

## ALTERNATIVE INTELLECTUAL PROPERTY?: INDIGENOUS PROTOCOLS, COPYLEFT AND NEW JURIDIFICATIONS OF CUSTOMARY PRACTICES

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This article takes up the workshop theme of 'Customs in Common' in an attempt to locate, or create, a space for an Aboriginal dialogue about legal rights in the context of indigenous culture and intellectual property law. Can Australian law create a space for a dialogue with indigenous people that allows for a form of indigenous autonomy or self-determination? How can Aboriginal law or custom be given contemporary meaning, significance and impact on Australian law?

At the outset, (at least) two problems stand out. The first is political in nature. Who is it that can speak 'for' indigenous people? As Aboriginal writer, Irene Watson, explains,

The idea of speaking 'for' is alien to my knowledge of the possibilities of an Aboriginal political representation. ... *There has never been an Aboriginal dialogue that has given over to this concept that is of giving the Aboriginal voice a political representative quality.*<sup>1</sup>

This is not a problem of there being a lack of Aboriginal political structures, but a problem with the forms of Aboriginal political representation that the Australian political system can recognise.

The second problem is one of law and legal language. In the context of teaching law, Watson puts the problem this way,

In looking forward, my own task is to resist assimilating or fitting into the dominant power structures and 'ways of knowing' while also offering non-Aboriginal students the opportunity to absorb or assimilate into themselves Aboriginal knowledge of this country. It is a difficult task; I have few resources to work with and a body of

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<sup>1</sup> Irene Watson, 'Aboriginal Sovereignities: Past, Present and Future (Im)possibilities', paper on file with author (emphasis added).

western knowledge that works against the centering of Aboriginal ways and knowledges as it posits Aboriginal peoples as pre-historic, native, without any formal knowledge system. The western knowledge system is supported by written documents, rules and regulations, and technological infrastructure. While Aboriginal knowledge exists alongside that western knowledge system, it is a non-formal, Aboriginal (local, traditional or ecological) knowledge system. The teaching of Aboriginal knowledge is problematic in that a different approach is called for ...<sup>2</sup>

The intellectual project described herein is one of trying to find a way of allowing for an Aboriginal dialogue using Australian law, acknowledging that this entails use of the oppressor's legal tools to provide for a form of self-determination. Can an Aboriginal voice be valued in Anglo-Australian legal institutions without it turning into something unrecognisable to Aboriginal people, and/or without the dialogue being turned against Aboriginal people?<sup>3</sup>

In the past, overwhelmingly legal efforts and energies have focussed on accommodation of indigenous rights and difference through advocacy for recognition of new rights in international law, and through reform of national law. However I want to deviate from that 'public law' and 'big picture' trajectory. The inquiry heads away from designing formal legal reforms at the international and national level. We need a fuller exploration of smaller domains - an investigation of the practical uses of private law at the community level for the protection of custom. This avenue is suggested for both pragmatic and jurisprudential reasons.

It is not suggested that public law, public international law, or national law reform is unimportant. However in the contemporary Australian context post-*Mabo*, the emancipatory potential of international and national law has, to say the least, proven disappointing. Reforms have been compromised and limited.

We need to learn from this experience. Firstly, political goodwill toward reconciliation cannot be assumed. Secondly, even where goodwill is present, Anglo-Australian legal intuition, grounded in legal positivism, is generally for reform that presumes an indigenous solidity in history, and a corresponding homogeneity in wants, needs, desires and capacities. It leads to abstract statements of the law's and policy makers' good intentions, which translates into significant obstacles to indigenous claims and to self-determination in practical contexts.<sup>4</sup>

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<sup>2</sup> Irene Watson, 'Some Reflections on Teaching Law: Whose Law, Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23, 24.

<sup>3</sup> For the difficulties of including indigenous voices in Australian legal education see generally, 'Racism in Legal Education: Special Issue' (2005) 6(8) *Indigenous Law Bulletin*.

<sup>4</sup> See for example, *Members of the Yorta Yorta Community v State of Victoria* [1998] FCA 1606 (unreported, Olney J, 18 December 1998); *Members of the Yorta Yorta Community v State of Victoria* (2001) 110 FCR 244; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. More generally, AIATSIS Native Title Unit, *Tradition and Authenticity: The Yorta Yorta Case*. <[http://ntru.aiatsis.gov.au/research/yorta\\_yorta/yorta\\_yorta.html](http://ntru.aiatsis.gov.au/research/yorta_yorta/yorta_yorta.html)> at 14 August 2006.

Political and legal authority has not been closed to all kinds of indigenous self-determination. However indigenous ‘progress’ is now claimed to be lacking in such cases, laying the foundation for the Federal Government to blame communities for ‘failing’. As Mick Dodson notes,

In [Federal Health Minister Tony Abbott] saying that, ‘Australians’ sense of guilt about the past and *naive idealisation of communal life* may now be the biggest single obstacle to the betterment of Aboriginal people,’ the minister is using the language of ideology, not of evidence.

Surely, we have moved beyond the old standby of blaming the victim and can finally start being honest about our shared responsibility for failure and our joint capacity for success.<sup>5</sup>

In the Australian context, self-determination of indigenous peoples has been branded by the Federal Government as a social experiment that failed.<sup>6</sup>

Whilst in international arenas the rhetoric concerning indigenous people is very different to the current domestic context, initiatives are still generally dependent on the state and its bureaucracies for implementation. Further,

While international and national regimes have extended some protections to ... indigenous peoples, in many respects the *results have not corresponded to their needs*. Although there has been some participation by indigenous peoples in the development of these laws, the result has, nevertheless, largely been the creation of top-down, international norms that have yet to take shape and that are rarely sufficiently multi-faceted to encompass the differences among indigenous groups. As such, the laws promulgated often are either too broad or too narrow to adequately capture the distinctions and nuances among indigenous groups and their particular cultural properties.<sup>7</sup>

Likewise Bluemel argues,

Increasingly groups are participating in global governance, however, most justifications for such participation are based upon an analysis of the benefits of participation for the governance system rather than also considering the impact of participation upon the groups. Justifications for group participation are typically borne from a functionalist perspective which concludes the international system

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<sup>5</sup> Mick Dodson. ‘Still Blaming the Victim’, *The Age* (Melbourne), 22 June 2006. 17 (emphasis added).

<sup>6</sup> As Dodson notes. ‘The administrative responsibilities in the hands of indigenous communities have not been self-determined, but imposed, by organisations including the Aboriginal and Torres Strait Islander Commission. ATSIC was not an indigenous creation, nor did it have genuine decision-making power. Allocation of the vast majority of the indigenous affairs budget has always been determined by senior bureaucrats and ministers.’ (Ibid). The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is the only remaining Federal organisation with an indigenous management board.

