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Accessorising Aboriginality: Heritage Piracy and the Failure of Intellectual Property Regimes to Safeguard Indigenous Culture

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Abstract
The cultural symbols we trade in and use to shape identity have discursive significance attached to them. Dominant norms of imperialist appropriation, product fetish and Western consumer capitalism do not provide the only source of these meanings. Indigenous claims to 'cultural capital' pose a direct challenge to hegemonic cultural practice and its associated exploitation of the Other. Cultural production and appropriation are located within discourses of contested meaning. In this paper, the contingent meanings attached to cultural symbols and signifiers will be examined in relation to indigenous claims for protection of intangible property rights within Australia's Intellectual Property regime.

Keywords
intellectual property, indigenous culture

Cover Page Footnote
Ms Meddin was a third year law student at Murdoch University and was employed as a research assistant to Dean Kendall. This work was a collaborative effort which, sadly, was unfinished before Ms Meddin died tragically in July 2003. Dean Kendall has completed the paper and any errors are entirely his own. This paper is a testament to Ms Meddin's commitment to equality and justice. She will be deeply missed by all who knew her. This paper could not have been finished without the intellectual efforts of Mr Mark McAleer and Mr Adam Jardine, both law students at the time of writing.

ACCESSORISING ABORIGINALITY: HERITAGE PIRACY AND THE FAILURE OF INTELLECTUAL PROPERTY REGIMES TO SAFEGUARD INDIGENOUS CULTURE

By Christopher N Kendall and Sarah Meddin***

Introduction

> There seems to be some fascination
> with writing about Aboriginal people,
> with stealing the designs of Aboriginal people.[1]

Our consumer and cultural *Self* is changing. Mass communication and wholesale dissemination of cultural imagery is the norm of contemporary Western bureaucracy. The market produces its own culture,[2] which is supported and transformed by popular culture. We are saturated with imagery, narratives and symbols. We know what value to ascribe to property and wealth. Our ideal *Self* is constantly being reflected back to us. We know what to wear, where to eat, what car the Joneses are driving and, in short, receive our collective desires encoded as consumer needs.

The cultural symbols we trade in and use to shape identity have discursive significance attached to them. Dominant norms of imperialist appropriation, product fetish and Western consumer capitalism do not provide the only source of these meanings. Indigenous claims to 'cultural capital' pose a direct challenge to

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1 Fay Nelson, Acting Director of the Aboriginal and Torres Strait Islander Arts Board of the Australia Council, 'Copyright & Ownership', paper presented at the Aboriginal & Torres Strait Islander Arts Board of Australia Council, DARE National CCD Conference, 1997, available online @ www.orca.on.net/dare/nelson.html.

2 A culture in which the individual *subjectivity*, its moral, social and economic value, is defined exclusively by reference to its ability to support and reinforce the market – a culture of commodification.

hegemonic cultural practice and its associated exploitation of the *Other*. Cultural production and appropriation are located within discourses of contested meaning. In this paper, the contingent meanings attached to cultural symbols and signifiers will be examined in relation to indigenous claims for protection of intangible property rights within Australia's Intellectual Property (IP) regime.

We will begin by looking at the meanings some traditional indigenous groups attach to their own cultural production and will seek to highlight indigenous concepts of continuity and change in relation to their collective cultural 'wealth'. Autonomous indigenous paradigms of regulation and transmission (such as customary law) will be used to define the notion of cultural exchange within indigenous cultures. Traditional Western IP regimes will then be examined as dominant discourses that have their roots in the colonial narratives of liberalism and Romantic individualism. The notion of Author as *Self* and its transposition into the discourses of copyright law will then be explored. The duality of *Self-Other* in traditional IP regimes will also be examined from the location of the *Other*. The production of meaning attached to non-Western *Others* will then be situated within discourses of systematic orientalism.

The intersection of Australian IP regimes and indigenous claims will be examined through the concept of cultural appropriation. Indigenous calls for protection of intangible property and their engagement with IP regimes will be constructed as sites of contested meaning calling for 'contingent histories of the object'.

Finally, we turn to the need for redefining the terms of the debate surrounding Aboriginal engagement with IP regimes. *Ruptures*[3] to the stability of the dominant discourses of IP will be explored with specific emphasis on notions of power, resistance and suggested reforms. The intersection between legal, social and political discourses will also be briefly explored as a means of expanding the framework of this debate.

The Significance of Indigenous Cultural Practice to Indigenous Communities

Fay Nelson notes that indigenous people identify by reference to their traditional homelands – their countries. 'Country' connotes the place (physically, spiritually and culturally) where indigenous people were 'given life to'.[4] Ancestral beings:

3 The term *ruptures* here is intended to carry its Derridean connotations; that is, as 'disruptions' to the 'structure' within which virtually all forms of officially recognised IP are located: see Jacques Derrida [trans Alan Bass], 'Structure, Sign and Play in the Discourse of the Human Sciences', in *Writing and Difference* (University of Chicago Press; 1978), 279.

4 Nelson, above n 1, 1 of 6.

> …divided the continent into those 500 or so separate Aboriginal countries and they taught Aboriginal people about who they were, where they belonged and who they belonged to.[5]

Traditionally, Aboriginal people did not compartmentalise their culture into 'little boxes', nor did they 'put religion aside for one… day of the week'.[6] Indigenous groups knew how their culture operated (how their culture was 'mixed up'[7]) because their parents transmitted and taught them this knowledge.[8]

Customary law preserved traditional knowledge. 'Arts and art practice was kept to customary law'.[9] This was, and continues to be, perceived as a means of '(keeping) to the teachings of the dreaming ancestors'.[10] Changes to art symbols and designs are not sanctioned. Change to art practice is only legitimately found in 'the movement of the hand and the brush'.[11] Cultural practice and transmission are not static within this model, but changes are subtle and complex. Change is seen in the wider context of preserving the dreamings.

