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

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INTRODUCTION

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

Given the fluidity between local and global intellectual property strategies, it is increasingly important to discuss the broader national political contexts that give rise to new intellectual property directions, as these tend to involve quite specific agendas.¹ Whilst there may be intersections in how these politics are generated and played out within local and global spaces, distinct political rationalities produce alternate understandings of the problems that intellectual property rights are being employed to 'solve'. This is, in part, due to the range of interest-holders involved in interpreting these problems and their solutions.² It is also due to inherent difficulties with the translation of evolving cultural discourses into the categorical terms of the law.³

Within each nation state multiple subjectivities respond and interact with the circularity of local and global engagement. The presumption that power is vested in nation states, as bounded entities, contains a misunderstanding concerning the dynamics internal to these same states, for

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

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

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

such individual subjectivities are intrinsic to the complicated relays, dispersions and resistances of power found in these national spaces. As Sarat and Simon have noted,

realist legal studies almost always operate within a political body, usually the nations, although this body is not often itself an object of realist analysis. The boundaries and exclusions wrapped up in this national frame are made up not just of its political borders, but also of its racial, cultural and linguistic embodiments.⁴

It is these embodiments and their representations that offer the opportunity of understanding differentiation within any specific country. ‘Citizens’ tend to make difficult legal subjects⁵ because there is no certainty in how individuals relate to the law – ‘some are ignorant about legal matters, some disinterested, some are “too” interested, ... wanting to test legal limits and use legal venues to gain some strategic advantage’.⁶ For my purposes here, a discussion of legal subjects also provides an important insight into localised developments in intellectual property, for instance, the cultural and political factors that both inform national approaches and make such approaches problematic.

This paper considers the interrelation of these issues in the context of the recent development in Australia of the draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth). The draft Bill has been posited as a solution to the issue of community ownership which was noted as a point of concern in earlier copyright cases.⁷ However, within the Australian context, the emphasis on ‘community’ and communal ownership presents considerable difficulties for the utility of this approach. Simply put, the differing needs, articulations, political representations and definitions of Indigenous ‘communities’ within Australia seriously compromise a singular legislative solution to the issue of community rights. Indeed, this issue raises important questions about how Indigenous peoples’ needs have been constructed and are represented, and how these representations influence national and international attention to developing strategic approaches for protecting Indigenous knowledge through intellectual property law. It also prompts discussion about the deployment of the term ‘community’ within

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

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

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

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

neo-liberal frameworks of governance: for example whether the attraction of these zones is in their apparent naturalness and, importantly, what kind of new political and legal subjectivities are being visualised and mobilised and with what effects.⁸

THE AUTHORITY OF THE AUSTRALIAN EXPERIENCE

The concept of ‘Indigenous intellectual property’ is not an ahistorical category to which law responds.⁹ Instead it has been produced by a variety of factors. In Australia it is a product of cultural sensitivities, changing political environments, governmental intervention through strategic reports and innovative instances of individual agency. These domestic experiences of identifying the problem of Indigenous knowledge and intellectual property, and judicially determining outcomes in terms of copyright protection for Aboriginal art, also feature as significant developments in international discussions of intellectual property and Indigenous knowledge.¹⁰

The framework of action within Australia was developed in *parallel* to the international efforts to grapple with the subject. Yet the local experience provided the initial examples of differentiation of Indigenous intellectual property issues.¹¹ A particular and unique issue (the copying of imagery from North-East Arnhem Land onto tea towels) contributed to an identification of the ‘problem’ – that imagery may be copied and used in unauthorised and inappropriate ways. This identification led to the development of strategies whereby the needs and expectations of Indigenous people in relation to this type of problem, and as a special class of legal subjects, could be interpreted, managed and remedied.

⁸ Nikolas Rose, *Powers of Freedom: Reframing Political Thought* Cambridge University Press: United Kingdom (1999) 167-196.

⁹ See Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* (D Phil Thesis, University of New South Wales, 2003).

