of the broader 'public' functions and expectations of the arts and community centres in remote regions.²⁸ Arts and community centres have a key role in community development and, indirectly, in assisting with service provision as a consequence of past government policy. This role, however, is not properly recognised by government. These organisations are treated as if they have arisen spontaneously in response to the 'art market', rather

than as being essential to the development and maturation of this market in the first place. In government policy and in relation to assignment of bureaucratic oversight, centres are treated primarily as arts organisations and/or Indigenous cultural organisations. Both characterisations diminish the public, political and economic significance of their role. But with inadequate support and resourcing, the 'community's' failure to deliver expectations of a better life will only feed a downward cycle, as more private operators step in with promises of a better deal for individual artists. The problem with rip-offs is not simply one of dealing with cases of exploitation of individuals, but of supporting local decision-making about a broad range of concerns – some about art and culture but also often mingling with much larger and intractable problems associated with dispossession and poverty.

B Stomping Out the Middlemen: The Punks Who Rip Off Aboriginal Artists²⁹

Indigenous and non-indigenous people have written in important copyright journals, we have heard people talking at important conferences about Aboriginal art and the rip offs, but still the trend continues. ...

This pattern makes me really worry because it links back to history repeating itself; back in them days when our Elders worked really hard on cattle stations. The government has failed to tell the community that the ones who done all the hard work to get the multimillion dollar cattle industry going were the Aboriginal stockmen who worked for next to nothing. They got the beef industry started and now we got roads, helicopters and boats for international beef exports. It's all happening – a full-steam-ahead multimillion dollar industry that gives very little back to Aboriginal communities; we're still living in poverty. Can you see the link with art yet? Aboriginal art is going down the same path as the cattle industry.

– Jason Davidson³⁰

Discussion of the strengths and weaknesses of copyright law needs to begin with a consideration of the broader expectations and ambitions of Indigenous Australia. The 'rip-offs' complained of are not simply about discrete examples of copyright infringement. The tensions created and problems identified are much larger. The more exploitative practices are capable of redress through the Australian Competition and Consumer Commission ('ACCC') and regulation of fair

trade using existing laws against unconscionable conduct. Law reform is not required to stamp out some of the more egregious conduct reported. Here the problem is with the lack of resources to pursue investigations and the mobility of the operators.³¹ The development of industry codes of conduct may, with time, assist in broadening the definition of what is considered unconscionable conduct in an Indigenous trade context. However, with the problem being characterised quite narrowly as the behaviour of rogue individuals, and industry self-regulation considered as the best method of governance,³² there is no recognition of the limitation of existing market mechanisms in delivering the public and social outcomes desired or in securing a 'sustainable' industry. Whilst the ability to provide necessary goods and services for the community from the profits generated by artistic enterprise is rightly the source of great pride, it creates significant and unrealistic expectations of capacity to address major problems in communities. 'Self-determination' can only be exercised within subject positions that have been historically constructed by past projects of governance, and the experiences and consequences of colonialism are not easily overcome. As the starting positions and kinds of obstacles differ between Indigenous subjects, it is also not the case that all artists and all communities will necessarily fail to do well. However, the current terms of the debate render the different historical circumstances less visible, making it easier to moralise and demonise 'failure' and 'success'.

This becomes most apparent from the minimal reference made in the Indigenous Art Inquiry to urban artists. The urban condition is presumed to provide access to 'regular' services and as such these artists are assessed as 'lower' in a hierarchy of precarious situations, and/or are identified as problematic subjects that do not readily fit with the collective subject status of 'the community'.

[T]he concept of 'community' is often used, as a broad brush attempt to talk about Indigenous majority. It is as if the mere reference to the idea of an Aboriginal Community somehow legitimizes opinions and quite often very complex cultural concerns. This is clearly one of many over zealous generalizations that are part of a wider problem that the art industry inherits.³³

From a policy perspective, the problem of political invisibility for urban artists is further compounded by market expectations that Aboriginal people produce 'traditional expressions': 'Urban Indigenous people have been locked

into an “in-between” space by the history of black-white relations in this country and deemed to have no place.³⁴ For some urban artists, this can lead to investigations of their ‘outsider’ status in artwork.

By the 1980s, city-based Indigenous artists were attempting to penetrate the white art world and make themselves visible as Aboriginal artists. ... [However,] [a]ffinities with tourist or souvenir art assured black city artists of invisibility as far as mainstream art was concerned. References to popular culture and commercial sources are no less significant in Koori art than in the work of popular artists such as Andy Warhol ... [but] ‘the work continues to be written off as either Aboriginal kitsch or a sophisticated fabrication – a simulacrum of Aboriginality’. This is in marked contrast to the effortless way in which the work of the acclaimed desert artists, Emily Kame Kngwarreye, is so uncritically accepted.³⁵

Colonialism has created different subject positions for different Indigenous peoples, and these remain in operation in the art market.

Beyond this limitation, overall expectations about what markets can deliver seem either to be very naïve or to simply ignore problems. From a trade perspective there are issues of ‘oversupply’. Any sustainable art market needs to manage labour and supply. Mostly, submissions to the Indigenous Art Inquiry related sustainability to issues of quality and the need for consumer education, which are especially problematic at the lower end of the market.³⁶ Thus, in many submissions to the Inquiry, stamping out blatant rip-offs and predatory practices and strengthening ‘authentication’ processes through intellectual property law reform is considered a priority. However, there seems to be a basic misunderstanding that exclusivity is one of the preconditions of ‘quality’ art markets, whether works are branded as Indigenous or otherwise. As Robert Hughes noted in the 1960s,

there is a glut of immature but professional-looking talent, and the distribution methods of the world art market cannot possibly cope with all of their work. In short it is a buyer’s market in which only a small minority of successful artists have any power over the destiny or price of their works.³⁷

For high art, success is dependent upon synergies between many players, most inevitably non-Indigenous, that are part of the global art scene – curators, critics, auction houses,

corporate collectors – all contributing to exhibition value and acquisition desirability. It is largely through the work of the curator, exhibition catalogue and critic that we come to know and value artists and their work. For the mid-range market largely focused on the gallery, the curator/owner holds significant power in selecting and profiling particular ‘products’. These mediation processes have particular significance in generating and maintaining an artist’s value. These ‘middlemen’, as Davidson describes them at the start of this section, are essential to the maximisation of profit by emphasising the distinctive reputation of the particular artist, the investment value of their works, and the social and cultural cache associated with the purchase.

One consequence of the ‘development’ of the Indigenous art market has been a change in marketing practice for traditional works. Once seldom marketed as the work of individual artists in the 1970s and 1980s,³⁸ the practice has changed to an emphasis on the distinctive, individually named artist, as well as more latterly on celebrated communities. The ‘value’ of the work of these ‘known’ artists has inflated alongside the authorial transformation.³⁹ This trajectory parallels the movement of the works from functional ethnographic artefact to cultural art object,⁴⁰ and the emergence of Indigenous art as copyright subject matter.⁴¹ However, as Michael Eather notes in his submission to the Indigenous Art Inquiry:

The Indigenous Arts Industry and its workers also are now realising that in ‘the art world’ there are essential strata systems with big players. Indeed there has always been an elitist system at work, largely controlled by non-indigenous persons, who will make and break careers. They are the taste makers and they will choose who they are going to put their energies behind.⁴²

There are middlemen and taste-makers servicing all stratifications of the art market, often combining value-producing and merchant roles. However, the stratifications and functions of the middlemen work slightly different in the Indigenous art sector.⁴³ The transformation from ethnographic object to art requires production of new forms of authentication for the art. Documentation has always been required to speak to the provenance of high art and secure potential value, however it serves an additional and different focus for Aboriginal art. The documentation both vouches for the authenticity of the signed work in the conventional sense and serves to explain ‘what the paintings are’ to the market.⁴⁴ For high-quality works, documentation is often in

the form of photographs of an individual artist painting and an accompanying sketch of the 'Dreaming' story. In the tourist market a desired form of documentation is the 'authenticity label'. The peculiar communicative demand to explain the works as Art, with reference to Aboriginal otherworldliness, carves out an 'exceptional' place for these artists in the art market and in law.

The latest addition to the regulatory landscape surrounding the Indigenous art market is the *Indigenous Australian Art Commercial Code of Conduct*, which emerged from the Indigenous Art Inquiry. The new code, which is voluntary, includes provisions about:

- dealings with artists;
- agreements with artists (including minimum terms, cooling off, payment to artists, etc);
- dealings with artworks (including misleading or deceptive conduct, authenticity, respect for Indigenous cultural protocols and artists' rights, and care of artworks); and
- record-keeping and reporting.⁴⁵

Code of conduct certificates can be issued to art centres, dealers and galleries who are signatories and who meet the requisite standard of integrity. These certificates can attach to works on future sales.⁴⁶ There is also a *Charter of Principles for Publicly Funded Collecting Institutions* to complement the commercial code.⁴⁷ If the voluntary code does not appear to be working after two years of operation it could become a compulsory industry code applying to anyone selling Indigenous visual artworks.⁴⁸

The presumption is that consumers may accept a premium on works sold with a certificate and prefer them over works without such credentials. Whilst this development is welcome, overall this is still likely to be a quite limited avenue for securing the 'exclusivity' of Indigenous works in the marketplace and it is not necessarily a strategy that empowers Indigenous artists or communities. Only if the code led to the empowering of art managers with close community management and ties over other industry intermediaries could the manufacture of 'exclusivity' in the marketplace and Indigenous empowerment potentially coincide.