McKeough and Stewart argue that 'the most enduring Aboriginal heritage is intangible'.[12] Aboriginal cultural heritage takes many forms, 'including images of the dreaming – of the ancestral past that is preserved in tribal lore and periodically recreated in artworks of various kinds (cave paintings, sand sculptures, facial and body painting etc).'[13] Such Aboriginal heritage and custom were crucial to the community's social cohesion, functioned as a means of dispute resolution, and '(provided) amusement and education'.[14] Artistic practice in the context of Aboriginal heritage acted as the community's 'social cement' and created invisible 'bonds that enabled social and spiritual contact'.[15]

Customary law provides a means of strictly controlling who has access to the use of certain images and information. Customary law functions as a way to maintain social boundaries between one community and another. Within

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5 Ibid.
6 Ibid, 2 of 6.
7 Ibid.
8 Ibid.
9 Ibid, 2 of 6. See also von Duossa J on complex customary law regulation of artistic practices: *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209 at 214-215, in Jill McKeough and Andrew Stewart, "Intellectual Property and The Dreaming', in Elliot Johnston QC, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996), 53-54.
10 Nelson, above, n 1.
11 Ibid.
12 Mckeough and Stewart, above n 9, 53.
13 Aboriginal heritage also functions to transmit "each community's oral history, the details of certain rituals and ceremonies, the music and dance sequences used at gatherings and knowledge of the natural environment inhabited by the community": Id, 53.
14 Ibid.
15 K Puri, "Cultural Ownership and Intellectual Property Rights Post *Mabo*: Putting Ideas into Action" (1995) 9 *Intellectual Property Journal* 295, 300, cited in McKeough and Stewart, above n 9, 53.

communities, customary laws enable differentiations in status, often based on age, gender, descendence and experience.[16]

If the system of access and use of traditional knowledge and imagery is infringed – for example, by an individual who uses this knowledge without legal sanction – 'it is the responsibility of the traditional owners to take action to preserve the dreaming and to punish those responsible for the breach'.[17] If an artist uses imagery in an appropriate manner, and a third party (even without the artist's knowledge) uses the artist's work in an unsanctioned manner, the artist is still responsible for the breach.[18]

Aboriginal cultural heritage and practice has significant intangible functions within Aboriginal communities. A further significance has now been attached to some artistic cultural practices – *economic*[19]. There has been an 'explosion of interest' in Aboriginal art in the 'past few decades', particularly in regard to tourism and the international collection of curios.[20] Positive economic outcomes for Aboriginal artists often bring much-needed infrastructure to some remote communities and can provide a significant source of non-public sector income to such communities.[21] Thus, the Western tendency to privilege the interests of recognised commercial actors in intellectual property law on the basis that IP is an 'economic rights system' has become highly questionable as a basis for denying indigenous claims.

The significance of cultural practice within Intellectual Property Regimes: the subjectivity of IP

Colonising themes in IP regimes

IP regimes, as has been noted, rest on the discourses of liberalism. They are informed by notions of 'possessive individualism'.[22] Narratives of possession find their roots in imperialism and 'discovery' of non-Western ('New') worlds.

16 McKeough and Stewart, above n 9**,** 53.
17 von Doussa J*, Milpururrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 215-15.
18 McKeough and Stewart, above n 9, 54.
19 This re-formulation of the significance of Indigenous culture is almost certainly an *affect* of the totalising disposition of the discourses of economic liberalism in Western society generally, but particularly as it is embodied, supported and reinforced by the institutions and practices of the law: the very society and system that Indigenous peoples, through the processes of colonisation, have been forced to reside "within".
20 Department of Aboriginal Affairs, *The Aboriginal Arts & Crafts Industry 1989* (Canberra: AGPS), 286 –7, cited in McKeough and Stewart, above n 9**,** 54.
21 McKeough and Stewart, above n 9**,** 55.
22 Rosemary J Coombe, "The Properties of Culture and the Politics of Possessing Identity", *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham: Duke University Press, 1998) 208, 209.

Possession for liberal subjects is inextricably linked with exploitation and disenfranchisement of indigenous cultures 'discovered' by Western travellers.[23]

Europeans who 'discovered' and colonised non-Western peoples created discourses of meaning in which to locate those they sought to subjugate. The *Other* was firmly located in European imagination[24] through systematic processes of stereotyping, derogation and dehumanisation. The notion of the 'discovered' people as *less than* European, of being primitively and repulsively *Other,* provided the impetus and support for colonial practices and policies designed to dispossess indigenous peoples from both tangible and intellectual property rights.[25]

Travel writers in the nineteenth-century often saw themselves as 'time travellers' looking for unchanged, archaic people. Writers described people they encountered in non-Western settings as 'savage' 'aliens'.[26] The 'other' was 'unfathomable' because the European traveller did not speak their language. Or, perhaps more importantly, *they* could not speak *his.* The traveller could penetrate this alien world – *he* who could 'truly learn their language will understand them'.[27] Within this context, the collection of non-Western artefacts and examples of *Other* cultural practice was seen as part of the author's 'journey into otherness that led to (voyages of discovery) (into) a forbidden area of the self'.[28] The literary epitome of this journey can be seen in Conrad's exploration into the 'Heart of Darkness'.[29]

Indigenous cultures were initially portrayed as diseased, illogical and superstitious, and hence 'ripe for civilisation'.[30] Some later nineteenth-century

23 Coombe notes this process of "discovery" in relation to Native Americans in North America: id, 209.

24 Id, 213, and Joel S Kahn, *Culture, Multicuture, Post Culture* (London: SAGE, 1995), 84-85.

25 Kahn, above n 24, 84-85.

26 Id, 76. Kahn notes the notion of other as savage alien in B Traven's *The Bridge in the Jungle*, in B Traven, *The Treasures of B Traven* (London: Jonathan Cape, 1980).

27 Kahn, above n 24, 77. Kahn notes that the notion of the traveller as go between, shedding light on "savages", informed the way the "Mexican Indian" and the American "Negro" were initially located in the European imagination via film and literary production.

28 James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art* (Cambridge, Mass: Harvard University Press, 1988), 215. Kahn also notes the manifestation of European fascination with the other in James Fenton's poem "The Pitt Rivers Museum Oxford". In the 1980's, Fenton "rediscovers a place of fascination in the museum's ethnographic collection". Traces of this discourse are also found in Greenblatt's 1991 assessment that indigenous culture has not died out; rather it remains "remarkably resilient by incorporating western values into traditional values": Kahn, above n 24, 80.