<sup>7</sup> Angela R Riley, ‘“Straight Stealing”: Towards an Indigenous System of Cultural Property Protection’ (2005) 80 *Washington Law Review* 69. 86 (emphasis added).

needs group participation to enhance the system's legitimacy, but those justifications do little to show how particular group representation solves either systemic or group needs.<sup>8</sup>

Given this political reality, continuing to discuss the politics of custom within Australian academia at all is possibly perverse. Such a discussion is only of value to me if there is a possibility of a legal space for dialogue that is sensitive to the realities of indigenous difference *and* of the need for self-determination. The challenge is for us as lawyers to find, or to make, such a space. With a pragmatic recognition of Australian institutional racism, and with a view to working past the impasse of reforms that seek to constitute indigenous people at large or within Australia, as one collectivity, this paper argues we need to look to the potential of private law at the community level.

There is a tendency in scholarship concerned with social justice to neglect private law because it is taken to be preoccupied with the self-interest of individual parties, where there will be inequalities in bargaining power. Formal court processes, in enforcing free will and contract, neglect the differential power relations and reinforce inequalities. Thus the presumption is that 'downsiders' inevitably get a raw deal. However it is the particularity of private law, and the capacity of collectives to use private law, that is of interest here.

One example this article reflects on is the status of indigenous cultural protocols - declarations of best practice in regard to using indigenous cultural property. These should not, as is currently the case, be characterised as non-legal, 'voluntary' codes of ethical practice. They should be asserted as a form and source of 'private' law, articulated and negotiated in regard to practical detail within a community. It is argued that custom more generally may be able to be implemented using devices of private law, where trust law and contract can inform some specifics of such agreements and enhance their status and enforcement.

The inspiration for this idea comes, in part, from recent 'private law' developments in intellectual property law – from copyleft.<sup>9</sup> Copyleft initiatives generally seek to engender the free circulation of works, subject to copyright. Copyleft both creates legal rights and is a social movement. It seeks to shift the legal focus from the protection of exclusive private property rights, where law creates restrictions, to law facilitating the interests of the community at large and open flows of information. In this sense copyleft uses the tools and powers of private law to advance communal, rather than individual, interests. Copyleft is dialogic, in that individuals and communities establish the terms of ownership and engagement with works produced under such licences. These agreements are legally enforceable in the

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<sup>8</sup> Erik B Bluemel, 'Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making' (2005) 30 *American Indian Law Review* 55, 57.

<sup>9</sup> See Wikipedia, *Copyleft*, <<http://en.wikipedia.org/wiki/Copyleft>> 14 August 2006; GNU Project, 'What Is Copyleft?', <<http://www.gnu.org/copyleft/>> 14 August 2006.

courts, but because of the social movement aspirations of copyleft, and for want of resources, there is greater reliance on education as to community norms, peer pressure and shaming. These seem to work quite successfully.

This article considers the scope of this practice born of the information technology industries, for providing the foundation for a reinvigoration of custom in Australian jurisprudence, at least with regard to protecting indigenous cultural rights.

The reference to 'juridification' in the title of this paper notes the challenge of using private forms of ordering, and using any of our legal 'ways of knowing', whilst retaining legal sense and meaning at the community level. When knowledge is 'juridified' it is captured by formal legal authority and taken over by the legally trained. With western law, knowledge is objectified, solidified, formalised and through the process of its translation and re-presentation, the meaning changes. Notwithstanding the apparent vitality of free and open source communities (FLOSS), and the proliferation of these licenses, it cannot be presumed that even here law respects community empowerment. Further it may be the case that such private ordering is only legally valued when it appears to service the needs of information capitalism.

However FLOSS shows that informal, grassroots sources of law can be used and function, to some degree, to the sides of formal legal oversight and 'correction'. Here law and language can retain the natural voice 'of the community'.<sup>10</sup> Experimentation with this form of 'private ordering' is now surely worth trying, especially where other legal and political alternatives for reconciliation with indigenous Australia seem so closed.

## I THE POLITICS OF CUSTOM AND LAW

Custom is usually constructed as of a source of law that needs to be reconciled with positivist jurisprudence. In the Australian context, the discourse is dominated by discussion of land. Put crudely, though not inaccurately, what this means is that the 'modern' legal system and its educated agents – lawyers, judges, and anthropological experts – assess whether the people claiming customary rights measure up.<sup>11</sup> When this is a successful process and some rights, in some form, to qualifying owners, are legally recognised, there are further rounds of political institutions to negotiate. The legislators and media, in conjunction with academic commentators – all actors representing 'the public' – further decode the judicially recognised customary claims. This impacts directly on the ongoing negotiation and settlement of the particular legal definition of custom. The tenor of this mediation between the judicial determination and 'the public' directly impacts on the stability

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<sup>10</sup> For an appraisal of the difficulties FLOSS faces in maintaining a strong sense of community see Kathy Bowrey, 'Chapter 4: Linux Is a Registered Trade Mark of Linus Torvalds' in *Law & Internet Cultures* (2005) 81.

<sup>11</sup> See for example, Gary Edmond, 'Thick decisions: Expertise, Advocacy and Reasonableness in the Federal Court of Australia' (2004) 74 *Oceania* 190.

of the rights and the potential inherent in the 'new' opportunities awarded to customary owners via the legal struggle.

In these negotiations between law and custom there is often reference to an alternate source of authority - that of international law, civil and political rights and/or human rights.<sup>12</sup> However, with the exception of implementing those agreements facilitating world trade, this remains an adjunct source of legal authority, and has an inconstant presence on the domestic scene. International discourse concerning the nature and scope of political and legal rights does not fit well with the presumed sovereignty of the modern nation state to determining its own constitution. In Australia, the Howard government has frequently cast doubt on the relevance of international law when politically expedient to do so.<sup>13</sup> Hence notice of international humanitarian obligations has commonly resulted in complaints of 'political correctness' and of the judiciary being 'out of touch' with 'ordinary' Australians.<sup>14</sup>

In this environment the conventional legal avenues that offer some opportunity for recognising custom need serious reappraisal.

As custom is conventionally understood and practiced in legal and political institutions in Australia, indigenous people are placed in a position where to speak to law, to be able to speak *at all* within the confines of western customary law, indigenous people have to give up the ability to speak of custom in a way that actually makes sense to them. Yet these are the peoples most directly affected by the outcomes of these legal and political processes.

Further, in terms of the conventional legal discourse, academics and lawyers inevitably perform as interpreters, mediators and spokespeople for custom, speaking for the presumed silent indigenous subject.<sup>15</sup> The task is one of showing how 'the

<sup>12</sup> For example, the *Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights*.

<sup>13</sup> Popularly debated examples include obligations with regard to refugees, citizen's rights and international obligations in the context of combating terrorism.