¹⁰ In terms of international discussion I am referring particularly to those engaged by the World Intellectual Property Organisation. See *Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, World Intellectual Property Organisation, 3rd sess, WIPO Doc WIPO/GRTKF/IC/3/1–17 (2002); Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* World Intellectual Property Organisation (2003), <http://www.wipo.org.int/tk/en/studies/cultural/minding_culture/studies/finalstudy.pdf> at 16 October 2004. For another instance of Australia’s experience being used as an example, see Amina Para Matlon, ‘Safeguarding Native American Art by Partnering Tribal Law and Equity: Applying *Bulun Bulun* to Navajo Sandpainting’ (2004) 27 *Columbia Journal of Law and the Arts* 211; Hugh Hansen et al, ‘Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources – Symposium: Global Intellectual Property Rights: Boundaries of Access and Enforcement’ (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 753.

¹¹ The case *Bulun Bulun v Nejlam Pty Ltd* (Unreported, Federal Court of Australia, Olney J, 29 March 1989) was written up in the *European Intellectual Property Review* and thus received both national and international coverage: see Colin Golvan, ‘Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun’ (1989) 10 *European Intellectual Property Review* 346.

Though it is an area that has been the subject of very scant, if not negligible research, it is generally assumed that Australia lacks a distinctive history in the emergence of intellectual property law. However, the Aboriginal art copyright cases constitute a ‘moment’ in the emergence of intellectual property jurisprudence within Australia, which has exerted considerable influence internationally.¹² The development of an intellectual property approach to Indigenous subject matter, consolidated in case law, and more recently in legislative initiatives, positions Australia at the forefront internationally in this area. This is the case in regards to an interpretation of what the problem is, the identification of the problem as cultural/legal, and the proposal and development of legislative remedies. Australia has generated a significant amount of expertise in the area of copyright and Indigenous knowledge – both in mediating the rights of Indigenous people and in securing some tangible outcomes.¹³

THE DEVELOPMENT OF COMMUNAL MORAL RIGHTS

Towards the end of the 1999 parliamentary debate on Australia’s introduction of a moral rights Bill as an amendment to the *Copyright Act*, Senator Aden Ridgeway (the only Indigenous member of the Senate) introduced the proposal that Indigenous communities should be provided with special communal moral rights within the legislation. Whilst this proposition was rejected (explained as bad timing, in that the Parliament would not have sufficient time to consider and debate the proposal), the Government did signal its commitment to developing a framework that would recognise the communal rights of Indigenous people within law.¹⁴

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

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

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

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

The Coalition will take steps to protect the unique cultural interests of Indigenous communities and the cultural works that draw upon communal knowledge in conjunction with relevant Indigenous arts groups and ATSIC. Amendments to the moral rights regime will give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.¹⁵

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

Indigenous communities will be able to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material under new legislation proposed by the Government. Amendments to the *Copyright Act*, to be introduced into Parliament later this year will give Indigenous communities legal standing to safeguard the integrity of creative works embodying community knowledge and wisdom.¹⁶

In mid-December 2003 copies of the draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 were distributed for comment. The Attorney-General, Philip Ruddock, made a point of explaining how copyright law extended beyond purely economic considerations, in that it could play a vital role in fostering and protecting our Indigenous and cultural heritage: ‘the protection of Indigenous culture depends upon strong and effective copyright laws’.¹⁷

It should be acknowledged at the outset that moral rights do not provide ownership rights per se. In Australian law they involve the right of attribution of authorship;¹⁸ the right not to have authorship of a work falsely attributed;¹⁹ and the right of integrity of authorship of a work attributed.²⁰ However, a precondition is that ‘only individuals have moral rights’.²¹

Unlike the automatic nature of moral rights for individual authors and creators, the draft Bill proposes five formal requirements that must be met before a community could claim Indigenous communal moral rights. First, (as per the existing moral rights legislation) there must be copyright subject matter – literary, dramatic, musical or artistic works and cinematograph films (sound recordings are excluded). Second, the work must draw on the particular body of traditions,

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

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

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

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

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

20 *Copyright Act 1968* (Cth) s 195AI.