29 See Joseph Conrad, *Heart of Darkness* (Harmondsworth: Penguin, 1989). Admittedly, Conrad's portrayal of the untamed savage at times depicts *savage nobility.*

30 Kahn, above n 24, 79.

writers came to view indigenous peoples as 'noble savages'.[31] Some indigenous peoples were seen as existing in an idyllic natural state, which was polluted by engagement with Western culture.[32] Both the 'noble savage' and the 'savage' discourses had strong ideological overtones that aimed to allow Western intervention into indigenous culture – either to preserve or civilise.

Since it relied on a dehumanised account of the *subject*, the 'noble savage' discourse was not much of an improvement on the savage signification. Idealised cultural representations aided in demarcating boundaries between the 'lower' end of social evolution and Western culture (although a valorised lower end in the case of the noble savage). Such a premise led to generalised representations of many diverse indigenous cultures, which were seen to bear stereotypical hallmarks of their culture of origin amalgamated with Western influences.[33] Such representations and their signification through Western perspectives have, of course, had oppressive consequences that exceed merely *representational violence* to cultural artistic forms.[34]

While many nineteenth-century writings had strong Social Darwinist themes, there was some contemporary criticism of this positioning of non-Western *Others*. Seminal anthropological works such as Evans-Pritchard's *Witchcraft, Oracles and Magic Among the Azande* provided a less ethnocentric rendering of cultural difference.[35] Rather than relying on the simple dichotomy between civilised/primitive, Evan-Pritchard sought to reveal the cogent internal logic of particular non-Western cultures. For example, paradigms of cultural regulation,

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31 The term coined by Rousseau in *The Social Contract* (Penguin, 1968). For a detailed discussion, see Maurice Cranston, *The Noble Savage: Jean-Jacques Rousseau 1754-1762* (London: The Penguin Press, 1991).

32 Kahn, above n 24, 80. Khan highlights such representation as an invention of the twenty-first century and as reliant on the 'somewhat hackneyed and clichéd' themes drawn from the 'Traven [above n 26] and Heyward show' (at 80-81). Stephen Greenblatt embodies this hackneyed cliché with his astonished 'disappointment' at finding Balinese homes with VCR's: Stephen Greenblatt, *Marvellous Possessions: The Wonder of the New World* (Oxford/New York: Clarendon Press, 1991), in Kahn, n 24, 80.

33 Kahn, above n 24, 79. African Americans were seen as amalgamating the 'urban jazz rhythms of Harlem with more "authentic" spiritual music of the South'. Gershwin's musical production of DuBose Heyward's *Porgy* (Garden City, NY: Doubleday, 1953 [1925]) entitled "I Got Plenty O' Nuttin" (G.Gershwin/I. Gershwin/D. Heyward ©1935 Gershwin Publ. Corp, USA, Warner Chappell Music Ltd, London W1Y 3FA) has traces of this discourse. African American performers 'spoke for themselves' in Gershwin's performance, but through highly stereotypical signifiers assigned to African Americans by the dominant culture. Note also the deeply ethnocentric representations of Polynesia (e.g. Gaughan) and Bali as 'sexual paradises' identified by Kahn, above n 24, 82).

34 To take one example from many, the arrival of Christian missionaries in Hawaii eventually led to the *Hula,* the most vociferous and easily identifiable symbol of Hawaii's traditional cultural and religious practices, being outlawed.

35 E.E. Evans-Pritchard, *Witchcraft, Oracles and Magic Among the Azande* (Oxford: Clardeon Press, [1937] 1965), commented on by Kahn, above n 24, 79.

in relation to medicine and healing, were seen as autonomous, comprehensive and logical – even more so than analogous Western regimes.[36] Such shifts in dealing with difference can provide 'ambivalence, if not outright hostility to civilisation narratives of empire'.[37] However, they failed to penetrate popular and dominant modes of culture and consciousness. Indeed, in the discourses of popular culture, 'the noble savage remains one of the last epic creation myths of our time'.[38]

Intellectual Property's colonial "heritage": the philosophical premises of authorship and IP culture

Liberal imperialist narratives of discovery have been translated into IP regimes. Binaries of *Self* (Western) and *Other* (non-Western) have been transferred intact to this legal regime.[39] The Self has become the 'Romantic author' and the Other continues to be located in the Western imagination via orientalism.[40]

The Romantic Author

The *Self* in IP regimes is drawn directly from liberal notions of methodological individualism. Theoretically, IP seeks to preserve the 'absolute freedom of the author's imagination'.[41] The author is privileged – everything (all ideas) in the world must be available to the author so that (he) can produce great works (such as philosophical texts, and artistic and musical 'masterpieces') that shape and enrich Western culture and 'civilisation'.[42] Anything that takes away from the totality of 'ideas' open to the Romantic author may be characterised as censorship[43] or a diminution of the author's potential rights.[44] Hence, 'the model

36 Khan above n 24, 79.

37 Ibid

38 M Shermer, 'The Ignoble Savage: Science Reveals Humanity's Heart of Darkness' (2003) *The Scientific American,* available online @ http://www.sciam.com/article.cfm?articleID=000B3718-5941-1F03-BA6A80A84189EEDF. Shermer cites 'the Disneyfication of *Pocahontas'* and 'Kevin Costner's eco-pacifist Native Americans in *Dances with Wolves'* as exemplars of this myth and its prevalence within the discourses of popular culture.

39 Coombe, above n 22, 216.

40 Id, 210. Locke's transformative labour theory provides for the author's ownership of that which he/she produces: see Bruce Ziff, *Principles of Property Law* (Scarborough, Ont: Carswell, 1993), 19. Moreover, and perhaps more relevantly, Lockean ideas can be seen to ruminate in European justifications for colonisination: see M A Neave et al., *Property Law: Cases and Materials,* 6th ed. (Perth: Butterworths, 1999), 14 with reference to *Mabo v Queensland (No 2)* (1992) CLR 1.

41 Coombe, above n 22, 211.

42 Id, 210-211.

43 However, there are counter arguments for limiting the 'ideas' available to the potential genius/Romantic author. 'Censorship' might legitimately be characterised as a means of silencing non-hegemonic voices that operate to destabilise dominant conceptions of

of authorship that dominates Anglo-American (and Australian) laws of copyright'[45] has its origins in the need to preserve the privilege of the Romantic author, the individual and *Self* in liberal discourse.