<sup>14</sup> ABC Radio, 'The PM on Political Correctness' *AM Program*, 31 December 2002 <<http://www.abc.net.au/am/stories/s755916.htm>> 14 August 2006; ABC Television, 'Federal Government Unmoved on Asylum Seekers' Fate', *The 7.30 Report*, 28 August 2001 <<http://www.abc.net.au/7.30/content/2001/s353913.htm>> 14 August 2006. There is a great deal of discussion of this aspect of contemporary Australian political culture. See eg, Sean Brawley, "'A Comfortable and Relaxed Past": John Howard and the "Battle of History"' (1996) *The Electronic Journal of Australian and New Zealand History* <<http://www.jcu.edu.au/aff/history/articles/brawley.htm>> 17 August 2006; Fr Frank Brennan, 'Honesty and the Issues' *The Jesuit Social Justice Centre Talks* 11 February 2004 available <[http://www.uniya.org/talks/brennan\\_11feb04.html](http://www.uniya.org/talks/brennan_11feb04.html)> 17 August 2006; Judith Brett, 'Relaxed and Comfortable: The Liberal Party's Australia' (2005) 19 *Quarterly Essay* 41; Gary MacLennan 'Political Correctness in Australia - and Courtesy' *Monthly Review*, March 1997 <[http://www.findarticles.com/p/articles/mi\\_m1132/is\\_n10\\_v48/ai\\_19344901](http://www.findarticles.com/p/articles/mi_m1132/is_n10_v48/ai_19344901)> 17 August 2006.

<sup>15</sup> There are of course many indigenous lawyers in Australia, although the numbers are still small. For example, overall in 2004, only 1.2% of law students enrolled at Australian universities were Indigenous (compared with 10.6% for NZ). See Richard Potok, 'Appendix 9: Issues Relating to Recruitment of Indigenous Lawyers into the NTRB System' in *Report into*

indigenous' *could* fit in, that is, be reconciled with and/or to the formal categories of the law.<sup>16</sup> Thus much scholarship centres on exploring how legal obstacles can be overcome, given the 'right' political will. However because the 'right kind' of political will is generally found to be lacking – because of racism or lack of vision or intellectual disagreement – meditating on both academic and popularist literature related to custom is a rather miserable and disempowering experience. There is often a single-minded desire for what, it seems, is politically impossible to deliver. Further this immediate quandary can come to overshadow a more critical appreciation of the level of difficulty encompassed in such jurisprudential projects for reform, were political willingness to eventually emerge. Both the legislative and the jurisprudential attempts to make law more responsive – for law to become less positivistic and less overbearing – flounder.

However the consequence of the failure of the law to adequately or appropriately address customary rights in this way can also be misstated in this jurisprudence. The preoccupation with the 'incorporation' of the indigenous in 'some' form can overstate the importance of formal, black letter law. While being Other to the law is not a problem that should be read down, it is also the case that 'the law that is', is not simply an overarching, impermeable set of fixed categories, housing sets of commands that dictate social life. The importance of formal law, black-letter law, can often thus be overstated in reconciliation jurisprudence. As a consequence of always looking to the design of the grand norms, what comes to be neglected is the more diverse ways and means of practicing law in the community. These practices intersect with formal law, but as the sociological literature on law has shown, social practices are not usually overly determined by legal command.<sup>17</sup>

This paper thus begins with a doubt about the value in trying to reconcile the indigenous subject with formal law. While acknowledging that there are problems with accepting a symbolic formal exclusion of the indigenous, given the indigenous and others in the community suffer from far more than just a symbolic absence (from silencing and from exclusion), perhaps the need for and possibility of that kind or level of legal reconciliation has been overemphasised?

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*the Professional Development Needs of Native Title Representative Body (NTRB) Lawyers* (2005) [http://www.auroraproject.com.au/Links/2005\\_april\\_report.pdf](http://www.auroraproject.com.au/Links/2005_april_report.pdf) 17 August 2006. Despite slowly increasing numbers of indigenous law graduates, the problem of speaking with an indigenous voice within our legal system, and of 'speaking for' otherwise unrepresented Others, remains.

<sup>16</sup> For example, by supplementing existing laws with new categories: 'It is true that intellectual property laws are based on Western, developed markets. Western concepts of creation and invention, and Western concepts of ownership. ... This Article argues that copyright laws can, and must, be expanded so as to maintain the vitality of, and protect, the creative artistic and literary works of indigenous cultures.' Megan Carpenter, 'Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community' (2004) 7 *Yale Human Rights and Development Law Journal* 51, 51.

<sup>17</sup> This is discussed briefly in Kathy Bowrey, *Law & Internet Cultures* (2005) 16-17.

This leads to the inquiry: is it possible to find an alternate space within our law, using private law, to deal with custom differently?

To address this we first need to consider the role of private ordering in an era of globalisation.

## II NEW CUSTOMARY LAW, INTELLECTUAL PROPERTY AND GLOBALISATION

As a matter of formal law intellectual property legislation is silent on the issue of customary rights, and case law says that there is not really a way of accepting custom as originating rights that would be legally enforceable in the usual manner. This is because in intellectual property jurisprudence it is axiomatic that positive law is the authoritative source of rights.<sup>18</sup> As a consequence of accepting this ‘truth’ the presumption of most, probably nearly all intellectual property academics, is that intellectual property and custom are quite estranged. There are people who want a reconciliation between the two and work hard at that, but there is an ever present doubt that it can happen without a lot of compromises, limitations and exclusions.

My view is different because I think there are a number of recent developments that look to me, in practical terms, as ways in which custom – *custom in the sense of the lived experience and legal wisdom of the community* – is being accepted and enforced *in the community*. These are developments that in terms of formal legal classification do not circulate under the rubric of ‘custom’. But both indigenous protocols and copyleft are about promulgating and enforcing communal norms and generating broad respect for, and compliance with, such demands. Why should they not be considered as contemporary forms of custom?

In intellectual property terms it may be somewhat scandalous to characterise high-tech information economy developments as an expression of customary practice. The use of the term ‘custom’ in this respect suggests a synchronicity between the indigenous and the high-tech. But if this connection causes anxiety, that discomfort is also a problem worth exploring. The failure to address it has ramifications for the indigenous subject seeking to claim full citizenship in the information economy.

At this juncture, and in order to connect the indigenous to the information economy, it is useful to sketch my understanding of the contemporary nature of citizenship, and its relation to indigeneity.