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

observances, customs or beliefs held in common by the Indigenous community. Third, an agreement must be entered into between an Indigenous community and the creator of the work (the copyright holder). This is a voluntary agreement, which could be oral in nature. The presumption here is that at the time of executing a work the individual artist will first attend to their legal affairs and formally consider the question of communal moral rights management, presumably in anticipation of commercial potential in the reproduction of the work. Since Indigenous communal rights cannot exist without this agreement, the onus is on the Indigenous people and communities to initiate contact and negotiation with those parties, such as other artists, film-makers, broadcasters or corporate organisations, who may have an interest in the work. There is an implicit presumption that the community will know, or will find out, possibly through the benevolence of the owner/creator, that a work is being created that draws upon that community's 'traditions, customs or practices'. Fourth, there must be an acknowledgement of the Indigenous community's association with the work. Finally, interested parties in the work need to have consented to the rights arising, and this consent must be provided through written notice. There is no clarification in the legislation of who constitutes an 'interest holder'. All of these requirements must be met before the first dealing with the work, otherwise no rights arise.

From a practical perspective, the presumption of action implicit in the draft Bill is that communities will enter formal agreements. This does not take into account difficulties of language access, legal translation and legal mediation. As *Yumbulul v Reserve Bank of Australia*²² aptly demonstrates, acknowledging and understanding contractual obligations can be a cause of substantial conflict between parties. With difficulties in basic service delivery for remote and rural communities, it is important to recognise the extent to which accessing legal advice on copyright matters will be a substantial challenge for the communities that are the target of the draft Bill.

The draft Bill presents serious practical obstacles for Indigenous people and communities seeking to protect their knowledge and its use. The onus is upon the Indigenous people and communities to initiate contact and negotiation with those interested parties intending to utilise their art for commercial purposes, rather than vice versa as might be expected. This ignores the remoteness of rural communities. Making Indigenous people and communities responsible for contracts and agreements forgets the difficulties that these communities have accessing legal

²² (1991) 21 IPR 481. While the case was initially about the use of Yumbulul's Morning Star Pole design by the Reserve Bank of Australia on the bicentennial 10 dollar note, it was revealed to be predominantly a dispute over contractual authority and the rights that Yumbulul believed he still retained in his work as opposed to those he had assigned.

advice. If we remember that English is not the first or in some cases even the second language of many Indigenous communities, the terrain which this Bill intends cross appears increasingly difficult.

Such practical problems of language and access should alert us to the difficulties of legislating solutions to complex social issues. We should be more attentive to the tendency in law making communities to assume that the most important issues revolve around what the law says rather than the effects of the law. The playing field is not level and it should not be assumed that Indigenous people have the same opportunity to access law as big businesses and companies do. The point worth reflecting upon is, if people can't understand the law that has been designed for them, how are they supposed to use it – and how will it deliver better protection for Indigenous peoples' cultural knowledge.

The draft Bill imposes serious conditions upon how and when Indigenous communal rights will be recognised within the law – to the extent that it is very unlikely an infringement would ever arise. This raises serious concerns about the motivation of the draft Bill that purports to do one thing, but actually does quite the opposite.

Hypothetically speaking, under the draft Bill, Indigenous communal moral rights would not have been recognized in any of the copyright infringements that constitute Australian jurisprudence in this area²³ nor the other instances of appropriation that have raised concerns for better protection of Indigenous cultural expression (for instance: the Eddie Burrup artwork by Elizabeth Durack; *Mutant Message Down Under* by Marlo Morgan; and, the artwork of Satchi Amyettere).²⁴ In several of these cases, the artist or creator would not have entered into an agreement with a community (and in the draft Bill this is very much the prerogative of the artist or creator) and in other instances, the only time the community was made aware of the infringement was when the work was already on sale. Even in the second *Bulun Bulun* case, *Bulun Bulun v R&T Textiles*²⁵ – the closest to recognizing communal rights via fiduciary duty – the Ganalbingu people only knew about the infringement when the fabric containing Bulun

²³ *Yanggarrny Wunungmurra v Peter Stripes* (1983) Federal Court, unreported; *Bulun Bulun v Nejlam Pty Ltd*, (1989) Federal Court, unreported; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurruru v Indofurn Pty Ltd* (1994) 30 IPR 209; *Bulun Bulun v R and T Textiles* (1998) 41 IPR 513.

²⁴ Stephen Gray considered these three examples in more depth: S. Gray, "Black, White or Beyond the Pale: The Authenticity Debate and Protection for Aboriginal Culture" (2001) 15 *The Australian Feminist Law Journal* 105.

²⁵ *Bulun Bulun v R and T Textiles* (1998) 41 IPR 513.

Bulun's artwork *Magpie Geese and Waterlilies at the Waterhole* was brought back from a shop in Darwin.