The Orientalist other in IP regimes

Concurrent with IP notions of the *Self* as the Romantic author is the concept of the *Other*. Cultural appropriation (although not strictly sanctioned by IP) allows objectification of non-Western *Others*. Indigenous peoples become stereotypes that reside in the imagination of the author and the dominant culture. Non-Western *Others* become 'fodder for Romantic imagination'.[46] Alternatively, some indigenous cultural practices may be protected as 'national treasures';[47] that is, as static relics of a time gone by.

Non-Western peoples are represented in dominant culture via orientalism. Orientalism is taken to mean:

> Western discourses of otherness… embedded and implicated in the imperial processes by which for more than a century the west treated the globe and its peoples as both playthings and objects to be exploited, ruled and studied.[48]

IP regimes support orientalist production of meaning attached to non-Western *Others* by protecting liberal authorship rights and to a large degree

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morality, value and reality. Of course, and as Coombe notes, '[in] denying the social conditions and cultural influences that shape the author's expressive creativity, we invest him with a power that may border on censorship in the name of property. By representing cultures in the image of the undivided possessive individual we obscure people's historical agency and transformations, their internal differences, the productivity of intercultural contact, and the ability of peoples to culturally express their position in the wider world. The Romantic author and authentic artefacts are both, perhaps, fictions of a world best forgone.' See Rosemary J Coombe, 'Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6:2 *Canadian Journal of Law and Jurisprudence* 266.

44 Coombe, above n 22, 211.

45 Id, 211.

46 Id, 213.

47 Ibid.

48 Kahn, above n 24, 5, commenting on Edward Said's *Orientalism* (New York: Pantheon, 1978). For a stark example of objectification, see Clifford, above n 28, 199. Josephine Baker is shown in a classic eroticised 'African woman' pose. At 164, Clifford paints a disturbing picture of an Igorot man from the Philippines who was exhibited at the 1904 St. Louis World's Fair. There are also echoes of orientalism and the romantic author in popular cultural works [such as Belle and Sebastian's album 'Storytelling' (Jeepster Records, 2002)], as well as in 'fine art': see Roger Benjamin, *Orientalist Aesthetics: Art Colonialism, and French North Africa, 1880-1930* (Berkley: University of California Press, 2003).

ignoring the rights of non-Western authors. Ownership of production of works is effectively limited to authors that can articulate their rights in a manner cognisable to Western legal property regimes. Claims to authorship and ownership that do not fit into Western jurisprudential paradigms are rejected or given limited protection.[49] The privilege afforded to Western concepts of authorship and ownership reflects sanctioned norms of imperialism. This is particularly evident in the Western author's inappropriate (although in some cases not illegal) appropriation of indigenous culture.

49 See, for example, *Bulun Bulun & Anor v R & T Textiles Pty Ltd* (1998) 157 ALR 173. In this case, a successful action was taken by the prominent Aboriginal artist John Bulun Bulun for the unauthorised reproduction of two of his paintings used in commercially manufactured T-shirts. In *Yumbulul v Reserve Bank of Australia Ltd* (1991) 21 IPR 481, the Reserve Bank reproduced, under licence, Terry Yumbulul's design for a morning star pole, for a 1980 'plastic commemorative $10 (bank) note (commemorating 200 years of white settlement in Australia)' (McKeough and Stewart, above n 9, 63). See also *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR ('The Carpet Case'), which we will discuss under 'Indigenous claims to intangible property rights and Australian IP regimes' (see page 10). Another significant issue, which I will discuss, is the scope of *who* the law will recognise as an owner of works (individual or communal owners).

Australian IP Regimes – Romantic Authors and Orientalised Others

Australian IP regimes are established largely through Commonwealth legislation.[50] Ownership of intellectual property is articulated as a right to 'prevent others from using or copying the… (author's and/or owner's) creation without permission'.[51] Policy considerations underpin this regime. The regime is to 'encourage creativity, innovation or *at least* investment in the commercial exploitation of creativity and innovation'.[52] Economic considerations such as 'just commercial reward' for works and stimulation of 'creative' markets are paramount in Australian IP law.[53]

IP regimes in Australia emanate in part from settlement politics[54] and associated cultural representations of *Self* and *Other*. Historically, Australian settlement provided an opportunity for transplanting European/British sovereignty and legal discourse. Within European colonial discourse, indigenous inhabitants were seen to not exist, or at a minimum to have no rights regarding their lands.[55] Indigenous peoples were treated as romantically 'discovered' as a passive, homogenous group named 'Aborigines' by the colonisers. Appropriation of indigenous works *should* be seen in the context of settlement narratives that

50 Most legislation is enacted by the Commonwealth Parliament using its constitutional powers over copyrights, patents of inventions and designs and trademarks [s51(xviii)] and 'external affairs' [allowing it to implement Australia's treaty obligations: s51(xxix)]. See also the *Copyright Act* 1968 (Cth) s68, *Patents Act* 1990 (Cth) s83, *Designs Act* 1906 (Cth) s4, *Trade Marks Act* 1995 (Cth) s119, *Trade Practices Act* 1974 (Cth) s51, state *Fair Trading Acts*, such as the *Fair Trading Act* 1987 (WA) s 10 (regarding passing off and misleading or deceptive conduct), and common law actions for breach of confidence and the tort of passing off. This summary is taken from McKeough and Stewart, above n 9, 57–59.

51 Mckeough and Stewart, above n 9, 56.

52 Ibid (our emphasis).

53 Ibid Australian regimes do not focus on the 'natural rights' of authors to the 'fruits of their labour'.

54 Colonial imperatives informed dominant modes of Australian political discourse from the 1800's until at least the seventies, in guises of humanitarian aid, 'smoothing the dying pillow' and assimilation: Dr David Cooper, 'Trumping the Race Card: the Role of ANTar and the People's Movement in Achieving Justice for Indigenous Australians', paper presented to the Diversity Conference, 2001, available online @ http://www.antar.org.au/race_card.html. Cooper notes that, in contemporary Australian discourse, 'we seem to have moved from smoothing the dying pillow of an entire race, to smoothing the dying pillow of its unique cultures.'