There remain issues for artists who do not comfortably fit established gallery and marketing dynamics. Stuurman comments:

I don't do exhibitions anymore because of the way I am told how to be an artist. I know who I am and my works speak for themselves, this is not to sound arrogant but simply to give me space into exercising who I am and what I do.⁴⁹

The need for intermediaries to position Indigenous work in the marketplace, whether at the high, middle or lower end, is a reality of economics that sits ill with the notion of art practiced for cultural renewal or art enterprise as an exercise in 'self-determination'. The market is not a position in which the artist is likely to be empowered. There is little security, let alone community 'sustainability', to be gained from market forces for the majority, even relying on those that have already gained prominence within the category of high art. The precariousness of the situation for artists and communities can be seen from the decline in art sales as a consequence of the global financial crisis, which is estimated as 50 per cent in some communities.⁵⁰

What the Indigenous Art Inquiry brushes over is the important difference between governance mechanisms that enhance value in a market context and support a sustainable art industry, and those that empower and sustain Indigenous painters and communities. It is no surprise that the economic, political and cultural objectives of policies supporting the sector are often run together with the presumption that each is mutually reinforcing of the others. In Australia it has ever been so. However, in Australian politics today it is the market that is the pre-eminent concern. Where conflicts arise, self-determination and development of Indigenous potential will take second place. Being a business concern, the selection of artists and works to profile must necessarily relate to assessments of consumer preference and demand. Interest in particular works can be encouraged but only a select few can really expect to be profiled and hyped in the art market in a way that 'cuts through'. Whilst policies in support of consumer education also matter to the growth of the market overall, they will do nothing for the individual artist who seeks recognition on their own terms. Thus, the Indigenous Art Inquiry recommendations and the new code of conduct potentially support the role of art centres, amongst others, in managing provenance and regulating supply, but they have little to offer individual artists such as Davidson or Stuurman, who dispute the authority of the 'middlemen' and the layers of managers selectively profiling and representing 'authentic Indigenous culture'.

In the current debates about the Indigenous art market there is no serious discussion about how problems of poverty generated by past colonial practices could be addressed, apart from the selling of more 'quality' works. While a code of conduct is still worthwhile, it is woefully inadequate as a means for redressing the real problems facing artists in the marketplace. There is no acknowledgement of the way the marketplace itself reproduces discriminations and disadvantage. This makes me sceptical of the recommendations to 'culturise' rights, thereby carrying the Indigenous cultural agenda into unique and separate categories of intellectual property law, and in the process further suppressing the discussion of economics and the material expectations to be had from sales of artworks and reproductive rights.

II The Perceived Limits of Copyright

A The Role of Intellectual Property Rights in the Culture Industries

Intellectual property has an odd relation to the 'culture industries'. Strong intellectual property rights, and especially copyright, are often conceived of as central to the arts industries. But how does this work? The presumption is that copyright is primarily concerned with sponsoring and protecting intellectual or creative endeavours. As a teacher, I find students often assume that copyright practice necessarily entails working with artists. However, this perception is not quite right. Copyright is only marginally engaged with questions of creativity.

Anglo-Australian copyright has conscientiously avoided serious engagement with discussions of creativity, originality and the cultural value of expressions. The law is far more pragmatic. Protection is awarded in recognition of the fact of a work's creation – what is legally required is evidence that a work subsists in some 'material form' from which it can be serially reproduced. Whilst the expression of literary, dramatic, artistic and musical must be 'original',

[t]he word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work', with the expression of thought in print or writing. ... [T]he Act does not require that the expression must be in an original or novel form ...⁵¹

Likewise 'the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high'.⁵² This has led to works as diverse as crosswords, timetables, receipt books, television program schedules and computer works being protected as literary works. Artistic works are generally judged according to 'whether the work is of artistic quality or not'⁵³ and so on. In terms of recognising copyright subject matter, the law is quite disinterested in questions about the creativity or artistic value of the venture. Copyright supports endless commodification of mass-market forms of expression – literary, artistic, dramatic, musical, sound, film. Discriminations about degrees of originality, artistic value or contribution to culture do not occur in the domain of law, but in the marketplace.

In line with international expectations centred on the *Berne Convention for the Protection of Literary and Artistic Works* (1886),⁵⁴ Australia introduced a moral rights regime in December 2000. This created new rights of attribution and rights of integrity. However, the author's right of attribution also serves to reinforce the marketing of the work as that of an acknowledged individual creator. Whilst ostensibly protecting individual artistic reputation, the moral right also develops and preserves art market values:

The 20th-century market emphasised the artist rather than the work, so that anything produced by a select group of market leaders became financially valuable, and the role of the critic and curator in discriminating between works of art was lost in both the market mechanism and in the exhibition of modern masters in the museum. The cult of personality of the artist parallels that of the cult of celebrity in the mass media.⁵⁵

Exercising the 'right of integrity' requires a consideration of whether a derogatory treatment of the author's work has taken place. This test is informed, however, by reference to existing market practices and protocols. Thus to the extent that moral rights might be perceived to protect the artist/culture, they also largely reinforce, rather than disrupt, market mechanisms.⁵⁶

There is a strong social expectation that the law support creative endeavours and the creator's right to private property. Yet intellectual property law only supports a culture of creativity indirectly, mainly by *protecting the exclusive rights of those who invest in bringing cultural products*

to the market. Insofar as more nuanced cultural outcomes are desired, this must be pursued through other avenues, such as federal, state and local government support for arts funding bodies, exhibition spaces, skills and professional development funds, small business assistance, legal advice and so on. It needs to be remembered that these 'cultural' initiatives are also usually considered as adjunct to or working alongside market mechanisms. Thus, though clumsily crafted as a tool of cultural policy, intellectual property rights continue to serve as a primary, if indirect and rather indiscriminate, foundation of support for the arts industries.

B Indigenous Cultural and Intellectual Property

Despite the lack of cultural discrimination in copyright law, in Australia Indigenous art and culture have been treated as a 'special case' since the 1980s. Policies have focused on the need to support the cultural property rights of Aboriginal and Torres Strait Islander people in a post-colonial context, with cultural property originally defined in terms of the distinctive character of traditional works and their ill-fit with modern mass-commodification practices. As such, in the Indigenous circumstance intellectual property is not looked upon in the regular way as a body of law that provides incentives to mass produce cultural works. Rather it has been thought of for its conservation potential – for its value in removing unauthorised works from circulation and, as such, out of bounds of commodification. Often this flows from an over-inscription of all Indigenous art as inherently sacred, traditional and relating to another time, beyond any material economy.⁵⁷

Yet Aboriginal culture has been exploited to profile Australian national identity and promote cultural tourism.⁵⁸ Examples include reproductions by government⁵⁹ and crass commercialisation of Aboriginal culture in the tourism industry. The tourism industry requires a ready market of mass-produced 'authentic' culture to serve as mementos of travel. This has led to ongoing exploitation in the form of 'carpetbagging'⁶⁰ and marketing cheap imitation Indigenous product, often sourced from overseas labour.⁶¹ From the late 1980s onwards, copyright law has been called upon to prevent these unauthorised reproductions. Australian cultural and legal policy in this area predates and informs much of the early interest of the World Intellectual Property Organization ('WIPO') in this area.

In terms of protecting Indigenous culture copyright has, despite some success in the courts, received very bad press – especially in government reports and academia. The prevailing view endorsed by various government inquiries is that copyright provides inadequate protection.⁶² The peculiar thing is this: much of the perception that mainstream intellectual property rights are limited is based only on conjecture. There is very, very little case law about copyright's fundamental 'principles' and the Australian legislation fails to define many key terms. In this context, well-meaning government expert and academic analysis, alert to the need to identify Indigenous cultural difference, arguably produces some of the alleged obstacles to protection that need to be later 'overcome' by progressive law reform. This dynamic allows liberal law to be quite self-congratulatory about the good-natured attempts at cultural inclusion, whilst again resettling new boundaries and discriminations that seem to only ever apply to the Indigenous context. It is partly this cycle that has produced the demand for the development of a *sui generis* law for the protection of ICIP.

An obvious example of where a cultural limitation has effectively been projected onto intellectual property law relates to the (once) much-discussed obstacle of 'originality'. This critique of one of copyright law's perceived shortcomings in protecting ICIP first appeared alongside the new market of Aboriginal art in the late 1970s and early 1980s. Aboriginal works, read in terms of embodying 'tradition', were presumed to lack the requisite standard of individual genius and creativity necessary for protection.⁶³ However, there was no Anglo-Australian legal authority that had previously defined the artistic input required for copyright protection in terms of any standard of individual genius. At the time there was only case-law authority about the need for minimal levels of creativity, skill or labour behind an expression with copyright awarded to non-creative works such as exam papers and blank receipt systems.⁶⁴ However, the perceived cultural 'limitation' of Western copyright law in valuing traditional works spawned the production of largely non-Indigenous expert witnesses to evidence the fact of Indigenous creativity, in order to justify the awarding of copyright to Indigenous artists.⁶⁵ Subsequent litigation in *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd*,⁶⁶ which concerned the concept of originality in relation to the compilation of telephone directories, effectively dispensed with even a 'modicum of creativity'⁶⁷ being required – which is the standard in the US – instead rewarding the mere investment of skill and labour.⁶⁸ In the most recent case concerning the

originality standard for copyright protection, *Nine Network Australia Pty Ltd v IceTV Pty Ltd*,⁶⁹ the defendant IceTV conceded that Nine Network Australia enjoyed copyright protection in its weekly television schedule information. The earlier *Desktop Marketing* decision that rewarded a low 'sweat of the brow' standard of originality remains the leading Australian authority on originality under Australian law.⁷⁰