The draft Bill is illustrative of the persisting conflict between modern social theory and positivist legal approaches to particular problems. There is a tendency in law making communities to assume that the most important issues revolve around what the law says, rather than the effects of the law.²⁶ This is contrary to how academics and academic lawyers understand law and legal processes as significantly impacting upon cultures and cultural production – and often reflecting quite specific agendas. For critical legal scholars it is not easy to divorce the creation of a specific law from the application and practical utilization of that law by those whom it is purportedly for. Thus practical questions must be raised, directed primarily at how this law would be used, who could access it and through what means. These are crucial questions that are integral to the development of solutions that are amenable to all stakeholders.

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

The inevitable engagement of practical cultural functions in law is, in part, due to the difficulty of people being conceived as stable legal subjects when, in fact, they do not necessarily behave in a predictable manner for law or governance. Thus, one of the difficulties for law is that it must constantly deal with the complexity of individuals and how they perform as legal subjects. In short, there is no certainty in how individuals relate to the law. These observations are also relevant when talking about Indigenous communities, which are made up of individuals upon whom the law exerts influence. Each community will act differently before the law, and will also challenge the law's ability to respond subjectively to elements that are unique to particular communities and individuals. As Peters-Little reflects, 'Aboriginal people are individuals and

²⁶ See Kathy Bowrey, *Law and Internet Cultures* (CUP, forthcoming)

need to be respected as such and not pressured into thinking that they are speaking on behalf of a race, community, organisation and doctrine, which I usually find is a relief for many'.²⁷

Beyond these practical problems with the draft Bill, there are larger, more substantial concerns with legislating for community rights. On one level, these are obviously related to difficulties with definition and the inherent instability of 'community' as a legal object. On another level, they concern the increasing tendency to deal with Indigenous differences before the law, especially intellectual property law, in terms of community relief.²⁸ The rationale behind the draft Bill presumes that there is no substantial problem in making 'community' a legal object. This is so despite other areas of law being overrun by disputes about community. For instance, in the native title claim in *Yorta Yorta Aboriginal Community v Victoria*,²⁹ a fundamental tension revolved around whether the Yorta Yorta people were the same community of people who had demonstrated continuity with customs and traditions that had survived British sovereignty. Indeed, native title provides an excellent illustration of the difficulties in the codification of community – this is not only in relation to problems of legal definition and identification, but also the effects that these legal processes of codification have on communities, individuals and the resulting social and political relations. Alternatively, the cases regarding the construction of the Hindmarsh Island Bridge demonstrate the divisions that can exist within a community, and the politics of representation, in terms of who can speak, and to whom, as well as who can be a party to certain types of knowledge.³⁰ With such recent examples, surely intellectual property law cannot be naïve about the reality of difficult and often political intersections that inform communities. Moreover, it is also worth reflecting upon the role that legislation and governmental policy has had in formulating concepts of Aboriginal 'communities' and their contemporary social organisation, geographical boundaries and cultural identities.³¹

The politics of community arise precisely because communities are not static or bounded, but instead are dynamic and fluid. Communities come together for different purposes and in different contexts; they split, coalesce or develop over time. The point here is that there is no clear consensus about the markers to be used in identifying a community or membership of a

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

28 This is also reflected in sui generis proposals.

29 (2002) 214 CLR 422.

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

31 Peters-Little, above n 41, 4.

community. The intense politics that surround the term make its very use open to contest and dispute. Communities are notoriously difficult to define, as the abstract identification is likely to bear little resemblance to the practical social reality at a given space and time. “‘Community’ is ... locally and situationally constructed. From this perspective, communities can be imagined and enacted as spaces of indeterminacy, of becoming.”³² The key point being that the category of ‘community’ is anything but stable and is thus a difficult notion upon which to rest legislative remedies.