In describing contemporary political and legal relations Peter Fitzpatrick observes:

One way of getting some perspective on the new imperialism would be to contrast it with the old. In its immediate effects, the old imperialism operated largely through the singular imperial nation, whereas the new, while still acting through the singular nation, also operates to a large extent through institutions of the community of nations. This collection of institutions and imperial nations is not gathered under any

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<sup>18</sup> This is taken up below.



perspicacious label but presents itself in such anodynes as the global, the world-wide, the human. With the new imperialism, the direct colonial imposition which characterized the old gives way to contractual modes of domination.<sup>19</sup>

He goes on to note that the guiding axioms of global legalism are liberalisation, deregulation and privatisation:

There is an overarching purport to the new imperialism and that is neo-liberal. The market is to be supreme both internationally and within the national territory, with the role of the nation-state being confined to the managerial and the supplementary. Barriers to that outcome have to be considerably diminished or removed.<sup>20</sup>

In a global marketplace where commodification is of information flows, the political climate creates ample space for the legal expression of new forms of information rights. The architecture of the information economy is supported by contract and forms of copyright licence over the infrastructure and over the data that flows. Global civil society and the global marketplace are constructed via these legal mechanisms.

The 'supplementary' role of nation states, and particularly the action of the United States Government, has led to the enactment of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement under the auspices of the WTO,<sup>21</sup> new WIPO treaties,<sup>22</sup> intellectual property chapters of Free Trade Agreements,<sup>23</sup> and associated reform of domestic intellectual property laws.<sup>24</sup> These legislative initiatives have overwhelmingly advanced the 'protection' of corporate private property rights. As such the positive law remains removed from consideration of broader social and political interests and the expression of communal needs. However the capacity for individual owners to contract, to consent, to construct collective interests, often expressed in the name of support for the 'human right' or 'natural right' of free communication,<sup>25</sup> remains unaffected.

<sup>19</sup> Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001) 212.

<sup>20</sup> Ibid 213.

<sup>21</sup> World Trade Organization, 'Intellectual Property- TRIPS Gateway' <[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)> 17 August 2006; Wikipedia, 'Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)' <<http://en.wikipedia.org/wiki/TRIPS>> 17 August 2006.

<sup>22</sup> World Intellectual Property Organization, 'WIPO-Administered Treaties' <<http://www.wipo.int/treaties/en/>> 17 August 2006; Wikipedia, 'World Intellectual Property Organization' <<http://en.wikipedia.org/wiki/WIPO>> 17 August 2006.

<sup>23</sup> Peter Drahos, 'Expanding Intellectual Property's Empire: The Role of FTAs' (2003) <[http://www.grain.org/rights\\_files/drahos-fta-2003-en.pdf](http://www.grain.org/rights_files/drahos-fta-2003-en.pdf)> 17 August 2006; Rafael Pastor, 'The Impact of Free Trade Agreements on Intellectual Property Standards in a Post-TRIPS World' (2006) <[http://www.bilaterals.org/article.php3?id\\_article=4311](http://www.bilaterals.org/article.php3?id_article=4311)> 17 August 2006.

<sup>24</sup> Kathy Bowrey, 'Can We Afford to Think about Copyright in a Global Marketplace?' in Fiona Macmillan (ed), *New Directions in Copyright Law* (2005) vol 1, 51.

<sup>25</sup> International initiatives include, *European Convention on Human Rights*, art 10, and proposals for a new global treaty for *Access to Knowledge*, [t]he freedom of all to access and reuse information, knowledge, creative works or scientific data is key to the advancement of

Chidi Oguamanam argues that,

Globalization, to some extent, empowers minority cultures and generates increased consciousness of cultural membership and identity. Indigenous renaissance and its impact on boosting various forms of cultural emancipation are incidences of globalization. In fostering homogenization, globalization also engenders resistance to domination and cultural appropriation which the integration initiative symbolizes. ... Among the diverse ways in which globalization has enhanced indigenous emancipation and the integration project in the last five years is by facilitating a networking culture amongst indigenous peoples across the globe.<sup>26</sup>

The conceptualisation of human rights in global legalism differs from that of modernity. It does not present as an Enlightenment creation legitimated by universal appeals to the naturalness of a particular vision of humanity, Man's place in the universe, or the European man's entitlement to the globe. Its universalism is an abstraction, distant from the ambition of any particular nation-state or any detailed cultural inscription. Global human rights jurisprudence explicitly recognises a space (at least formally) for nuanced, culturally sensitive negotiations over the political sphere and the construction of law.

In intellectual property law, the problem is discussed in these terms,

[w]hat is critical in the development of any 'international' framework is the ability to identify what might be 'common' to various traditional and Indigenous groups, without generalising the identity of those groups themselves. ... An effective and relevant model of protection must not homogenise the Indigene, but should provide a workable legal concept for the relationship between community and the individual, towards a model for community authority and capacity with respect to traditional resources. In providing a legal framework for community authority, it is important not to suggest any fixed definition of the indexical 'Indigenous community' in and of itself. The definition, if it is to be understood as one, must come from a 'communal' and mutual recognition between individuals, the recognition that ultimately manifests itself as 'community', rather than a concept into which the individual Indigene as and when she arises is to be inserted.<sup>27</sup>

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humanity' . Society for Public Information Spaces. *Pro-commons Blanket Clause* (2005) Preamble <<http://www.cptech.org/a2k/spis.doc>> accessed 28 August 2006.

<sup>26</sup> Chidi Oguamanam. 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge' (2004) 11(2) *Indiana Journal of Global Legal Studies* 135, 166-7.

<sup>27</sup> Johanna Gibson, 'Intellectual Property Systems, Traditional Knowledge and the Legal Authority of Community' (2004) 26 *European Intellectual Property Review* 280, 287-9. See also Rosemary J Coombe. 'Intellectual Property, Human Rights and 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; Rosemary J Coombe. 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law' (2001) 14 *Saint Thomas Law Review* 275; Shelley Wright, 'Intellectual Property and the "Imaginary Aboriginal"' in G Bird, G Martin and J Neilson (eds). *Majah: Indigenous Peoples and the Law* (1996) 129; Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (2001).

Global information technologies assist with the spread of such discourses and suggestions of new models,

[s]trategic alliances are being forged between indigenous NGOs, North-South alliances of farmers' and peasants' groups, traditional healers associations, environmental NGOs, development institutions and activists. ... These new coalitions form the core of a new and vibrant political movement organized around group opposition to existing intellectual property laws. ... These new networks of advocates and activists are organized to put pressure on governments and United Nations bodies to insist upon new understanding of justice, equity, and accountability in the appropriation of genetic resources, traditional knowledge, and in the international exercise of and justifications for intellectual property rights.<sup>28</sup>

There are links between advocates of copyleft and academics interested in indigenous issues.<sup>29</sup>

Though FLOSS advocates may be marginalised by developed country nation states, by WIPO, and in trade talks initiated by developed countries, global legalism seems to allow a space where rights conferred by positive law, and certain normative expectations of 'sharing', expressed as free software and open source licensing, can co-exist. Despite antagonism from multinationals and US Trade Representatives in particular,<sup>30</sup> the strength of copyleft as a social movement, and as a techno-legal practice, continues unabated. Thus it is argued that at the current time positive law does not necessarily appear to be completely closed to the expression of new communal practices. Nor as a practical matter, is enforcement of FLOSS licensing heavily dependent on formal legal processes.