Likewise, though some have suggested that intellectual property law offers inadequate protection for the collaborative endeavours involved in the production of some Indigenous art, there are in fact few limits in recognising 'collective' or 'collaborative' labour in any commercial context.⁷¹ Other stated obstacles to protection, such as the need for art to be expressed in material form, do not just affect the Indigenous creator, and for new works the evidential problem of identifying the work produced can be often overcome by use of any form of recording.⁷² Performers' rights prospectively and sometimes even retrospectively award Indigenous performers co-ownership rights with the maker of a recording of their performance. Performers' rights under the *Copyright Act 1968* (Cth) were amended in accordance with provisions of the *WIPO Performances and Phonograms Treaty* ('WPPT'),⁷³ as part of the package of reforms associated with the passage of the Australia-US Free Trade Agreement.⁷⁴ The WPPT creates a post-Berne adjustment of the public domain in the interest of a broader range of creators, allowing for a retrospective alteration of economic rights existing in recordings.⁷⁵ Provisions explicitly include an adjustment of rights related to the making of recordings of expressions of folklore, creating rights of co-ownership between the recording-maker and the performers.⁷⁶ As co-ownership is practically realigned with the fact of actual participation in live performances, this effectively sidesteps the problem of legislatively defining community interests and ownership with reference to more abstract notions of inclusion/exclusion. Whilst the shared administration of rights between, for example, museums and anthropologists who originally made the works on the one hand and Indigenous performers on the other hand can be complex, these provisions potentially offer a very useful avenue to assert Indigenous interests in relation to the historical record. Although it is true that copyright does not confer perpetual rights, the current trend is toward serial extension of copyright terms.⁷⁷

My point is not to suggest that there are no limitations in the protection of ICIP under existing intellectual property law.⁷⁸

However, the point is to try, at least initially, to separate more clearly legal requirements from social expectations. Not every cultural or artistic demand can be recognised under existing intellectual property laws. Yet, as noted above, the idea that Anglo-Australian law especially discriminates against Indigenous art and cannot accommodate Indigenous demands requires careful, considered analysis so as not to produce self-fulfilling results. Further, citizens do not automatically occupy positions from which they can make claims on the state – they first have to carve out a political subject position or locate themselves within a pre-existing position.⁷⁹ Before embarking on a consideration of Indigenous demands on law, then, we need to more carefully consider the subject positions that are available under the law as it currently stands. There have been significant, though piecemeal, developments in Australian intellectual property law and practice that have changed the ground rules for protecting owners. In my view these changes have significantly transformed the political subject position of all intellectual property 'owners' in the global economy.

C Stopping the Rip-Offs⁸⁰

Since 1994 I have developed various styles and have also been exploited in various ways. This is sad because when people hold on to certain works they are really taking on a curse which can see their whole life fall apart etc. I know this sounds superstitious and doesn't comply with rational thought.

Robert Stuurman⁸¹

It is important to note that Indigenous understandings of 'rip-offs' often far exceed Western contexts of copyright infringement, trade practice law definitions of deceptive and misleading practice, and criminal law notions of fraudulent dealing.⁸² However, what needs to be taken seriously is the problem that emphasising the spiritual dimensions of art has previously been tantamount to courting marginality under Western law.

[L]iberalism presumes to master culture by privatizing and individualizing it, just as it privatizes and individualizes religion. It is a basic premise of liberal secularism and liberal universalism that neither culture nor religion are permitted to govern publicly; both are tolerated on the condition that they are privately and individually enjoyed. Contemporary liberal political and legal doctrine thus positions culture as its Other and also as necessarily antagonistic to its principles unless it is subordinated ...⁸³

An emphasis on the sacred, spiritual or religious nature of Aboriginal art creates an immediate disjuncture with the secularism of liberalism. Promoting *sui generis* ICIP rights does not at face-value necessarily break with this logic of subordination. That the question of how *sui generis* rights would interact with mainstream intellectual property rights is often considered as a secondary issue⁸⁴ gives further cause for concern.

Nonetheless, a *sui generis* approach to the protection of ICIP has been advocated by the National Association for the Visual Arts, the Arts Law Centre of Australia, the Australia Council and the Arts Law Centre of Queensland – all drawing on the work of Terri Janke and Robynne Quiggin.⁸⁵ The possible content of such a *sui generis* law includes protection in relation to:

- communal ownership;
- artistic styles;
- intangible forms of expression;
- time limitations;
- the use of Indigenous cultural materials without the appropriate consent of Indigenous custodians;
- wilful destruction of cultural property;
- ecology and biodiversity; and
- misrepresentations as to the source of ICIP.

A major reason a *sui generis* approach is seen to be necessary concerns the collective nature of Indigenous rights and the associated custodianship claims of community. These are expressed by Janke and Quiggin as

laws ... based on positive obligations toward cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations. To ensure this, there is often an individual or group who is the custodian or caretaker of a particular item of heritage. The traditional custodian acts as a trustee, whose role it is to pass on the knowledge and ensure that its use conforms to the best interests of the community.⁸⁶

In previous litigation, when communal obligations conflicted with individual rights, the former were subjugated. This was explicitly recognised in an early case concerning the Reserve Bank of Australia's release of a special \$10 bank note to commemorate the first European 'settlement' of the country. The artwork featured was the Morning Star Pole by Terry Yumbulul, which had been displayed in a museum

in Canberra. Mr Yumbulul's right to paint the designs was derived from his father; however, as the works were ceremonial objects, made in accordance with religious rituals, the circulation of the works should have been controlled. In finding a copyright agreement between Mr Yumbulul and an Aboriginal artist's agency as valid, French J noted:

There was evidence that Mr Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the Bank. It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations ... It may be that greater care could have been taken in this case. And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.⁸⁷

The reason the assignment was found valid was because

Mr Yumbulul understood the general nature of the licence he was signing, and that it went beyond merely conferring the right to inspect his works. While his evidence indicated that he had some difficulty with particular words of the English language, he showed a grasp of the concept of royalty and the general notion of a licence. He had discussed the matter with his wife, Clely, who, although of Italian birth, came to Australia at age 12, and was educated in Adelaide to Year 10 level. ... While they may have been reluctant to enter into such an all embracing agreement with the Agency, they were in need of money urgently. In April and May 1987 they were living at an island outstation, earning something less than the amount payable under unemployment benefits. Mrs Yumbulul's father was then in Adelaide and seriously ill and she wanted to get down to see him. Their need for funds overcame the reluctance to sign the licence agreement and on 11 June 1987 they executed it.⁸⁸

It is felt by critics of intellectual property law that legal recognition of communal rights in works could prevent such wrongs occurring.

However, were this kind of case to present in court today, would the outcome be the same? In endorsing the Janke/Quiggin position on the need for *sui generis* and customary rights, the submission by the Arts Law Centre of Queensland to the Indigenous Art Inquiry says:

it is now thirty-two years since the Commonwealth Government set up a working party to investigate the protection of Aboriginal folklore. To date, there has been no satisfactory outcome to this identified need.⁸⁹

Whilst it is difficult to ascertain what a 'satisfactory outcome' would be, it should be remembered that the 1981 Folklore Report also suggested that the long tradition of Aboriginal art meant that it could not be protected as original.⁹⁰ Cultural prejudices and legal positions change.

It would be impossible for someone now in a position like that of Mr Yumbulul's agent, who arranged the licensing of Mr Yumbulul's artwork (and whose position was created in association with the Aboriginal Arts Board of the Australia Council), to credibly claim that they have no responsibility to consider any cultural obligations associated with the assignment of reproduction rights. The point is not that the conflict could never happen again but that, whilst the positive law may still look the same, the knowledge base that informs law in this area has changed significantly in the intervening period. The government and academic work done that has addressed these issues matters and has legal influence. Assessment of the consequences of a specialist art agent's knowledge, authority and ostensible authority in facilitating this kind of inappropriate licence without consultation would – or at least should – be treated differently now in law. The 'middlemen', especially those negotiating between Indigenous subjects and government entities, should have cultural responsibilities too. That these are not taken lightly is evidenced by the explicit commitment by government bodies such as the Australia Council to Indigenous protocols.⁹¹ Adherence to cultural protocols is one of the considerations of the new 'voluntary' code of conduct. Cultural understandings inform and affect legal standards. Protocols and community consultations already create an indirect mechanism for protection of spiritual concerns and they should not necessarily be presumed as unenforceable or simply as 'voluntary' codes.

In the *Bulun Bulun* case,⁹² whilst a claim of community ownership was rejected, von Doussa J found that Mr Bulun Bulun had an enforceable fiduciary obligation to respect the cultural protocols of his community:

equity would impose on [Mr. Bulun Bulun] obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people,

and, in the event of infringement by a third party, to take reasonable and appropriate action to retrain and remedy infringement of the copyright in the artistic work.⁹³

Under the new *Indigenous Australian Art Commercial Code of Conduct*, respect for cultural protocols is part of the considerations about compliance. Why would arts intermediaries be exempt from an enforceable fiduciary obligation to the relevant communal owners, particularly now in situations where such intermediaries have agreed to the new 'voluntary' code? The notion of trust that creates fiduciary obligations in 'traditional' contexts should be extended to include the non-Indigenous agents that facilitate the Indigenous art trade.⁹⁴ It is hard to fathom why they should be logically excluded from such a responsibility and this is certainly an avenue worth closer investigation.