55 Dr Jean Battersby, 'Legislative Developments in Australia', in Lyndel Prott and James Specht (eds), *Protection or Plunder: Safeguarding the Future of Our Cultural Heritage, Papers of the UNESCO Regional Seminar on The Movable Cultural Property Convention, Brisbane 1986* (Canberra: Australian Government Publishing Service, 1989), 85.

explicitly sought to exclude Indigenous peoples from the emerging polity.[56] Overt acts of oppression, justified as necessary for constructing a new, 'better', 'civilized' home for new arrivals (those who claimed to have 'discovered' a land which was, in their eyes, *terra nullius*) underpinned the dominator's efforts systematically to destroy the *meaning* that indigenous people ascribed to themselves, their families and their communities.

Narratives of settlement located (and locate) indigenous populations as a source of fascination, as naïve, even childlike. Against the backdrop of imperialist legal paradigms, recent economic developments have called into question the stereotypical location of indigenous Australians within the European imagination. The last decade has seen a 'rapid growth in sales and production (of Aboriginal arts and crafts)'.[57]

Uneasy Intersections: Indigenous IP Rights Under Australian Law

Contingent histories of the object: dominant norms and contested meanings

To understand the intersection of indigenous claims to intangible property rights and IP's response, it is necessary to define 'appropriation'.[58] Appropriation or 'borrowing' in IP is seen as a diminution of an individual's legal entitlement. This is undoubtedly an *affect* of the dominance of possessive individualism.

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56 M Dodson and L Strelein, 'Australia's Nation-Building: Renegotiating the Relationship Between Indigenous Peoples and the State' (2001) 24:3 *University of New South Wales Law Journal* 826.

57 The Australian Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (July 1989), reports that from 1979/80 to 1989 the Aboriginal arts and crafts industry has grown by 33% per annum. Piracy of these products has far reaching consequences. Infringement of indigenous art causes a substantial economic and cultural impact on Indigenous peoples. (Australia Parliament, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats: Enforcement of Copyright in Australia* (Canberra: The Parliament of the Commonwealth of Australia, November 2000). The Report and all submissions are available from http://www.aph.gov.au/house/committee/caca/copyrightenforcement/contens.htm. 15 and 17). As Aboriginal artist W Marika explains, copyright infringement of indigenous art cuts to the core of Aboriginal identity. For some it amounts to 'an act of spiritual violation and personal disgrace':

> Our art is indeed an integral part of our life. It is not separate from the rest of our life, it is the expression of a total cultural consciousness and is interwoven into the texture of our everyday life. In song and dance, in rock engraving and bark painting we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structures of our society.

W Marika, 'Copyright in Aboriginal Art' (1976) February *Aboriginal News* 7.

58 Clifford, above n 28, defines appropriation as 'to make one's own' (at 221).

Clifford has argued that appropriation must be seen in a wider context, as part of the 'contingent history of the object' being appropriated. A 'critical history of collecting'[59] is needed to *rupture* the totalising disposition of traditional Western IP regimes. Cultural appropriation is 'never singular, but specific to particular people with particular historical trajectories'.[60]

Appropriation includes removing indigenous cultural signs from their original context and placing them within 'western museums, exchange systems, disciplinary archives and discursive traditions'.[61] Alternatively, indigenous artistic products are 'collected' by private market actors as 'serious art' or tourist souvenirs. Such collection practices relate directly to liberal notions of the 'self as owner: the individual surrounded by accumulated property and goods'.[62] Western culture uses product fetish and product accumulation to generate status. Collection defines the *Self*. Hierarchical value is ascribed to those who can exclusively possess items (such as Indigenous art).[63] Indeed, the central guiding force of cultural material possessivism is the idea that *he who dies with the most toys wins.*

Collection involves commodification of *Others*. The *Other* becomes represented and embodied through collectable 'antiquities', 'curiosities', 'souvenirs'[64] or 'monuments' and 'ethnographic artefacts'.[65] Dominant collection discourse is riddled with hierarchy. Some objects of cultural production are given institutionalised and market status as 'masterpieces'. The demarcation of what is meaningful and legally valid changes according to the dominant culture's wants and desires – usually motivated by the hope of financial gain. However, if there is a continuing theme in relation to collecting Indigenous art, it is one of colonialism.

Dominant collection narratives are contested by non-hegemonic claims to meaning attached to so-called collectables (such as indigenous art works). There is no immutable meaning attached to cultural exchange. Bhaba notes that sites of appropriation are not silent and undisputed. Such sites reflect 'unmanned, antagonistic and unpredictable cultural contestation'.[66] While the West may view objects (including appropriated objects) as 'playthings of those with the cultural capital to manipulate them',[67] postcolonial narratives ascribe different meanings

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59 Id, 215. According to Clifford, this '…critical history of collecting is concerned with what from the material world specific groups and individuals choose to preserve, value, and exchange': Id, 221.

60 Coombe, above n 22, 210.

61 Clifford notes a long history of appropriation of cultural artefacts in this manner (above n 28**,** 215).

62 Id, 217.

63 Id, 218.

64 In the case of tourist items, Clifford draws attention to items such as 'customised T-shirts form Oceania' (id, 222).

65 Id

66 Dr Chris Couch, citing Homei Bhaba, in 'History, Theory or Cultural Praxis'*, Hatched Symposium – 'Engaging Australia'*, Perth Institute of Contemporary Arts, Saturday May 12, 2001, available @ http://www.pica.org.au/hatch01/ChrisCrouch.html (1 of 4).