It is the success of FLOSS in existing on the margins of formal political and legal discourse, empowered through network relations, that gives cause to re-evaluate the place of 'civil society' assertions of sovereignty in this era of globalisation. The new customary practices have the potential of expressing a different kind of sovereignty, self-determination, community autonomy and legalism, to that associated with modernity and positivism. Where, in relation to indigenous rights, sovereignty is not a justiciable issue, it suggests the possibility of routing around State and court brokerage, and having an impact on social practice and values in the broader community. Further, where the normative content is determined 'bottom-up', indigenous identity and law can be expressed more appropriately, without the automatic presumption of 'speaking for' any others.

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<sup>28</sup> Rosemary J Coombe, 'The Recognition of Indigenous Peoples', above n 27, 278.

<sup>29</sup> For example, 'The Bellagio Declaration' *Rockefeller Conference on 'Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era'* (1993) <<http://www.cwru.edu/affil/sce/BellagioDec.html>> 17 August 2006; Consumer Project on Technology <<http://www.cptech.org/>> 17 August 2006.

<sup>30</sup> Bowrey, *Law and Internet Cultures*, above n 17, 91.

### III 'INDIGENOUS KNOWLEDGE' AND INTELLECTUAL PROPERTY LAW<sup>31</sup>

Intellectual property dialogue about custom started properly in the mid-late 1980s when the subject of traditional knowledge began to be carved out as a special area of regulatory interest.<sup>32</sup> There were inquiries, reform suggestions, case law comments and a lot of academic writing about the presumed inability to recognise indigenous cultural property rights appropriately.<sup>33</sup> It was also unanimously accepted that this was a legal wrong that needed correcting. Throughout the 1990s the *Mabo* discourses had revitalized academic debate and brought to the fore questions of law, authority, and identity. That attempt to redress history gave a further impetus to better explore how intellectual property rights could and should accommodate indigenous interests. Even though intellectual property and real property are obviously treated in law as quite different forms of legal rights, with different objects of regulation, property theory and the same discourse of dispossession cuts across both areas.<sup>34</sup>

As with real property, the issue was and remains the problem of fitting indigenous interests into the authority structure of Australian law. The potential for that has always been presumed in intellectual property to be quite limited, although in litigation it often proved not as limited as first thought.<sup>35</sup> However it is also worth noting that the opposition to the idea of recognising 'indigenous cultural property'<sup>36</sup> has not come from the usual quarter. Governments of both persuasions, and associated ministries and law reform bureaucracies have never been as hostile or suspicious of reforming cultural rights as they have been with revisiting real property rights. The problem with intellectual property is not one of a legislature or the courts wanting to see no development or to forestall the birth of new rights, especially in copyright.<sup>37</sup>

Domestic interest has been mirrored on the global stage, where the Australian example is often drawn on to exemplify the 'problem of traditional knowledge'

<sup>31</sup> The article primarily focuses on developments in copyright, but the 'communal' dynamic is also present in other areas such as patents and trade mark law, and in internet law generally.

<sup>32</sup> Jane Anderson, *Law/Knowledge/Culture: The Making of Indigenous Knowledge in Intellectual Property Law*. (Edward Elgar, forthcoming). Anderson argues that much of the Australian interest predates and later informed the international context.

<sup>33</sup> The most commonly cited report is by indigenous lawyer, Terri Janke, *Our Culture, Our Future* (AIATSIS, 1997).

<sup>34</sup> The connection between developments in Australian intellectual property law and land law is sketched in Justice Ronald Sackville, 'Legal Protection of Indigenous Culture in Australia' (2003) 11(2) *Cardozo Journal of International and Comparative Law* 711.

<sup>35</sup> *Bulun Bulun v Nejlam Pty Ltd*, (unreported, Federal Court of Australia, Darwin, Olney J, 29 March 1989), referred to in Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 10 *European Intellectual Property Review* 346; *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240; *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513 ('*Bulun Bulun*').

<sup>36</sup> 'Indigenous cultural property' is the current term of usage in Australia. Others include Folklore, Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE).

<sup>37</sup> See Justice Ronald Sackville, above n 34.

more generally.<sup>38</sup> There is a specialist bureaucracy within the World Intellectual Property Organization (WIPO) dedicated to ‘Traditional Knowledge, Genetic Resources and Folklore’:

Working in co-operation with other international organizations and in dialogue with NGOs, WIPO provides a forum for international policy debate concerning the interplay between intellectual property (IP) and traditional knowledge, genetic resources, traditional cultural expressions (folklore).<sup>39</sup>

The work of this body has increased substantially in the past decade. Nonetheless reservations remain. WIPO’s ‘fact-finding’ inquiries<sup>40</sup> into traditional knowledge are rich in identifying ‘difference’, and the lack of legal confidence in this area relates to a more fundamental jurisprudential dilemma of how it is possible to do it – how to achieve a form of reconciliation of positive law and custom.

Despite a considerable amount of goodwill (especially compared to the property law world),<sup>41</sup> intellectual property lawyers in the 1990s were even more sceptical about the potential for legal ‘reconciliation’ with indigenous peoples from the start. This has to do at least in part with the lingering influence of romanticism on cultural intuitions about the category of copyright law.

Romanticism comes into the picture in two ways. Firstly it is a marginalised discourse in copyright law. There is no formal recognition of romantic philosophy underpinning copyright law. The most important case law about the foundation of copyright<sup>42</sup> casts doubt that this or any philosophy really fits with the rights the legislature created. However notwithstanding the position that it is not helpful to align the content of these legal rights with philosophy or art theory, romanticism has had and continues to have a strong social presence. It grounds conventional views about high art and culture and is never far away from critiques of copyright law from the perspective of art and artists. One of the recurring criticisms of copyright is that this body of law supports commodification at the expense of a genuine interest in fostering culture, creativity and art.

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<sup>38</sup> See WIPO, ‘Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions’ (2002) <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>> 28 August 2006; Michael Blakeney, ‘The Protection of Traditional Knowledge under Intellectual Property Law’ (2000) 22 *European Intellectual Property Review* 251; Megan Carpenter, above n 16; Rachel Grad, ‘Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia’ (2003) 13 *Duke Journal of Comparative and International Law* 203.

<sup>39</sup> <<http://www.wipo.int/tk/en/>> 21 February 2006.