D Authenticity Labels

The recent introduction of a new form of certificate under the *Indigenous Australian Art Commercial Code of Conduct* is related to the recommendation by the Indigenous Art Inquiry to commence planning for the reintroduction of the earlier failed 'authenticity label' for Indigenous art and craft.⁹⁵ The authenticity label was administered in the 1990s by the National Indigenous Arts Advocacy Association to try and advantage 'authentic' products in the marketplace over the significant number of 'fakes', with the presumption that buyers would ideally seek to purchase articles actually made by Indigenous people and branded as authentically Aboriginal. Fakes are often marketed as authentic product, and whilst there can be prosecutions under trade practices law for the deception, litigation is expensive.⁹⁶ An authenticity mark was considered as, amongst other things, a useful self-help marketing tool.⁹⁷

Yet, as the Indigenous Art Inquiry noted:

It became apparent that the 'one size fits all' approach did not factor in the individual needs and differing situations of Indigenous communities, and that the test for Aboriginality was too complex with over 75 per cent of applicants failing the requirements.⁹⁸

It was also noted that Indigenous artists who, for whatever reason, did not use the mark would be perceived in the market as 'inauthentic'.

The new certificate under the code of conduct is designed to serve the higher, fine-art end of the market, however the certificate signals compliance with ethical standards more generally, rather than 'authenticity' per se. In this way it better meets the needs of a broader range of sellers, including those who may not want to adopt a specific branding as 'authentic'.⁹⁹

Unfortunately the certificate is designed for 'art' and as such it currently offers little to combat problems with the general tourist trade, where Aboriginal-style product is frequently sourced from overseas.

Tourists often would simply want to buy a t-shirt or boomerang to commemorate their visit or to buy as a gift for someone else, and would possibly be considering factors such as the cost of the goods and the aesthetics of the object as more immediate concerns than authenticity or provenance. Therefore, an authenticity labelling scheme or similar venture would involve many layers of the industry and would not be a straightforward exercise.¹⁰⁰

There remains no real practical suggestion as to how the problem of 'inauthentic', usually cheaply produced imported merchandise for the tourist trade would be addressed.

E Communal Moral Rights

Attempts to introduce communal moral rights legislation in Australia in the early 2000s faltered on the familiar mix of fundamental problems in defining Aboriginality and the right to claim the benefits of the official designation. There were also related difficulties in the practicalities of administering the proposed complex regulations.¹⁰¹ However, the Indigenous Art Inquiry supported the reintroduction of communal moral rights legislation 'as a matter of priority',¹⁰² emphasising the need for further and broader 'consultation with stakeholders'. Whilst earlier drafts of the communal moral rights legislation were only circulated to a select few, the notion that broader consultation can 'fix' the difficulty of legally defining 'authentic' Indigenous subjectivities and allocating associated rights of attribution and integrity is rather optimistic. Arguably a stronger attitude toward the validity of protocols would achieve much the same result without the attendant problems of fashioning a national law which inevitably must construct a pan-Indigenous identity that pretends to encompass the situation of all Aboriginal and Torres Strait Islander peoples.

III The Anti-Piracy Rights of Multinational Owners: Their Significance for the Indigenous Context

In non-Indigenous contexts, the widespread culture of piracy has encouraged development of much tougher legal obligations owed to owners. The legislature and the courts have embarked on a program to stamp out music piracy and create 'respect' for, and a culture of protection towards, owners. Thus perceptions of limits to copyright deserve reconsideration in terms of the new ground rules for corporate owners. In copyright there are new presumptions of ownership¹⁰³ and a system of 'on-the-spot' fines for strict liability offences to be imposed by police.¹⁰⁴ In trade mark law courts have allowed multinational-trained persons to give independent evidence about the authenticity of alleged counterfeit product.¹⁰⁵ If the cases I briefly discuss below are considered as a whole, they demonstrate that, in conjunction with some statutory changes, the courts have considerably redefined the balance of power to privilege the claims of corporate owners. This involves casting protection around a highly flexible and mobile legal definition of property. Similar reforms to stamp out 'piracy' in Indigenous contexts are worth serious consideration.

A Simplifying Proof of Ownership: *Microsoft v PC Club*¹⁰⁶

In 2003 the Australian Government amended the *Copyright Act 1968* (Cth) to allow legitimate software (including computer-based games), books, printed music and periodical publications to be parallel imported.¹⁰⁷ Out of concern for the possibility of facilitating the entry of pirated software into Australia, new evidentiary presumptions of copyright ownership were introduced to make it difficult for defendants to put copyright subsistence or ownership in dispute.¹⁰⁸ *Microsoft v PC Club* tested the effect of these provisions.

The case concerned the US-based Microsoft Corporation taking action against a local wholesaler who sold computer hardware with unauthorised copies of Windows XP pre-installed. The defendant argued that evidentiary presumptions of copyright ownership under Australian law, where the person named on the product packaging is presumed to be owner, did not apply to the US corporation because of exclusive licensing arrangements entered into between Microsoft subsidiaries. It was argued that the true copyright owner of the software was not one of the named plaintiffs.

There were three Microsoft plaintiffs. The first plaintiff was the parent company, Microsoft Corporation (US), who was the published owner named on Windows XP Home and XP Pro packaging. The second plaintiff was Microsoft Pty Ltd (Aust), who was the local subsidiary that provided Australian marketing and technical support and owned the Australian trade marks. The third plaintiff was Microsoft Licensing General Partnership (US), who was the exclusive licensee of programs distributed to original equipment manufacturers and sold sub-licenses to local authorised wholesalers. Microsoft Licensing Inc (US), the original exclusive licensee of Microsoft programs, was not a plaintiff: Microsoft claimed that they did not need to be a plaintiff as this entity had assigned its interests in the programs to the third plaintiff. Considerable evidence was given on ownership. It mainly demonstrated confusion as to the nature and effect of the various agreements and movement of assets between Microsoft entities. Thus the relevant ownership of the copyrights seeking to be enforced was a real issue.

The Federal Court determined that copyright ownership could be established by proof of first publication in the US and the name of the publisher as 'Microsoft Corporation' being affixed to the original copies of the programs. The point of the 2003 reforms to the *Copyright Act 1968* (Cth) was to prevent diversions into disputes over who is entitled to bring suit. In contesting ownership the defendant was characterised as disputing 'technical matters' the reforms had sought to overcome, and particular mention was made of the inconvenience of requiring a US-based Microsoft executive to come to Australia to give evidence about their agreements.¹⁰⁹ The legal strategy of asking the plaintiff to prove their entitlement to copyright was described by the judge as 'bold', 'radical', 'controversial'.¹¹⁰ Further, a case concerning infringement of Indigenous copyright¹¹¹ was cited as evidence in support of the argument that award of copyright damages could include a punitive function in these kinds of cases.¹¹² The defendant was found liable for a flagrant breach, with additional damages awarded.

Presumptions of ownership granted to 'owners' to assist in the battle against piracy could be translated to an Indigenous context. For example, where an artist or community has an established relationship with a dealer or signatory to the code, and certain goods are identified as being of suspect provenance, there could be a statutory presumption of ownership, with the legal priority shifted toward assessing the defendant's conduct and likelihood of infringement. This

reform would refocus the heart of the legal inquiry towards the infringing conduct and encourage closer engagement by commercial operators with art centres and other authorised parties in negotiating over rights. It would assist in shifting the balance of power in bargaining contexts and also deter legal diversions into technical disputes about whom in the community is entitled to bring suit against rogue operators when there is a general agreement amongst affected Indigenous persons that the work is a rip-off. This approach would extend the operation of the code of conduct from regulation of art sales to connect more directly with existing copyright law. It would also move copyright discourse away from the current preoccupation with legislatively identifying Indigenous ownership to prioritise scrutiny of the rogue trader and making it more difficult (and potentially costly) for them to operate in Australia.

B Assisting Owners in Gathering Evidence: *Universal Music v Sharman Networks*¹¹³

Kazaa, operated by Sharman Networks, was a popular music file-sharing successor to earlier programs like Napster and Grokster, both of whom had faced litigation in the US that effectively curtailed their operations. In the US litigation, which found against Napster and Grokster, part of the legal test adopted was whether there was a technical capacity to control the serving of unauthorised music files to users.¹¹⁴ Under Australian law a finding of contributory infringement requires a consideration of the power to prevent infringement¹¹⁵ and merely providing the facility for making a communication to another person does not alone constitute authorising that infringement.¹¹⁶ In view of these legal provisions, Kazaa operations were set up to try and avoid any finding that the file transfers could be monitored and controlled.¹¹⁷

In the face of these strategic obstacles, the Australian Federal Court granted a pre-trial discovery order against Sharman – known as an Anton Piller order – allowing the plaintiff to monitor Sharman's computer activities for over a year. Anton Piller orders are awarded ex parte, most usually to prevent the destruction of evidence. They are not supposed to be an investigative tool of the applicant. These Anton Piller orders enabled the plaintiff to establish a substantial record of evidence about the technical nature of Kazaa's operations. However, technicians were still unable to determine if Kazaa utilised a central server from which they could 'control' communications and file transfers.