67 Crouch, id, 3 of 4.

to objects. Product fetish can be seen as a means of revealing Western collective desires rather than an unmalleable way of defining the *Other*.[68] Cultural production, including artistic practice, is seen from the perspective of a process of production, distribution and consumption of cultural knowledge. Economic consumption need not be the paramount superstructure informing cultural exchange.[69] Instead, cultural practice may be about struggles for self-definition, 'autonomy and political recognition'.[70] Claims to artistic ownership by indigenous individuals and communities reflect a means of challenging imbedded imperialist definitions of Indigenous peoples themselves. Indigenous people who claim art as their own challenge their residence in the imagination of the European Romantic author.[71]

Indigenous claims to intangible property rights and Australian IP regimes

Appropriation of indigenous art in Australia includes, but is not limited to, 'unauthorised imitation of …art', via 'direct copying of works', ' "borrowing"…(of) Aboriginal themes', images or styles or incorporation of traditional motifs into artwork in an unsanctioned manner.[72] Indigenous and non-indigenous artists may produce 'Aboriginal art' without permission from the traditional owners of the images and knowledge. The majority of appropriation is through 'business profiteering', where imitation and 'culturally insensitive' copying and alteration occur.[73]

Indigenous action to redress artistic appropriation does not sit easily within IP law. Often, an indigenous artist who has copyright over their work will not be seen within traditional customary schemes as the owner of the images in their work. Indigenous communities may perceive themselves as *communally* and collectively holding the property rights in question.[74] Artistic works are embedded in notions of appropriate access, transmission and dissemination of cultural signs. Communities attach strict meanings to significant and valuable cultural 'property'.[75] 'An artist (may have) been given permission to depict a design, (this) does not mean what is produced is "owned" by that person'.[76]

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68 Clifford, above n 28, 229.
69 Ibid.
70 Coombe, above n 22, 210.
71 Ibid Australian dominant culture has a tradition of locating Indigenous peoples as noble savages in Australia's collective imagination via representations on tea towels, placemats, statuettes and other prosaic manifestations.
72 McKeough and Stewart, above n 9**,** 55.
73 Ibid Stewart and McKeough, at 65, note in the case of *Milpurrurru v Indofurn Pty Ltd* that Mr Bethune, his company Beechrow and two other Beechrow company directors copied traditional designs and altered other designs they judged to be "too busy" for carpets.
74 McKeough and Stewart, above n 9, 62.
75 Ibid.
76 Ibid.

Australian copyright law, like most received English law, is premised on individual ownership and rights.[77] Courts struggle with cultural difference associated with individual and communal ownership. Courts are willing to hear evidence of distinct indigenous collective ownership over imagery and art.[78] Customary legal regulation of access to, or reproduction of Indigenous art may be judicially acknowledged. However, in *Milpurrurru* Justice von Doussa clearly stated that customary law obligations cannot be a relevant factor in considering if a remedy is available for breach of Aboriginal copyright under existing statutory regimes.[79]

Aboriginal artists who are established and recognised as 'fine artists' are also more likely to receive protection for copyright breaches.[80] This results primarily from an Anglo schema of dividing art into different categories, such as tourist art. Such divisions inform the value ascribed to works in the market place, but are alien to traditional indigenous cultural paradigms of value and worth. The few Aboriginal artists who can fit themselves within 'fine art' categories are best able to use copyright regimes and remedies for appropriation. However, since Western conceptions of 'fine art' assume their privilege through the absence of 'shared experiences and mutually understood symbols' (the separation of 'fine art' from culture and tradition), those indigenous artists whose work can be designated as 'fine art' are unlikely to fall within traditional artistic categories.[81] As such, their *indigenousness* is only peripheral to the artwork in question. In such cases, it is not *indigenous art*, it is merely the work of an *indigenous artist*.

A further problem arises for some Indigenous artists in relation to negotiating advantageous bargains for the transferral of copyright rights. Bargaining is a means in IP for 'copyright holders to exploit their property right by allowing others to use their copyright for whatever means the owner sees fit'.[82] Aboriginal people may wish to assign or licence their copyright to others for financial gain. However, many bargains "negotiated" to this end are often

77 Ibid.

78 Note the evidence presented by Terry Yumbulul about secret practices surrounding artistic creation of morning star poles and the need for approval of relevant clan members to use specific imagery in *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, 490 (cited in McKeough and Stewart, above n 9, 63).

79 von Doussa J, *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 239.

80 This seems to be the case for artists generally within IP regimes because 'artists are valued for their idiosyncrasies and their self-absorbed subjectivity, conflicting with their potential role as eloquent voices for the voiceless within a larger community of shared experiences and mutually understood symbols': R Barsh, 'Grounded Visions: Native American Conceptions of Landscapes and Ceremony' (2000) 13 *St. Thomas Law Review* 136. Indeed, the methodological underpinnings of creative individualism in this context are undeniable. However, it should be noted here that it is precisely this *voicelessness* within the larger community that has driven the movement towards preserving Aboriginal art to international forums.

81 Barsh, above n 80, 136 and 151.

82 McKeough and Stewart, above n 9, 67.

'deliberately vague about the rights being transferred' or 'simply unfair'[83] and pave the way for exploitation of Aboriginal artists.[84] Artists may transfer their copyright conditionally. Imagery may be assigned for the purpose of education and increasing knowledge of indigenous culture. The licensee or infringer may then use the imagery for an unsanctioned use – such as for making and marketing carpets with 'authentic Aboriginal designs'.[85] Such blatantly inappropriate use may attract legal remedy. This is especially so where the appropriator 'borrows' from prominent Aboriginal artists.[86]

More subtle and complex issues arise in relation to licensing agreements. Traditional communities may not wish to demarcate an Aboriginal copyright holder as the 'owner' of artistic imagery. An artist may be given limited permission to use a traditional symbol. This artist may give consent regarding use of the work in question to a third party. IP law has difficulty dealing with a scenario (as in *Yumbululu*) where this third party infringes the particular traditional permission granted to the artist. Consent given by the artists to the licensee will be perceived in law as wholesale consent. If the copyright owner has given consent to a third party, the traditional owner's position on consent is not a relevant judicial consideration and no infringement may be seen to occur.[87]

Additional problems arise in relation to monitoring the use of assigned copyright in accordance with the particular type of consent given under contract. If a contract is successfully negotiated and contains a transferral of copyright rights for certain purposes, it is difficult for Aboriginal artists to ascertain if the licensee is adhering to the limited consent given under the contract.[88]

Damage caused by unchecked appropriation

Cultural appropriation that cannot be redressed within IP regimes has enduring effects for the Aboriginal community whose rights are infringed. Appropriation continues the colonial legacy of dispossession and attempted destruction of indigenous meanings associated with their selves and their culture. Aboriginal people are 'denied status as fellow members of a multi-cultural

83 *Art Law Newsletter of the Arts Law Centre of Australia*, No 9 (1995) p 3.