<sup>40</sup> WIPO, ‘Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)’ <<http://www.wipo.int/tk/en/tk/ffm/report/index.html>> 28 August 2006.

<sup>41</sup> Such is the interest in the problem that there are few Australian copyright academics that do not claim some level of indigenous expertise. In 20 years of close study of the Australian literature I am yet to come across an IP article ‘against’ indigenous cultural property. Media coverage is also overwhelmingly supportive of reform.

<sup>42</sup> *Donaldson v Beckett* (1774) 4 Burr 2408; 98 ER 257.

Secondly, romanticism directly links the notion of true artistic identity with artistic suffering in the world and with alienation from Nature. The Romantics rejected the Enlightenment objective, scientific view of Nature. Part of this discourse about Nature involves an idealisation of the Savage, of the indigenous and the associated spirituality.

Because the romantic does not fit comfortably in copyright law, and because romantics in a sense are identified with the indigenous, I think intellectual property academics and other commentators tended to assume that as a matter of common sense the indigenous could not fit into modern western copyright law. There is a lot of 1990s scholarship about the author function in copyright and its western bias.<sup>43</sup>

The case that formally considers the status of indigenous customary rights in copyright is the *Bulun Bulun* decision.<sup>44</sup> This dispute was about an indigenous claim to communal copyright ownership. The painting, 'Magpie Geese and Water Lilies at the Waterhole', was executed by artist John Bulun Bulun. However the artist, with the support of his community, the Ganalbingu people, argued that the copyright in the work, which expressed ritual knowledge of the community, should be treated as communally owned.

The court said that recognition of communal ownership could not be linked to recognition of native title rights, as under Australian law it is copyright that determines what, if any, rights exists. Section 8 *Copyright Act 1968* (Cth) says copyright does not exist except as under this Act. There is no legislative provision for communal authorship or ownership.

There is however provision for joint authorship.<sup>45</sup> Does that apply?

The precedent for joint authorship says that to come under this definition the co-authors' contributions need be inseparable from each other. In *Bulun Bulun* the court said that this means the contributions that count as authorship must relate to the physical production of the material form of the work. Unless the community were actually all involved in the painting of the work, they have no copyright in it. Indigenous authority, community-based authority to paint particular imagery and circulate it more broadly, is not thus recognised as part of the necessary conditions of production of those works for copyright purposes. Oversight and authority over the production is treated as too ephemeral a contribution to be recognised in copyright.

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<sup>43</sup> Michel Foucault, 'What Is An Author?' in J Harari (ed). *Textual Strategies. Perspectives in Post-Structuralist Criticism* (1979) 141; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) *Duke Law Journal* 455; Mark Rose, *Authors and Owners: The Invention of Copyright* (1993); Martha Woodmansee, *The Construction of Authorship: Textual Appropriation in Law and Literature* (1994). There is an overview of this literature in Jill McKeough, Kathy Bowrey and Phillip Griffith, *Intellectual Property. Cases and Materials* (3<sup>rd</sup> ed, 2006) [2.10].

<sup>44</sup> (1998) 41 IPR 513.

<sup>45</sup> See *Copyright Act 1968* (Cth) s 10 'works of joint authorship', pt III div 9 ss 78-83.

There was recognition that the community may have some equitable ownership rights, arising from usual circumstances of implied trust and fiduciary relations. That is the artist of traditional works, made with authorisation of the community, owes an obligation to the community whose interest could be harmed by some treatments of the work. Because copyright does not recognise the communal relations of the work, the community and its culture is vulnerable to exploitation – hence the artist owes a fiduciary obligation to those ‘owners’. But these equitable rights are usually only exercisable intra-community, between beneficiary of the trust (the community) and the fiduciary (the individual artist as formal copyright owner). Given that traditional authority need already be present and acknowledged by the individual copyright owner for such an equitable interest to arise in copyright, having recourse to the court of equity to enforce such community obligations/expectations is most likely to be of limited practical use and application in traditional contexts.<sup>46</sup>

The intellectual challenge of the *Bulun Bulun* case is in working out precisely why it is so difficult to meaningfully accommodate indigenous communal ownership. The case is one where the cultural specificity of copyright law was directly at issue. The judge self-consciously considered his position as interpreter of a different culture. However his openness to cultural difference was moderated by his obligation to preserve mainstream copyright law. Von Doussa J explicitly stated a commitment to maintaining the integrity of principles of interpretation of copyright law in this case.<sup>47</sup>

While concern for legal integrity creates a limit to stretching legal concepts to accommodate indigenous demands, Australian courts have demonstrated no comparable incapacity in stretching the very same legal ideas to accommodate the collective authority and production of corporations. In copyright, it is the act of making the work that gives rise to authorship, and hence ownership of the copyright, unless there is some contractual provision that alters this presumption.<sup>48</sup> Managerial supervision of production from afar, and contributions as ephemeral as identifying a potential market for a new product has been valued as a substantial original contribution that gives rise to the subsistence of copyright.<sup>49</sup> The ‘directional’ vision for an interactive computer game that was communicated to the

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<sup>46</sup> It has been mooted that the community, as fiduciary, may be able to act in their own name in relation to ‘orphan’ works, that is those held in collections with no records of individual authorship. For a case dealing with discord between an individual artist’s consent to formal legal relations and community expectation see *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

<sup>47</sup> *Bulun Bulun* (1998) 41 IPR 513, 524f. Concern that the single Federal Court judge not write a ‘brave’ decision, likely to be overturned on Appeal is a related factor. Jane Anderson, ‘Personal correspondence with John Von Doussa’, *The Production of Indigenous Knowledge in Intellectual Property Law* (PhD thesis, University of New South Wales, 2003).

<sup>48</sup> See *Copyright Act 1968* (Cth) s 35.

<sup>49</sup> *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213. This is discussed in more detail in relation to the *Bulun Bulun* case in Kathy Bowrey, ‘The Outer Limits of Copyright Law’ (2001) (12)1 *Law and Critique* 75.

game programmers, but only brought into visual reality by the eventual player was sufficient to produce authorship of a cinematographic film.<sup>50</sup> So *why is it that all the concepts and categories that touch on the indigenous involve impossible demands, and all those that relate to reinvigorating the rights to accommodate mainstream culture and economy show up the law as flexible, malleable and constantly able to be legally renewed?*

There seems to be something about the way we understand custom and indigenous difference that produces an impasse. The impasse resides with the limiting formal construction of the indigenous subject in the project of reconciliation.

Firstly, there is a theoretical presumption that comes with approaching the politics of engagement with indigenous culture as primarily a question of difference, where sovereignty is not a justiciable issue. Further where our legal system segregates land and cultural rights, this totally disrupts Aboriginal 'ways of knowing'. Another problem is the inevitable conflation of the indigenous with the traditional, and the traditional, through the notion of custom, with the presence of the past. This demand of the law is based on a dichotomy of tradition and modernity, even when law says it is looking for continuity.