CULT(URE) OF THE COMMUNAL

The translation of the ‘problem’ of protecting Indigenous knowledge into a Western context of intellectual property has generated particular demands on this body of law. Indigenous claims have raised differing concerns and these have manifested themselves primarily through issues of ownership.³³ Commentators on the nature of Indigenous knowledge always emphasise its collective character thus leading to the assertion that in an Indigenous context, intellectual property rights must accommodate group rights.³⁴ The lack of clarity in how to respond to differences between individual ownership and communal ownership has forced the law to consider a world beyond its cultural borders. This process has been extended by academic writing and the litigants themselves who insist that these issues be addressed.³⁵

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

32 Nikolas Rose, *Powers of Freedom: Reframing Political Thought* at 194.

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

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

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

[w]hile fully cognisant of difficulties of assigning rights, advocates of [intellectual property rights] for indigenous peoples in resting their case on traditional knowledge rest it on collective possession. By conserving their cultural base, it is argued, people will have a core around which they will adapt for the future.³⁶

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

As other commentators have also noticed, questions of (cultural) identity are increasingly being brought within the intellectual property discourse.³⁷ Inescapably, in discussions about intellectual property and Indigenous knowledge, 'culture' has come to occupy a central political position.³⁸ This position of 'culture' illustrates nicely Sarat and Simon's recent observation of the 'turn to culture' within law.³⁹ Law has been forced to reflect upon its own historical contingencies through the emergence of specific cases where claims of legal remedy also incorporate arguments regarding cultural identity.⁴⁰ Concern for collective ownership, as a key characteristic of Indigenous knowledge and hence representative of the problems of protecting this subject matter, functions as an identifier of difference. For collective ownership helps establish limits between what is understood to be Indigenous knowledge and what is not, what is within the competence of intellectual property law and what is not. But as collective ownership relies heavily upon a construction of 'community' this raises corresponding concerns. As Frances Peters-Little explains,

[t]he concept of community invokes notions of an idealized unity of purpose and action among social groups who are perceived to share a common culture. To some extent, 'community' and 'culture' are treated as synonymous, rather than principles operating at different levels of social realities. Indigenous culture is therefore seen to define Indigenous community. This, of course, is not so.⁴¹

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

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

38 See, eg, Michael Brown, *Who Owns Native Culture?* (2003); Michael Brown, 'Can Culture Be Copyrighted?' (1998) 39 *Current Anthropology* 193; Greene, above n 1.

39 See Sarat and Simon, *Cultural Analysis, Cultural Studies and the Law*, above n 4.

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

41 Peters-Little, "'The Community Game'" above note 27 at 4.

In a corresponding way, interpretation of Indigenous knowledge in intellectual property law is dependent upon a specific construction of Indigenous culture. This occurs in relation to how Indigenous knowledge is conceived but also, importantly, how it is differentiated within a legal discourse. In Australia, like elsewhere, there has been a tendency to imagine Indigenous ‘culture’ in its singularity despite the myriad of experiences integral to knowledge and cultural production.⁴² This means that Indigenous issues relating to intellectual property are conceived as being relatively homogenous – that is, different from standard intellectual property issues but the same in their identification as ‘Indigenous’. This is also perpetuated in the academic writing on the cases, which fails to point out the specific and unique characteristics of the particular intellectual property cases, for example, that they evolved in North-East Arnhem Land in northern Australia where the specific communities have a unique history in relation to law, legal mediation and legal strategies.⁴³ This allows little room for differentiation within the ‘Indigenous’ category. As Helliwell and Hindess have observed,

concepts denoting unities that are both ideational and systematic serve the dual role of inscribing ideational *sameness* within a population, and *difference* between one population and another ... [however] a stress on sameness or homogeneity is at the expense of the recognition of the disorder that can also be observed within a society or culture, and of the ideational diversity pertaining between its members.⁴⁴

Political differences experienced at a local, regional or national level are seldom articulated within the Australian discourse on intellectual property. For instance, what might be a workable strategy in one community or region of Australia is often inappropriate for another.⁴⁵ This can be due to differing social and cultural circumstances, alternative interpretations of the issue and challenges in terms of representation. Whilst national legislation cannot necessarily be attuned to site and locale differences, it is nevertheless ironic that it is precisely these differences, which in themselves are highly political, that will undermine the efficacy of legislative strategies relating to Indigenous people.