84 Bargains are often unfair for artists in general, who have 'little choice other than to assign or sell (their copyright)' if they want a wider income and an audience/market for their work: McKeuogh and Stewart, above n 9, 68.

85 As in M*ilpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209.

86 Ibid at 209.

87 McKeough and Stewart, above n 9, regarding *Yumbulul v Reserve Bank of Australia Ltd* (1991) 21 IPR 481.

88 McKeough and Stewart, above n 9, 67-68. McKeough and Stewart note that similar problems exist for all artists regarding copyright contracts. Centralised copyright collecting societies for visual artists, such as VI$COPY, and some Aboriginal bodies, such as the National Indigenous Arts Advocacy Association (NIAAA), act as copyright collecting agencies aiding artists in monitoring the use of their work and, in the case of NIAAA, articulating claims for remuneration where appropriate.

society'.[89] Core indigenous cultural values – such as maintaining the secrecy of knowledge of ceremonies encoded in visual imagery – are derogated from by inappropriate commercial use of these cultural practices. Appropriation attempts to take away Aboriginal control over the continuity and change of their own culture in accordance with traditional and contemporary Aboriginal definitions of *Self*.[90] Appropriation is also deeply ironic, considering the value Western IP regimes place on the need to foster commercially advantageous ownership and production of cultural and artistic works[91] and fairness regarding appropriate payment for commercialised use of artistic works.[92]

Suggested Reforms: Expanded Terms of the Debate

There has been a range of reforms suggested to rectify particular issues of indigenous appropriation. These include using *sui generis* regimes,[93] Native Title legislation,[94] an *Aboriginal Folklore Act*[95] and the various state *Aboriginal Heritage Acts* to allow Aboriginal communities themselves to obtain redress for unauthorised use of materials.[96] In addition, the *Convention on the Elimination of All Forms of Racial Discrimination* expressly recognises the right of everyone to

89 Coombe, above n 22, 213.

90 Ibid.

91 Id, 211. Coombe notes (at 209) that it is somewhat ironic that Indigenous ownership of indigenous cultural practice is an issue at all. Corporations have little trouble articulating their outrage when, for example, their logo is appropriated in an unsanctioned manner. This argument is, however, contingent on an *aggregate* view of the corporation, which fails to appreciate the significance of the grant of separate legal personhood and *entity* status. Of course, even under such a configuration, there is certainly room for arguments which question why the Nation-State (i.e. and for example, the Australian Government), particularly under an Ethno-cultural conception of the Nation-state, can hold IP rights. The recognition of 'the Australian people's' IP rights and not those of 'Indigenous peoples', it would seem, represents a far greater irony.

92 McKeough and Stewart, above n 9, 55.

93 M Blakeney, 'Human Rights and Indigenous Australians: Intellectual Property Rights', *Seminar Paper,* available online @ Australian Legal Information Institute, www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/car/1997/3/speeches/seminar2/blakeney.htm?query=%7e+human+rights+and+indigenous+australians+%20intellectual+property+rights+%20blakeney.

94 Puri, in McKeough and Stewart, above n 9, 77-78. The case for using native title rights to articulate IP claims is somewhat limited, as native title is grounded in continuous connection to land. Similar suggestions have been made in respect to Aboriginal IP rights as fiduciary obligations and as a burden on Crown sovereignty: VJ Vann, 'Copyright by way of Fiduciary Obligation – Finding a Way to Protect Aboriginal Artworks' (2000) 5(1) *Media Arts and Law Review* 13 –23.

95 As suggested by the *Report of the Working Party on Aboriginal Folklore* (Canberra: Department of Home Affairs and the Environment, 1981).

96 McKeough and Stewart, above n 9, 78.

equality before the law without distinction as to race, colour, or national or ethnic origin, including the enjoyment of 'the right to own property alone as well as in association with others'.[97] However, the protection of indigenous IP as a *human right* remains ambiguous and problematic.[98]

Reform may also be found in the construction of copyright legislation. *Culturally sensitive*[99] approaches to notions of collective ownership and providing remedies that can account for the 'personal suffering'[100] of claimants may be a means of restitution for appropriation. Further, indigenous property can now be imbued with economic significance, and, as such, there no longer seems to be any clear inhibition to orthodox forms of economic compensation for breaches.

Some reforms call for an acknowledgement of moral rights in IP regimes. Under a moral rights regime, a copyright holder who transfers their economic interests in a work maintains moral rights to the works, including the right to the integrity of the work. Of course, the fact that an author must already have copyright in the work represents a significant hurdle to the application of moral rights systems to Indigenous IP.[101] Integrity rights would allow prevention of distortion of the original work in question.[102] Commentators note that suggested institutional reforms in Australia regarding the introduction of significant moral rights into Australia have received some support, observing that those suggested reforms have not been implemented and do not go far enough to protect indigenous interests.[103]

These issues are now, more than ever, under the international spotlight with the release in June, 2002 of the Report of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore -- *National Experiences with the Legal Protection of*

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97 *Convention on the Elimination of All Forms of Racial Discrimination*, 5 I.L.M. 352.

98 For a detailed discussion, see R Coombe, 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 6 *Indiana Journal of Global Legal Studies* 59.

99 'Culturally sensitive' is intended to mean accommodation of cultural relativism/accounting for difference where Australian ownership is not seen as the *only* paradigm of significance and value.

100 Damages under s 155(2) of the *Copyright Act* 1968 (Cth).

101 R Sackville, 'Legal Protection of Indigenous Culture in Australia' (2003) 11 *Cardozo Journal of International Law* 711, 727.

102 McKeough and Stewart, above n 9, 68–69, as they would in European law. The right of integrity of authorship allows for protection from distortion of the original work because it establishes that a reproduction that is 'prejudicial to the author's honour or reputation' will constitute a breach of the right.