The Court found much of the evidence about the technical nature of Kazaa operations difficult to understand or address. Nonetheless, Wilcox J found that Sharman had authorised infringement. But what is of interest for our purposes is the way the judgment addresses a culture of piracy as justifying legal intervention. This was explained in a short summary of the case produced by Wilcox J in the public interest:

- (i) despite the fact that the Kazaa website contains warnings against the sharing of copyright files, and an end user licence agreement under which users are made to agree not to infringe copyright, it has long been obvious that those measures are ineffective to prevent, or even substantially to curtail, copyright infringements by users. The respondents have long known that the Kazaa system is widely used for the sharing of copyright files;
- (ii) there are technical measures (keyword filtering and gold file flood filtering) that would enable the respondents to curtail – although probably not totally to prevent – the sharing of copyright files. The respondents have not taken any action to implement those measures. It would be against their financial interest to do so. It is in the respondents' financial interest to maximise, not to minimise, music file-sharing. Advertising provides the bulk of the revenue earned by the Kazaa system, which revenue is shared between Sharman Networks and Altnet.
- (iii) far from taking steps that are likely effectively to curtail copyright file-sharing, Sharman Networks and Altnet have included on the Kazaa website exhortations to users to increase their file-sharing and a webpage headed 'Join the Revolution' that criticises record companies for opposing peer-to-peer file-sharing. They also sponsored a 'Kazaa Revolution' campaign attacking the record companies. The revolutionary material does not expressly advocate the sharing of copyright files. However, to a young audience, and it seems that Kazaa users are predominantly young people, the effect of this webpage would be to encourage visitors to think it 'cool' to defy the record companies by ignoring copyright constraints.¹¹⁸

Following the decision there was a settlement of US\$115m and conversion of Kazaa into a (rather unsuccessful) licensed music provider.¹¹⁹

The Australian Kazaa litigation was not simply about the problem of Sharman profiting indirectly from copyright infringement. The reckless 'culture' of the defendant was a primary reason for a broad interpretation of contributory infringement, shifting from examination of particular allegations about the defendant's conduct to scrutiny of their broader behaviour and attitude. In sanctioning Sharman's conduct the Court also affirmed the importance of law and the courts in supporting and structuring an orderly and viable market. In seeking to profit by their own rogue attitude to law, Sharman had to be punished, especially given their established popularity and cultural influence over the next generations of young, 'naïve' potential consumers encouraging future piracy. As such the decision demonstrates judicial commitment to stamping out piracy, challenging the strategic behaviour of those who seek to profit from difficulties in enforcing the law. This is not an isolated decision in dealing with music piracy this way and, as is suggested below, such decisions could help to protect against piracy in the Indigenous art and tourist trades.

C Overlooking Where the Infringing Acts Occurred: *Cooper v Universal Music*¹²⁰

Mr Cooper operated an Australian website, 'MP34Free', where users accessed largely pirated music files via hyperlinks to remote websites, some of which would have been located outside the jurisdiction. His defence argued that there was not a sufficient nexus between the infringing acts by users, Mr Cooper and associated company operations in Australia. Similarly to Sharman, Mr Cooper also argued that he had no power to prevent infringements; he merely provided the facility for making a communication to another person, which does not constitute authorising the infringements under Australian law.

As in the Kazaa litigation, the Full Court of the Federal Court determined that the Australian operation had 'authorised' infringements because of the way the site was constructed. Even though the users downloaded the infringing material from remote locations, Mr Cooper permitted operators of other remote sites to upload new hyperlinks to his site *without any controls or checking involved*. Some of the hyperlinks led to automatic downloading of files and did not require the user to click to access the remote site at all. As such Mr Cooper was 'inviting' the infringements by users. There was ample evidence of substantial use of the site from within Australia to constitute infringing acts being done in

Australia. The provision of a Disclaimer of responsibility for infringement was not a sufficient 'reasonable step' to avoid legal responsibility for the users' infringing acts because Mr Cooper was responsible for the architecture of the site and he derived income from advertising arrangements associated with site traffic.

Despite there being remote relations between Mr Cooper and Australian companies associated with the hosting of the website, the companies were also found responsible for authorising infringement. This was because they did not place any pressure on Mr Cooper to stop his website being predominantly used for copyright infringement and gained a commercial advantage from the advertising on Mr Cooper's site.

In *Cooper* we have a departure from the traditional liberal focus of legal responsibility attaching to individual behaviours and their consequences, to law creating new forms of corporate social responsibility toward the world at large. There is a legal responsibility to be proactive in curtailing potential avenues that might support deviant behaviour affecting owners' rights and facilitating a culture of piracy.

Kazaa and *Cooper* suggest further legal avenues that could be developed to try and curtail the profitable trade in often cheap, low-quality, 'Indigenous-style' rip-offs. Relations between offshore producers, wholesalers, importers and local retail outlets of such merchandise are not that dissimilar to the relations between software designers, ISPs and site managers who facilitate access to infringing music. In both cases 'middlemen' establish operations, service demand for dubious products and pursue profits with disregard for the legitimate interests of copyright owners. Those that support suspect 'Indigenous art' trade are likewise recklessly facilitating a culture of 'piracy'.

The one main difficulty would be that any finding of contributory infringement requires identification of underlying infringements – nominating ownership of artistic works and particular infringements that were facilitated by others. Whilst this may be difficult where loose 'styles' and 'ideas' are appropriated, such as in the example of the x-ray koalas,¹²¹ the case below suggests an avenue used by corporate owners to control the broader circulation of troublesome, allegedly dubious goods, where the provenance of the goods in circulation is actually hard to determine.

D Assisting Owners in Collecting and Giving Evidence Proving the Wrong: *Nokia v Truong*¹²²

Usually an expert witness is called upon to provide basic scientific or technical information and present inferences and conclusions from the facts which the judge or jury, for lack of specialised knowledge, could not draw themselves. There is often considerable debate about whether a case requires this kind of expertise, what the relevant expertise is, and what kind of background training would provide the appropriate foundation for giving expert evidence in a particular case.¹²³ However, it is clearly arguable that Indigenous knowledge is a body of specialised knowledge.¹²⁴ In trade mark litigation expert evidence in 'identification of counterfeit goods' has recently emerged as new area of 'scientific knowledge'.

Nokia v Truong concerned infringement of Australian trade marks owned by Nokia Corporation on mobile phone covers and straps imported and sold in retail outlets in Australia. The retailer was licensed to sell Nokia product, however Nokia claimed that the overseas sourced material on sale was counterfeit. Nokia arranged 'trap purchases' as the foundation of an infringement action. One of the purchases was made by Mr Taylor. Mr Taylor was then relied upon to provide expert evidence central to proving that the goods were counterfeit.

What exactly was the foundation of his expertise? Mr Taylor had conducted 'in-house training' by the Nokia Intellectual Property Rights Enforcement Branch, and he was on a retainer from the corporation since 2001 to investigate trade mark infringement in Australia. From his training and experience, he and other Nokia witnesses claimed they could identify 'facts' about the appearance of products that allowed them to distinguish the genuine from the counterfeit article. Their factual findings were then backed up as 'correct' by head of the Nokia Intellectual Property Rights Enforcement Branch, responsible for oversight of the litigation.

That 'trade mark infringement' is an area of specialist knowledge is taken as a given in this case. The broader issue of how mass-market products can be instituted as objects of scientific study, and what kind of scientific or technical knowledge would enable one to distinguish the manufacturing or marketing differences of the genuine article from the counterfeit, is not elaborated on. The case notes other actions where (uncontested) expert evidence was accepted based upon the 'experience' of a store manager

in handling Louis Vuitton products and their method and style of manufacture.¹²⁵ However, how this particular area of expertise would differ from the retail expertise of the ordinary consumer or retail assistant for those kinds of mass-market goods, and hence not normally be considered as raising issues requiring evidence from independent experts, is hard to discern.

Given the global proliferation of models and licensed distributors of mass-market products, and especially for those of modest cost, there are real difficulties in identifying legitimate product at point of sale. High-quality counterfeit goods will, to the eye, most likely be identical to licensed product – that is, after all, the point. However, for consumers accustomed to serial redundancy in design and branding styles and variability in quality of manufacturing related to different points of origin, identification of facts about the appearance of particular goods divulges little about their ‘authenticity’ in terms of licensing arrangements. Further, it is usually hard to tell what is of low quality when it comes to what are already cheap consumer purchases. The nature of the retail outlet and price are more likely to distinguish particular products as suspect goods.

The function of the trade mark in protecting the ‘genuine’ article is to suggest the exclusivity of a mass-produced object and a form of certification as to quality, in a context where exclusivity and quality relate as much to the marketing of the goods as to their inherent qualities. As such, the notion that an expert can necessarily discern the qualities of the genuine article by inspection of the goods, is stretching credulity. ‘Trade mark infringement’ as a new area of witness expertise developed by multinational trade mark owners makes sense, however, in terms of the economic logic of global intellectual property rights. The law creates and maintains the conditions for maximising multinational control over the global circulation of goods, from point of manufacturing and supply to retail. As with *Microsoft v PC Club*, the multinational is trusted by law to best identify and authenticate legitimate product, and to assist the courts in policing the ‘competition’ and maintaining the ‘hype’ about corporate value. How a defendant could contest the expertise and repudiate ‘facts’ about the counterfeit object is extremely difficult to imagine. It is worth noting that this is an area of law where actions are most usually uncontested.¹²⁶ Shoddy operators usually lack access to funds and expertise to mount legal defences. It should be remembered that in the celebrated Aboriginal art cases the litigants could not recover

the significant damages they were awarded because of the bankruptcy of the defendants. An effective legal strategy to curtail piracy needs to regulate point of supply, rather than litigation outcomes, to achieve practical justice.

One of the Indigenous Art Inquiry recommendations was ‘that, as a matter of priority, the ACCC be funded to increase its scrutiny of the Indigenous art industry ... with a goal of increasing successful prosecutions of illegal practices in the industry.’¹²⁷ The illegal practices identified included fraud, forgery and counterfeiting. The Inquiry further recommended

that ... the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights, that the legislation be drafted to ensure prosecutions of breaches will have a realistic chance of success, and that the Australian Customs Service be given an appropriate role in assisting the protection of these rights in relation to imported and exported goods.¹²⁸

However, as already noted, rather than recommending that Aboriginal owners should be entitled to the same or similar protection as that granted to the multinational owner, the Inquiry recommended *sui generis* legislation.