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

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

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

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

To some degree, political and cultural contexts are rendered explicit in the identification of Indigenous subject matter within intellectual property frameworks. The debates about terminology remind us that politics is never far away from these discussions. But rather than finding a stable legal object, the recognition of explicit 'cultural' components also influences perceptions of the incompatibility of the subject matter. This is not a problem for those comfortable with poststructuralist deconstruction and cultural approaches to law. However, in the case of Indigenous knowledge, the interest in the concept of the 'Indigenous' exceeds that particular discursive legal framework. For the more traditional legal scholar, the lack of stability and universality in the legal object creates an unhappy tension. Under such circumstances, 'cultural' politics within the 'Indigenous' category are underplayed so that attempts to manage the legitimacy of the broader negotiation of cultural inclusion, within the law's established terms, can be effected. It is this interplay between acknowledging the cultural politics and reducing them that characterises the position of Indigenous knowledge within both Australian and global systems of intellectual property.

The attention directed to international forums for outcomes is often turned directly back to national initiatives. This is as much a deferral of the issue internationally as it is a recognition of the intricacy that the subject generates in each distinct and diverse locale. Relations of power and resistance are mutually engaged in the process, whereby the difficulty of the subject is both realised and minimised: realised in the emphasis on the need for national initiatives (and hence the differing politics) and minimised through the displacement of internal politics for the global intellectual property dialectic.

CONCLUSION

As images of Indigenous people and communities are constructed in national and international intellectual property forums, so too are Indigenous peoples' needs and expectations. In many cases these are set against the current intellectual property framework. This is most noticeable in the insistence of communal ownership versus individual ownership arguments.⁴⁶ The search for a differential creates a binary that masks the fluidity between these categories. The unity and agreement assumed of 'community' is problematic given the extent to which, in Australia at least, communities are far from neat linear models, but rather exist as contested spaces with dynamics

⁴⁶ See, eg, Blakeney, 'Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions' (1998) 1 *Journal of World Intellectual Property* 985; Rachael Grad, 'Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia' (2003) *Duke Journal of Comparative and International Law* 203.

that expose multiple positions and levels of agency and action. Thus it is important to encourage reflective critique of the range of interests and actors within communities and recognition that these shape decision-making processes.⁴⁷ Whilst the communal versus individual binary may appear to establish a starting point in considering the inclusion of Indigenous interests within the intellectual property discourse, it actually diverts attention away from the inherent social and cultural complications informing the law. The problem comes to be presented as one of clear sociological and ontological otherness. Inevitably there is a failure to account for those Indigenous people who do not necessarily identify with distinct communities, let alone with the internal politics confounding identification of the spatial unit that could be named as a 'community'. The focus on the community versus individual ownership issue as the locus of the intellectual property and Indigenous knowledge problem relegates the diverse dynamics and relationships of control and ownership within Indigenous social and political contexts to the margins. It excludes recognition of Indigenous people as 'individual' owners and at the same time it removes interrogation of the law's own processes of categorisation and identification.

Indigenous people are invited participants when they affirm the legitimacy of the discourse to account for what Indigenous people want and how they expect the law to function. In this sense the authority of the law is maintained in intellectual property forums and Indigenous perspectives are incorporated when they confirm the authorised conception of the problem and the nature of the proposed corresponding solution. The dynamics of these relations of power mean that Indigenous participants are included when they comply with particular assumptions about the legal nature of the problem and the legal discourse governing future solutions.

There are often diverse sets of politics that underpin both national and global developments in intellectual property law. Thus the point of this paper has been twofold: to highlight the internal national politics imbued within the development of a communal moral rights Bill, and to bring to the fore of international discussions particular localised contexts where meaning, expectation and anticipation remain fluid and contested. Without giving attention to these elements, there remains a danger of replicating ineffective remedies that appear influential and pander to the rhetoric at international levels, but are practically unusable because they remain based on imagined communities that bear little resemblance to the actual communities to which they are directed.

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

Thus a central challenge for intellectual property law remains grasping the changing dynamic of Indigenous differentiation and adequately accounting for the moments of locality.

Practising the politics of cultural inclusion in global intellectual property frameworks necessitates the recognition of the political and cultural contexts in which people make claims, identify needs, and generate expectations. In treating Indigenous people and Indigenous needs and expectations as wholly different from those experienced by other stakeholders, a categorisation of Indigenous knowledge as ‘traditional’ knowledge is made possible. In this sense the subject ‘Indigenous knowledge’ is produced in such a way as to allow for global systems of management to be endorsed. This is at the expense of appreciating the differences between Indigenous people, their expectations of intellectual property law and the political dimensions that are inherent to the identification of the legal category of ‘Indigenous knowledge’.