103 Id, 68–69, 70. See also T Janke, 'Berne, Baby, Berne: the Berne Convention, Moral Rights and Indigenous People's Cultural Rights' (2001) 5 *Indigenous Law Bulletin* 14, 17. Janke includes a copy of the proposed amendments. While it is beyond the scope of this essay, it is worth noting that each of these reforms can be considered in depth to reveal strengths and limitations of the paradigm in question.

Expressions of Folklore.[104] The Report was discussed at a meeting of the Committee in Geneva on June 13 to 21, 2002, at which time a number of papers relevant to these issues were also discussed.[105]

The Report catalogues the responses of 64 nations, including Australia, to a series of questions pertaining to the protections offered in these states to traditional expressions of folklore. Section III of the Report suggests four tasks that the Committee might choose to undertake. These relate to the establishment, strengthening and implementation of national and international systems for protection of expressions of folklore; the updating of the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Exploitation and Other Prejudicial Actions; the implementation of measures for the extra-territorial protection of expressions of folklore; and the commission of a practical study by the WIPO Secretariat of the relationship between customary laws and protocols and the formal intellectual property system.[106]

Most of the nations that responded to the questionnaire that formed the basis of the Report responded favourably to the suggestion that there be a collection of more information on this issue and that more assistance be given to indigenous communities wanting to protect their traditional cultural knowledge. Australia, in particular, noted the need to give consideration to 'appropriate modifications to existing regimes to be more culturally sensitive.'[107] Although no recommendations as to how one might go about ensuring that this is done was forthcoming, it is worth noting that Australia expressed the view that the present system of IP protection, combined with protection by laws in other policy areas, such as cultural heritage laws, was adequate for protecting expressions of folklore in this country. Rejecting the need for an international treaty or a radical departure from the current domestic approach for protecting traditional knowledge, Australia concluded, 'the current direction of domestic policy development is to protect Indigenous arts and cultural expression within legal frameworks, rather than the implementation of *sui generis* regimes'.[108]

What is clear from all of the above is that concerns of cultural reaccession remain at the forefront of the debate over indigenous claims to intangible property. For debate and reform to be effective, dominant discourse and IP need to be seen as systems of ideology and power. They are discourses that traditionally and contemporaneously privilege Anglo individuals, partially by exploiting non-Western individuals and communities. Discourse as power allows an acknowledgement and a tracing of the way that power always carries with it

104 WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*. The Report can be found online at http://www.wipo.org/emg/meetings/2002/igc/pdf/grtkfc3

105 The papers can be found online at http://www.wipo.org.eng/meetings/2002/igc/index

106 WIPO Report, above, note 104 at 5.

107 Ibid at 48.

108 Ibid at Annex 1, page 7.

resistance.[109] Indigenous people may seek to reclaim *Self*-definitions. Control over the meaning ascribed to contemporary and traditional cultural practice is a powerful means of decentring dominant meanings of 'Aboriginal' and '[forging] new identities and communities'.[110]

Conclusion

As explained by Prof. Dr Erica-Irene A. Daes, Chairperson – Rapporteur of the United Nations Working Group on Indigenous Populations, the United Nations Commission on Human Rights, its Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Sub-Commission's Working Group on Indigenous Populations have been examining the question of the rights of indigenous peoples since 1982. These discussions have attracted the interest of many hundreds of indigenous peoples around the world, and represent a survey of the conditions, needs, and aspirations of indigenous peoples. Throughout this process, indigenous peoples have underscored the urgent necessity of international action to protect their intellectual property rights. Dr Daes continues:

> Over the past twenty years, indigenous peoples have grown acutely aware of the great medical, scientific and commercial value of their knowledge of plants, animals and ecosystems. Indigenous peoples have also attracted growing public interest in their arts and cultures, and this has greatly increased the worldwide trade in indigenous peoples' artistic works. Global trade and investment in the arts and knowledge of indigenous peoples has grown millions of dollars per year. Yet most indigenous people live in extreme poverty, and their languages and cultures continue to disappear at an alarming rate. Also, in most parts of the world, large-scale extractive projects, industrialization, and settlements continue to destroy the ecosystems upon which indigenous peoples depend, and in which they have developed their specific forms of knowledge.[111]

The emotions of Australia's traditional people with respect to the lack of any indigenous voice in protecting Aborginal IP interests, are perhaps best expressed in the words of Aboriginal artist W Marika, who explains that, copyright infringement, for example, cuts to the core of Aboriginal identity. For some it amounts to 'an act of spiritual violation and personal disgrace'.[112]

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109 Michel Foucault, *Power-Knowledge: Selected Interviews and Other Writings, 1972-1977* (Brighton, Sussex: Harvester Press, 1980).

110 Coombe, above n 22, 206.

111 Prof. Dr Erica-Irene A. Daes, Chairperson – Rapporteur of the United Nations Working Group on Indigenous Populations, *Some Observations And Current Developments On The Protection Of The Intellectual Property Of Indigenous Peoples*, Geneva, July 23 and 24, 1998, located at http://www.wipo.int/eng/meetings/1998/indip/daes.htm.

112 M Martin, 'What's in a Painting? The Cultural Harm of Unauthorised Reproduction: *Milpurrurru & Ors v Indofurn Pty Ltd & Ors'* (1995) 17 *Sydney Law Review* 591.

Australian IP regimes have their roots and authority in liberal narratives of 'possessive individualism' and concurrent discourses of exploitation of non-Western peoples. Indigenous claims to cultural property provide a direct challenge to hegemonic singular understandings of property as wealth. Indigenous claims challenge dominant imperialist representations of *Self-Other* enacted through appropriation of cultural property. The contested meaning assigned to cultural capital is seen in the interaction between indigenous claimants' actions for IP rights and their treatment within Australian legal systems. A critical history and understanding of appropriation and collection allows for an interrogation of the location of Indigenous people in the Romantic Author's imagination and brings to the political fore issues of post-colonial indigenous autonomy and *Self*-created identity. In the succinct and incisive words of bell hooks:

> Critically examining the association of whiteness as terror in the black imagination, deconstructing it, we both name racism's impact and help break its hold. We decolonize our minds and our imagination.[113]

113 Bell hooks, 'Whiteness in the Black Imagination', in Ruth Frankenberg (ed), *Displacing Whiteness: Essays in Social and Cultural Criticism* (London: Duke University Press 1997), 164.