The notion of indigenous knowledge as somehow fundamentally and indescribably different to other forms of knowledge is often related to a romanticism of aboriginal peoples, historically locating them with land, nature, and a subsistence economy, disconnecting them from the space occupied by 'high' tech society and the growth of the economy. This further excises the indigenous from empowerment in relation to the future, without acknowledging so, or intending to do so, indeed being blind to it so doing.

I am interested in challenging the validity of separating traditional or indigenous knowledge from western knowledge.<sup>51</sup> The point here is not to try and suppress or smother indigenous identity, but to turn the gaze back to the way in which we, especially in copyright, use the foil of the indigenous and their presumed difference to avoid all manner of engagement with questions about the role of law in supporting the 'mainstream' and developing forms of commodity culture.

In sociological and anthropological terms, there are questions about the permeability and intersections of all kinds of knowledge that need exploring. There

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<sup>50</sup> *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462. See also the discussion of photography in Kathy Bowrey, 'Copyright, Photography & Computer Works – The Fiction of an Original Expression' (1995) 18(2) *University of New South Wales Law Journal* 278.

<sup>51</sup> See Anderson, *Law/Knowledge/Culture*, above n 32 and Arun Agrawal, 'Dismantling the Divide between Indigenous and Scientific Knowledge' (1995) 26 *Development and Change* 413. Another version of this article 'Indigenous and Scientific Knowledge: Some Critical Comments' (1995) 3(3) *Indigenous Knowledge and Development Monitor* <<http://www.nuffic.nl/ciran/ikdm/3-3/articles/agrawal.html>> 28 August 2006, generated varying and considered responses. See responses in: (1996) 4(1) *Indigenous Knowledge and Development Monitor* and (1996) 4(2) *Indigenous Knowledge and Development Monitor*.



is a need to reflect on the effects of adopting such a dichotomy between the indigenous/traditional and the western/modern, given that this characterisation is itself a product of particular relations of power.<sup>52</sup>

In intellectual property there are all manner of contradictions about how law deals with its cultural power. Copyright in particular, has always had very weak intellectual or philosophical foundations.<sup>53</sup> It could be that, in intellectual property law, we use the occasion of addressing an indigenous demand to locate the limits in the law, to try and anchor it, and affirm more generally the law's particular objects and purpose. In copyright this allows a gesture towards this law having 'foundations' or 'principles' so that it can present as modern law, with the suggestion of coherence, clarity, certainty in definition, and order.<sup>54</sup> In the non-indigenous case such rationality and order to the law is usually more simply presumed. If so, the indigenous subject is always inevitably, *struck from the same presumption of legal inclusion* that flows naturally to those that qualify as 'mainstream', because it is the notion of the indigenous Other that assists in the definition of the mainstream.

This reading of the role of indigenous marginality in the law is supported by the way Australian copyright deals with questions of cultural judgement more generally. Despite an express indigenous sensitivity, judges often hide behind the explanation that copyright law does not require cultural judgement or discrimination.<sup>55</sup> In fact the legislation explicitly says that in relation to artistic works it is not required.<sup>56</sup>

<sup>52</sup> Jane Anderson, 'Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use' (paper presented at *Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena*, New York, 5-7 May 2005); Jane Anderson and Kathy Bowrey, 'The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas Are Being Advanced?' (paper presented at the Con/texts of Invention Conference, Case Western Reserve University, 20-22 April 2006).

<sup>53</sup> See Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property* (1999).

<sup>54</sup> This would also help explain why invariably, in speaking as a copyright expert in Australia, one and all necessarily feel qualified to talk about (the problems of) indigenous inclusion.

<sup>55</sup> In *Sheldon & Hammond Pty Ltd v Metrokane Inc* (2004) 135 FCR 34 at 80 Conti J notes: 'the inappropriateness of the courts making aesthetic judgments also appears in what I have cited from the speeches in *Hensher* of Viscount Dilhorne, Lord Simon and Lord Kilbrandon, and has been similarly emphasised in the Australian authorities which I have reviewed, and to which I would add reference to the opening observation in the judgment of Hill J, as a member of a Full Federal Court, in *Schott Musik International GMBH & Co v Colossal Records of Australia Pty Ltd* (1997) 75 FCR 321 at 325.' Similarly in the recent case involving the eligibility of a painting for the Archibald Prize, Hamilton J noted: 'I do not intend to proceed to a judicial finding of fact as to whether or not the work is "painted". I have already commented that there is a certain appearance of strangeness in courts making determinations concerning the qualities of works of art. That matter is better left to those involved in the art world': *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 (unreported, Hamilton J 14 June 2006) [32].

<sup>56</sup> For example, *Copyright Act 1968* (Cth) s 10(1) defines an artistic work in which copyright subsists as (a) a painting, sculpture, drawing, engraving or photograph, *whether the work is of artistic quality or not*; (b) a building or a model of a building, *whether the building or model is of artistic quality or not*. The definition of 'originality' in copyright more generally limits

Of course non-discrimination is impossible in disputes about the limits and potential of rights in a cultural work that affect how another can engage that work. Further in terms of recognising rights, a failure in creativity with legal interpretation can hinder 'innovation'. Copyright law wants to be forward looking *and* fulfil the liberal promise of 'impartiality' and 'neutrality'. But how do you make space for the nuances and flexibility that might be required, when we don't know what the information economy is going to look like five years from now? An open, reflexive approach suggests itself more useful than a literalist mode of interpretation here. It authorises the law to be surprisingly malleable when confronted with rights claims by owners of new media forms.

The number and tenor of digital copyright reforms shows that the legislature is far more responsive to new private property claims than it is to the new forms of sharing. However respect for the autonomy of all property owners grants a degree of freedom to those who so qualify, to privately manage their copyrights as they see fit. As stated above, since the late 1990s intellectual property law has increasingly been developed by accommodating private ordering, and permitting the meaning of the rights to be determined with reference to 'private', informal sources of law.

Codes of practice, voluntary protocols, contract, express and implied agreements about use, advocating general global 'standards', and simply using technological encoding are all recognised as legal sources relevant to formal determination of the balance or scope of rights. All of the law reform in the last five years has accommodated this politics. Even copyright law reform inquiries have been contracted out to the private sector to manage and to make recommendations.<sup>57</sup>

This global legalism reflects a lack of confidence in making 'public' determinations about the culture and economics of copyright. Accordingly there is little space for domestic provision for any broad appeal to the public interest or public good expressed as universal needs, defined by the nation-state alone.