If it is acceptable for multinational owners to manage endemic piracy by credentialing ‘experts’ who can identify inauthentic works to deal with rogue traders, why should not the same privilege apply to Indigenous experts? Whether in copyright or trade mark law, if the issue is one of determining the facts, surely Indigenous persons with the requisite knowledge are best equipped to understand the standards that should differentiate authentic from inauthentic objects? Empowering Indigenous experts to police goods of suspect provenance would be a very useful mechanism for regulating supply in the tourist trade. It would be worth considering how such a scheme could enhance border patrol by customs, if used in conjunction with collective or certification marks.¹²⁹

In the *Nokia* case, enforcement of registered trade marks entitled the bringing of the action, which necessitated the use of the experts in identifying counterfeit goods. In the Indigenous art industry, it would be worth implementing the creation of a certification mark of compliance with the industry code of conduct that would enable similar enforcement action. This may require some co-operation from the ACCC, which has oversight of both certification

marks and voluntary commercial codes.¹³⁰ The *Indigenous Australian Art Commercial Code of Conduct* already provides for a consideration of compliance with cultural protocols and there has been significant interest in addressing administrative capacity to improve standards of enforcement of such 'marks of rectitude' globally. This is an area we may expect further jurisprudence to develop in the near future, especially in relation to administration, maintaining meaningful standards and enforcement of such marks of quality.¹³¹ Certification marks along the lines of a special 'fair trade' mark are now well established in the global marketplace. They are widely recognised as a useful tool for changing market practices. Coupled with corporate reporting on social responsibility such marks can have some clout.¹³²

It needs to be noted that trade mark law does not provide much assistance unless the *Indigenous Australian Art Commercial Code of Conduct* was extended from high art to cover other segments of the tourist market. If the code were broadened in subject matter and made compulsory, at least all Indigenous-themed works produced in association with Indigenous artists and communities would have to comply with standards, including respect for protocols. The mark would facilitate enforcement by the Australian Customs Service. It would be appropriate for administrators to rely upon Indigenous expert evidence to determine whether there was compliance with cultural protocol. Indeed it would be hard to establish any reasonable non-Indigenous expertise in such matters.¹³³ With a compulsory code it would be relatively easy for customs officers to seize 'Indigenous art' that purports to be of Indigenous origin and does not have a certification mark. Dubious goods could be assessed to ensure compliance and check against counterfeit application of the certification mark. This is clearly an avenue worth further investigation were the subject matter of the code broadened and compliance with the code/mark made compulsory. The use of a certification mark would be a useful first step toward starting to redress the making and importation of Indigenous-themed work by non-Indigenous persons. Although not covered by the code, these rip-offs would still not be prohibited outright. However, the inconvenience of investigations as to origins of such works could help disrupt their entry into the country.

IV Conclusion

Government and judicial support for the 'culture industries' and combating the international problem of piracy has

substantially redefined the character of intellectual property law. The change involves a legal shift, from the modern notion of protection of positively defined property rights, to validation of relatively formless and mobile property claims associated with the multinational's global ambition. In certain contexts where piracy is a known problem multinationals do not have to prove ownership of intellectual property rights – the plaintiff is presumed by law to be an owner based on a marketing claim on their package. 'Owners' can ask the court to assist them in forensically examining a competitor's operations. Owners can presume the courts will overlook evidential and jurisdictional complications in proving nexus between the defendant and infringing acts. In fact, disrespect for the 'right' of property owners and encouraging a culture of piracy are themselves reasons for legal intervention. Owners are entitled to credential the court experts 'qualified' to assess if products are genuine or counterfeit. Defendants have few avenues to rebut any of these claims. Given these new marketplace priorities and legal initiatives there is much to be investigated in terms of how these new legal forms might be developed to prevent ongoing exploitation of indigenous peoples.

It is time to begin to question the logic of the current pursuit of a cultural exception for Indigenous rights which places these rights primarily in a cultural/human rights framework, especially if this is at the expense of a consideration of the recent evolution of economic rights.¹³⁴ The exceptionalist reform agenda requires a more precise definition of Indigenous property rights in the form of *sui generis* rights, at a time when multinational owners are permitted to evade any such comparative legal requirement and when Western legal forms are already being stretched to accommodate new scenarios and foster different market practices. Whilst grounded in a sensitivity to Indigenous difference, the way in which the Indigenous difference is managed by the *sui generis* agenda actually upholds a range of discriminatory practices and burdens that the 'norm' is not expected to entertain to the same degree. Further economic issues and power distributions supported by mainstream law are left unchallenged if the agenda is managed within special 'Indigenous' categories. As such there is a need for serious consideration of the power dynamics at play surrounding this proposed legal recognition of difference.

How well Indigenous artists and communities fare in the global economy very much depends on the sensitivities of government policy. However, the success of Indigenous

artists does not necessarily require greater attention to the particularities of Indigenous difference. It cannot be emphasised enough that with today's anti-piracy culture it is not primarily the rights of the owner that entail close scrutiny. Rather, it is the conduct of the alleged pirates that warrants close scrutiny and a proactive approach toward encouraging a more respectful legal and mainstream culture.

There have been many costly, significant government inquiries and cases over the past 30 years dealing with Indigenous art. They all evidence a significant culture of piracy. In these official documents Indigenous claims of ownership are always taken very seriously. So why can't Indigenous claims against rogue traders and 'pirates' now be accepted in copyright law on more or less the same terms as that awarded to the multinational – as *prima facie* valid as asserted by the purported owners? If there is a suspected infringement or question about provenance, why can't Indigenous persons or other authorised persons (eg, art centre personnel) ask the court to assist them in forensically examining a competitor's operations as to the source of the competitor's 'original' art? This information might be thought unhelpful if there is merely appropriation of 'style' and not infringement of a copyright expression. However, in determining 'theft', why can't Indigenous communities also authorise and validate expert evaluations of whether or not a work is a fake? It is, after all, what multinationals currently do.

There is already in place a quite extensive system of industry protocols that apply to Indigenous content. Many of these have been developed for government agencies and extended beyond those institutions through linkages with the industry code of practice.¹³⁵ As part of the industry commercial code of conduct, protocols greatly enhance its relevance and potential scope of application. Mostly, rather than trying to prescribe in formal rules and legal abstractions what is appropriate in all circumstances, protocols require consultation with the affected community. Failure to adhere to a social and legal obligation to stamp out 'piracy' in the Indigenous sector could really bite, if non-compliance with protocols and codes was accepted as *prima facie* evidence of 'piracy'.

Customs seizure of overseas manufactured goods should also primarily focus on the question of protocol and code compliance, with suspect importers nominated by concerned Indigenous owners. Awareness of a Customs focus on traders' compliance with industry codes and Indigenous protocols would certainly help sponsor more responsible attitudes and

educate the market. When there are in existence codes of responsible conduct, to choose to ignore these is not all that different to designing software and website architecture to evade the spirit of the law. In cases where a primary case of copyright infringement may be plausible, the justification for strong legal intervention and protection is satisfied, because non-adherence to protocols and industry codes is tantamount to designing business in a manner that invites and authorises infringing conduct. Down the track enforcement could encompass the introduction of on-the-spot fines imposed on retailers – especially at the lower end of the market – where there is a 'reasonable belief' goods are of questionable provenance.¹³⁶

To advocate for treatment of Indigenous owners similar to that already successfully negotiated by multinational owners would bring far more significant change to the industry to prevent piracy, and do far more to enhance the prospects of a sustainable market, than 'consumer education' with respect to new industry codes alone. Putting Indigenous owners on a similar legal footing to multinationals is also arguably preferable to the alternative of seeking formal recognition of new forms of ICIP. The example of recognition of Australian native title rights suggests that, as with other 'customary rights', Indigenous expectations are invariably subjugated to others' economic claims. Customary law, in the form of a special kind of cultural right, is not as necessary if Indigenous owners already have significant legal power to control the manufacture, distribution, display and retailing of Indigenous culture in Australia. It is one avenue of managing problems of oversupply, where there are few other options.

Extending similar protections to Indigenous owners to that recently awarded to multinational owners would strengthen the development of the Indigenous art and craft market. As such 'equal treatment' would serve to reinforce, not undermine, the stated government aims of securing the prosperity of the Australian cultural industries and of strengthening Australian Indigenous communities. It is an ambitious reform strategy, but surely one worthy of further reflection and debate.

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- 1 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Indigenous Art – Securing the Future: Australia’s Indigenous Visual Arts and Craft Sector* (2007) ('Indigenous Art Inquiry').
 - 2 Ibid 134–44; Australian Government, *Australian Government Response to Indigenous Art – Securing the Future: Australia’s Indigenous Visual Arts and Craft Sector* (2008) 7–9 <http://www.aph.gov.au/Senate/Committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/govresponse/govresponse.pdf> at 12 December 2009; Indigenous Australian Art Commercial Code of Conduct, *The Code* <http://www.indigenousartcode.org/the_code> at 15 January 2010.
 - 3 Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Co for Aboriginal and Torres Strait Islander Commission (1998); Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, Law Reform Commission of WA, Aboriginal Customary Law: Project No 94, Background Paper 12 (2005) <<http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-12.pdf>> at 15 January 2010; Larissa Behrendt and Chris Cunneen, Terri Libesman, *Indigenous Legal Relations in Australia* (2009) ch 10.
 - 4 Indigenous Art Inquiry, above n 1, 152–7; Australian Government, above n 2, 9–10.
 - 5 The suspension of the *Racial Discrimination Act 1975* (Cth) to enable the Northern Territory Intervention comes to mind. See James Anaya, 'Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, as He Concludes His Visit to Australia' (Press Release, 27 August 2009) <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument>> at 15 January 2010.
 - 6 Irene Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 108(1) *South Atlantic Quarterly* 27, 37.
 - 7 Ibid 44.
 - 8 *Bulun Bulun v Nejlam Pty Ltd* (Unreported, Federal Court of Australia, Olney J, 29 March 1989); *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrruru v Indofurn Pty Ltd* (1995) 30 IPR 209; *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.
 - 9 See, eg, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Revised Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge* <http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html> at 15 January 2010.
 - 10 Commonwealth Attorney-General's Department, *Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (1994) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Stoppingtherip-offs-October1994> at 15 January 2010; Janke, above n 3; Indigenous Art Inquiry, above n 1.
 - 11 The Howard Government (1996–2007) dismantled the Hawke/Keating Government's (1983–1996) emphasis on Indigenous self-determination. The current Rudd Government has provided ongoing support for the NT Intervention, which has involved suspension of racial discrimination laws (although the Government is now making efforts to re-establish the *Racial Discrimination Act 1975* (Cth) in the NT). This shows the uneasy and contested trajectory of colonial to post-colonial politics in 'settler' societies.
 - 12 Fred Myers, 'The Wizards of Oz: Nation, State and the Production of Aboriginal Fine Art' in Fred Myers (ed), *The Empire of Things: Regimes of Value and Material Culture* (2001) 165, 168–9.
 - 13 Annette Van den Bosch notes that Gabrielle Pizzi, a well-known metropolitan dealer of Papunya art, was offered exhibition space to display Aboriginal art at Art Cologne in 1993. This was withdrawn because she included the work of urban Aboriginal artists rejected by the organisers as 'folk artists'. Annette Van den Bosch, *The Australian Art World: Aesthetics in a Global Market* (2005) 109.
 - 14 Geoffrey Bardon and James Bardon, *Papunya: A Place Made After the Story: The Beginnings of the Western Desert Painting Movement* (2004) 6.
 - 15 Ibid 38–9.
 - 16 Ibid 37.
 - 17 Fred Myers, *Painting Culture. The Making of An Aboriginal High Art* (2002) 5.
 - 18 Ibid.
 - 19 See *ibid*; Bardon and Bardon, above n 14; Myers, 'The Wizards of Oz', above n 12. See also Geoff Bardon, *Aboriginal Art of the Western Desert* (1979); Hetti Perkins and Hannah Fink (eds),

- 20 *Papunya Tula: Genesis and Genius* (2000); Vivien Johnson (ed), *Papunya Painting: Out of the Desert* (2007).
- 21 Papunya Tula Artists Pty Ltd, *Submission to the Inquiry into the Indigenous Visual Arts Sector* (2006) 2 <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub14.pdf> at 16 January 2010.
- 22 For a critical discussion of the rise of the 'culture industries' as a regulatory object see Rosemary Coombe, 'Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference' (2005) 1(1) *Law, Culture and the Humanities* 35.
- 23 See, eg, Desart, *Submission to Inquiry into Australia's Indigenous Visual Arts and Craft Sector*, 34–8 (appendices 3–5) <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub49.pdf> at 16 January 2010.
- 24 Japingka Indigenous Fine Art Gallery, *Submission to Senate Inquiry into Australia's Indigenous Visual Arts and Craft Sector* <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub21.pdf> at 16 January 2010; Jennifer Herd, *Submission – Inquiry into Australia's Indigenous Visual Arts and Craft Sector* <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub47.pdf> at 16 January 2010.
- 25 Indigenous Art Inquiry, above n 1, xi (recommendations 4, 6).
- 26 Michael Eather, Fire-Works Gallery, *Notes for Senate Inquiry* (2007) 8 <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub88.pdf> at 16 January 2010.
- 27 Myers, 'The Wizards of Oz', above n 12, 167.
- 28 For a discussion of the moralistic elements of this politics, see Irene Watson, 'In the Crusade, What is Being Protected and What is Being Saved?' *Cultural Studies Review* (forthcoming); Wendy Brown, 'Neoliberalism and the End of Liberal Democracy' in Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (2005) 37, 42ff.
- 29 In recognition of the wide and varied demands made on centres there are consistent calls for better pay and conditions to attract more experienced arts administrators. However, in the Inquiry this was translated into a much more limited recommendation for better cross-cultural training: Indigenous Art Inquiry, above n 1, 37 (recommendation 2). This suggests the problem is one of 'culture', rather than of recognising and supporting the very wide range of professional skills and resources required to provide sound management in these situations.
- 30 Jason Davidson, 'Stomping Out the Middlemen: The Punks Who Rip Off Aboriginal Artists' (2006) 6(18) *Indigenous Law Bulletin* 16.
- 31 Ibid 16–17.
- 32 See Indigenous Art Inquiry, above n 1, 117 (recommendation 15: call on the ACCC to conduct greater scrutiny of the Indigenous arts industry).
- 33 Indigenous Art Inquiry, above n 1, 142 (recommendation 21).
- 34 Eather, above n 25, 5.
- 35 Margo Neale, 'Urban Dingo' in Margo Neale (ed), *Urban Dingo: The Art and Life of Lin Onus, 1948–1996* (2000) 13.
- 36 Ibid 17.
- 37 One distinction made is between painters and artists. Whilst anyone can be a painter, some argue that only those trained by elders should be called artists, and correspondingly any art produced outside of community regulation is of no value or harmful. Whilst many galleries seem to use this shorthand, this reinforces both the circularity involved in inscribing all Indigenous art as 'traditional', and the disadvantage of Stolen Generations and others forced off their land and/or disentitled to land rights.
- 38 Robert Hughes, quoted in Van den Bosch, above n 13, 26.
- 39 Ibid 110.
- 40 Australia Council, *Attachment 1: Top 25 Sale Prices for Aboriginal Artworks 1998–2006* <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub38att1.pdf> at 16 January 2010.
- 41 See generally Howard Morphy and Morgan Perkins, 'The Anthropology of Art: A Reflection on Its History and Contemporary Practice' in Howard Morphy and Morgan Perkins (eds), *The Anthropology of Art: A Reader* (2006) 1.
- 42 See Brad Sherman, 'From the Non-original to the Ab-original: A History' in Brad Sherman and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law* (1994) 111.
- 43 Eather, above n 25, 5.
- 44 This is discussed in Wally Caruana, Caruana Fine Art, *A Submission on Australia's Indigenous Visual Arts and Craft Sector* (2006) <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub31.pdf> at 16 January 2010.
- 45 See Bardon, pp30–2.
- 46 Indigenous Australian Art Commercial Code of Conduct, above n 2, 4.
- 47 Ibid 14–15.
- 48 See *ibid*.
- 49 Australian Government, above n 2, 8.
- 50 Robert Stuurman, *Submission to the Inquiry into Australia's Indigenous Visual Arts and Craft Sector* <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub04.pdf> at 16 January 2010.
- 51 'Some Highs for Aboriginal Art in Economic Downturn', *ABC News* (online), 9 April 2009 <<http://www.abc.net.au/news/>

- stories/2009/04/09/2539237.htm> at 16 January 2010.
- 51 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608 (Peterson J).
- 52 Ibid.
- 53 *Copyright Act 1968* (Cth) s 10(1) (definition of 'artistic work').
- 54 Australia, which had been a signatory in its own right since 1928, nonetheless failed to enact moral rights legislation until over 70 years later. See Copyright Law Review Committee, *Report on Moral Rights* (1988).
- 55 Van den Bosch, above n 13, 5.
- 56 For a discussion of the failed attempt to introduce communal moral rights see Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *UNSW Law Journal* 585.
- 57 See, eg, Daniel Gervais, 'Spiritual but not Intellectual?: The Protection of Intangible Traditional Knowledge' (2003) 11 *Cardozo Journal of International and Comparative Law* 467.
- 58 Vivien Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (1996); Van den Bosch, above n 13, 172–3.
- 59 In 1966 one of David Malangi's designs was produced on the Australian \$1 note, originally without his knowledge. Whilst there was no litigation, there was subsequent payment to him by the Reserve Bank. See Djon Mundine, 'Some People are Stories' in David Malangi, *No Ordinary Place: The Art of David Malangi* (Susan Jenkins, ed) (2004) 34–5. See also the \$10 note case, *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, discussed further below.
- 60 That is, outsiders moving in to an area to take advantage of a situation which they believe will yield them gain of some nature.
- 61 See also the film *Copyrites*, produced and directed by Cathy Eatock and Kim Mordaunt (Australian Film Finance Corporation/Marcom Projects, 1997).
- 62 The most commonly cited government reports include: Commonwealth Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (1981); Commonwealth Attorney-General's Department, above n 10; Janke, above n 3; Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, above n 3. The academic literature on this subject is extensive.
- 63 See Department of Home Affairs and Environment, above n 62; Kamal Puri, 'Copyright Protection in Folklore: A New Zealand Perspective' (1988) 22(3) *Copyright Bulletin* 18; Michael Blakeney, 'Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law' (1995) 17 *European Intellectual Property Review* 442; Elizabeth Burns Coleman, 'Aboriginal Art and Identity: Crossing the Border of Law's Imagination' (2004) 12(1) *Journal of Political Philosophy* 20. For a refreshing alternative view see Sherman, above n 41.
- 64 See, eg, *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213.
- 65 Tony Davies, 'Aboriginal Cultural Property?' (1996) 14 *Law in Context* 1, 12.
- 66 [2001] FCA 61.
- 67 *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 240 (1991).
- 68 *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* [2001] FCA 61.
- 69 [2009] HCA 14.
- 70 *Nine Network Australia Limited v IceTV Pty Limited* [2009] HCA 14.
- 71 Kathy Bowrey, 'Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65; Kathy Bowrey, 'The Outer Limits Of Copyright Law – Where Law Meets Philosophy And Culture' (2001) 12(1) *Law and Critique* 1. But note *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, which affirmed the need for identification of the author of the expression.
- 72 Significant problems, however, relate to past documentary exercises, which can result in the non-Indigenous 'discoverers' and archivists claiming to own the records. See Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas are Being Advanced?' (2009) 18(4) *Social and Legal Studies* 1.
- 73 *WIPO Performances and Phonograms Treaty*, 36 ILM 76 (1997) (adopted 20 December 1996).
- 74 See Kimberlee Weatherall, "'Pretend-y Rights": On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Lost Out' in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law: Volume 3* (2006) 171.
- 75 See Antony Taubman, "'Nobility Of Interpretation": Equity, Retrospectivity and Collectivity in Implementing New Norms For Performers' Rights' (2005) 12 *Journal of Intellectual Property Law* 351.
- 76 *Copyright Act 1968* (Cth) ss 22, 84.
- 77 Matthew Rimmer, 'Robbery Under Arms: Copyright Law and the Australia–United States Free Trade Agreement' (2006) 11(3) *First Monday* <<http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/1316/1236>> at 16 January 2010.
- 78 See Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006*, Australia Council (2006) <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/

- indigenous_arts/submissions/sub38att3.pdf> at 15 January 2010; Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, above n 3.
- 79 Courtney Jung, '“Indigenous” is the New “Peasant”: The Struggle for Political Identity in the Neo-Liberal Age' (2003) 70(2) *Social Research* 433.
- 80 Commonwealth Attorney-General's Department, above n 10.
- 81 Stuurman, above n 49.
- 82 For a criminological perspective on art fraud see Christine Alder and Kenneth Polk, 'Examining Claims of Fraud and Deception in Australian Aboriginal Art' (2004) 9(2) *Art, Antiquity and Law* 117.
- 83 Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (2006) 21.
- 84 Indigenous Art Inquiry, above n 1, 153.
- 85 See National Association for the Visual Arts, *Submission by the National Association for the Visual Arts (NAVA)* (2006) <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub27.pdf> at 15 January 2010; Arts Law Centre of Australia, *Submission to the Inquiry into Australia's Indigenous Visual Arts and Craft Sector* (2006) 11, 14 <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub36.pdf> at 15 January 2010; Janke and Quiggin, *Indigenous Cultural and Intellectual Property*, above n 78, 3; Arts Law Centre of Queensland, *Submission to the Inquiry into Australia's Indigenous Visual Arts and Craft Sector* (2006) 3 <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub45.pdf> at 15 January 2010. See also above n 78.
- 86 Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, above n 3, 456.
- 87 *Yumbulul v Reserve Bank of Australia*, (1985) 21 IPR 481, 490 (French J).
- 88 Ibid.
- 89 Tina Baum et al, *Submission to the Inquiry into Australia's Indigenous Visual Arts and Craft Sector* (2006) <http://www.aph.gov.au/SEnate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/submissions/sub42.pdf> at 16 January 2010.
- 90 Sherman, above n 41, 122.
- 91 See Bowrey, 'Alternative Intellectual Property?', above n 71.
- 92 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.
- 93 Ibid 531.
- 94 See ibid; Bowrey, 'The Outer Limits Of Copyright Law', above n 71.
- 95 Indigenous Art Inquiry, above n 1, 127 (recommendation 16).
- 96 For trade practices litigation see *Milpurruru v Indofurn Pty Ltd* (1995) 30 IPR 209; Simon Etherington, '“Aboriginal” Style Art' (2003) 5(24) *Indigenous Law Bulletin* 18; ACCC, 'ACCC Concludes Aboriginal-Style Souvenir Proceedings' (Press Release, 6 May 2004).
- 97 See Leanne Wiseman, 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity' (2001) 23(1) *European Intellectual Property Review* 14.
- 98 Indigenous Art Inquiry, above n 1, 122–3.
- 99 Hence the rejection of the Aboriginal branding, especially by many urban artists. See Ian McLean, 'One Mob, One Voice, One Land: Lin Onus and Indigenous Postmodernism' in Margo Neale (ed), *Urban Dingo: The Art and Life of Lin Onus, 1948–1996* (2000) 41, 41–3.
- 100 Indigenous Art Inquiry, above n 1, 124–5.
- 101 See Anderson, above n 56.
- 102 Indigenous Art Inquiry, above n 1, 157 (recommendation 24).
- 103 *Copyright Act 1968* (Cth) s 124.
- 104 *Copyright Act 1968* (Cth) s 248SA.
- 105 *Nokia Corporation v Truong* [2005] FCA 1141.
- 106 *Microsoft Corporation v PC Club Australia Pty Ltd* [2005] FCA 1522.
- 107 *Copyright Amendment (Parallel Importation) Act 2003* (Cth).
- 108 *Copyright Act 1968* (Cth) ss 126A, 126B, 128.
- 109 *Microsoft Corporation v PC Club Australia Pty Ltd* [2005] FCA 1522, [257].
- 110 See, eg, ibid [7], [48], [52], [53], [185], [282].
- 111 *Milpurruru v Indofurn Pty Ltd* (1995) 30 IPR 209.
- 112 *Microsoft Corporation v PC Club Australia Pty Ltd* [2005] FCA 1522, [218].
- 113 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2004] FCA 183; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.
- 114 *A&M Records Inc v Napster Inc*, 114 F Supp 2d 896 (N D Cal 2000); *A&M Records Inc v Napster Inc*, 239 F 3d 1004 (9th Cir 2001); *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 259 F Supp 2d 1029 (CD Cal 2003); *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 545 US 913 (2005).
- 115 *Copyright Act 1968* (Cth) s 101(1A).
- 116 *Copyright Act 1968* (Cth) s 112E.
- 117 For further discussion of the changes to corporate structures behind Kazaa as a response to copyright litigation aimed at curtailing operations, see Matthew Rimmer, 'Hail to the Thief: A Tribute to Kazaa' (2005) 2(1) *University of Ottawa Law and Technology Journal* 173.
- 118 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.
- 119 Dawn C Chmielewski and Charles Duhigg, 'Kazaa Settles Piracy Suits', *Los Angeles Times* (online), 28 July 2006 <<http://articles.latimes.com/2006/jul/28/business/fi-kazaa28>> at 16 January 2010.
- 120 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

- 121 Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 2(56) *Aboriginal Law Bulletin* 5.
- 122 *Nokia Corporation v Truong* [2005] FCA 1141.
- 123 See Gary Edmond (ed), *Expertise in Regulation and Law* (2004); Gary Edmonds, 'Specialised Knowledge, the Exclusionary Discretions and Reliability: Reassessing Incriminating Expert Opinion Evidence' (2008) 31 *University of New South Wales Law Journal* 1.
- 124 Gary Edmond, 'Thick Decisions: Expertise, Advocacy and Reasonableness in the Federal Court of Australia' (2004) 74 *Oceania* 190.
- 125 *Fendi Adele SrL v Friedland* (2003) AIPC 91-836, cited in *Nokia Corporation v Truong* [2005] FCA 1141, [21].
- 126 Jason Bosland, Kimberlee Weatherall and Paul Jensen, 'Trade-Mark and Counterfeit Litigation in Australia' (2006) 4 *Intellectual Property Quarterly* 347.
- 127 Indigenous Art Inquiry, above n 1, 117 (recommendation 15).
- 128 Ibid 157 (recommendation 25).
- 129 Collective trade marks can be exclusively used by particular members of the organisation which owns them, while certification marks indicate the origin, material or mode of manufacture of products and evidence the existence of agreements between manufacturers and nationally accredited testing and certification organisations.
- 130 The ACCC has shown an interest in this area in the past, but has had difficulties with enforcement. See generally Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' (2004) 3 *Indigenous Law Journal* 139.
- 131 Margaret Chon, 'Marks of Rectitude' (2009) 77(1) *Fordham Law Review* 101; Margaret Chon, 'Intellectual Property Borderlands: Marks of Rectitude (Coda)' (Paper presented at the ISHTIP Workshop, Università Bocconi, Milan, Italy, 26–27 June 2009).
- 132 At least where public companies are involved in the supply chain. See Justine Nolan, 'With Power Comes Responsibility: Human Rights and Corporate Accountability' (2005) 28 (3) *University of New South Wales Law Journal* 581.
- 133 Cf early copyright cases where non-Indigenous experts were relied upon to support Indigenous evidence. See Davies, above n 65; Colin Golvan, 'The Protection of *At the Waterhole* by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights' in Andrew Kenyon, Megan Richardson and Sam Ricketson (eds), *Landmarks in Australian Intellectual Property* (2009) 191.
- 134 The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (commonly known as the 'IGC') failed to reach a consensus on support for a treaty in 2009. However, agreement was reached in October 2009 on a new mandate to continue the work of the IGC.
- 135 Examples include those of media and arts organisations, arts and education funding bodies, libraries and archives, universities and civil society groups. There is an excellent overview at Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, above n 3, 484.
- 136 The *Copyright Amendment Act 2006* (Cth) (in pt V, div 5) introduced 'on the spot' fines aimed at shutting down low-level offenders selling infringing goods at street markets.