Section 8, the provision that says copyright is a creature of positive law, is still valid. But the positive law itself now references the legal authority of the 'private sector', comprised of community and industry views, in order to expand and manage new rights and protections.<sup>58</sup>

This move to private ordering as a source of law is usually viewed with concern. It is evidence of the might of corporate power and profoundly anti-democratic. There

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*scope for overt aesthetic judgment in all categories of work. See University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601, 608-9; Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited (2002) 119 FCR 491.*

<sup>57</sup> For example, the Commonwealth Attorney General's Department outsourced the *Digital Agenda Review Report and Recommendations*, (January 2004) to transnational law firm Phillips Fox.

<sup>58</sup> For example, compliance with industry practice and voluntary codes of practice is relevant to determining liability for authorisation of copyright infringement, s 101(1A)(c), and infringement of moral rights, ss 195AR(2)(c); 195AR(2)(d); 195AS(2)(f); 195AS(2)(g).

is something to this critique. Drahos and others are particularly critical of this.<sup>59</sup> But beyond the space in which the large corporations and government intersect, some of these forms of private ordering involve legal recognition of social practices that are potentially empowering. And as already foreshadowed it is these kinds of new legal practices that interest me. I want to know what potential they have for giving communities the kind of authority, perhaps even sovereignty, over cultural production that they value and desire.

#### IV INDIGENOUS PROTOCOLS

[V]irtually all cultures have their own knowledge-protection protocols or conventions. Fundamentally, such culture-specific protocols are designed to protect knowledge. In that sense, they are functionally akin to Western intellectual property frameworks. Giving due regard to cultural protocols on knowledge protection is different from evaluating such schemes only in terms of their relevance to the conventional IP system. The latter approach undermines the differences in the epistemological narratives between Western and non-Western ways of knowing. In virtually all cases, ways of knowing have correlation to the ways of protection, transmission, legitimization and evaluation of knowledge. An acceptable *sui generis* mechanism for the protection of local knowledge must be rooted in indigenous episteme.<sup>60</sup>

One reading of indigenous protocols is that they exist in place of formal legal recognition of community custom. They stem from the failure inherent in Anglo-Australian jurisprudence to respect indigenous law. Thus protocols can be characterised as the only avenue left for affected communities to post their views.

Since the late 1990s a large number of institutions have drafted guidelines as to culturally appropriate practice.<sup>61</sup> Examples include those of

- media and arts organizations and arts funding bodies. Eg Australian Broadcasting Corporation,<sup>62</sup> Special Broadcasting Service,<sup>63</sup> the Australia Council,<sup>64</sup> Australian Film Commission,<sup>65</sup> NSW Ministry of Arts,<sup>66</sup> NAVA.<sup>67</sup>
- Libraries and Archives. Eg, Australian Institute of Aboriginal and Torres Strait Islander Studies<sup>68</sup>, Charles Darwin University<sup>69</sup>.

<sup>59</sup> See eg. Peter Drahos with John Braithwaite. *Information Feudalism: Who Owns the Knowledge Economy?* (2002); Susan Sell. *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003).

<sup>60</sup> Oguamanam, above n 26, 136-7.

<sup>61</sup> See also Sally McCausland, 'Indigenous Cultural Protocols as Legal Obligations in Filmmaking' (2006) 18(10) *Australian Intellectual Property Law Bulletin* 157.

<sup>62</sup> <<http://www.abc.net.au/message/proper/>> 27 August 2006.

<sup>63</sup> <<http://www.sbs.com.au/sbsi/documentary.html?type=6>> 27 August 2006.

<sup>64</sup> <[http://www.ozco.gov.au/arts\\_resources/publications/cultures\\_indigenous\\_protocol\\_guides/](http://www.ozco.gov.au/arts_resources/publications/cultures_indigenous_protocol_guides/)> 27 August 2006.

<sup>65</sup> <[http://www.afc.gov.au/filminginaustralia/indigproto/fiapage\\_9.aspx](http://www.afc.gov.au/filminginaustralia/indigproto/fiapage_9.aspx)> 27 August 2006.

<sup>66</sup> <[http://www.arts.nsw.gov.au/Guidelines/Grants/Indig\\_Arts/indigarts.htm](http://www.arts.nsw.gov.au/Guidelines/Grants/Indig_Arts/indigarts.htm)> 27 August 2006.

<sup>67</sup> <<http://www.visualarts.net.au/practicaladvice/default.asp?page=IndigenousArtsProtocols/IndigenousArtsProtocols>> 27 August 2006.

- Civil society groups. Eg the European Network for Indigenous Australian Rights-Guide for Journalists.<sup>70</sup>

Unlike positive law, protocols are usually classified as voluntary codes of practice. But what do we mean by voluntary here?

Protocols are prescriptive – in that they prescribe particular types of behaviour. They also have the capacity to convey a mode of behaviour that institutions and individuals are presumed to follow. Protocols prescribe modes of conduct through emphasizing or normalizing particular forms of cultural engagement. Whilst this effect is not assured, over time protocols do have the capacity to influence change in ways that differ to stringent bureaucratic or legislative programs.<sup>71</sup> Protocols are part and parcel of repositioning certain agendas.<sup>72</sup>

They are ostensibly based in choice and therefore less than law as command. It is true that an individual, or even an institution either chooses to follow them or not. But this is also true of positive law. As the guidelines for media and arts bodies in Australia referred to above suggest, most forms of public arts and cultural funding in relation to indigenous subject matter expects consultation and some form of compliance. Federal Government policy formally supports these initiatives, where indigenous culture is recognised as a (potentially) valuable commodity and point of reference for Australian identity.<sup>73</sup> Bureaucracy is an efficient and powerful disseminator of standards, and once gained, a poor reputation will hinder provision of assistance (such as seed funding, production funding, access to distribution channels, marketing help) for future projects. Also, arts bureaucracies like to herald their creative and funding successes – as good products/art/culture and as examples of sound policy management.

Would there be a market for a work that overtly transgresses protocols?

There is the recent example of the dispute between Australian tennis player Lleyton Hewitt and indigenous AFL Footballer Andrew McLeod, concerning the DVD, *Lleyton Hewitt: The Other Side*.<sup>74</sup> The DVD depicts the tennis star's life away from

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<sup>68</sup> <<http://mura.aiatsis.gov.au/>> 27 August 2006.

<sup>69</sup> <<http://www.cdu.edu.au/library/protocol.html>> 21 February 2006.

<sup>70</sup> <<http://www.eniar.org/info/protocol.html>> 27 August 2006.

<sup>71</sup> They can, of course, also be implemented as bureaucratic ritual. For example, one wonders about the convention in public ceremonies in many universities to formally acknowledge the traditional owners of lands when there has been so little progress in including indigenous people as students, fellow academics and indigenous views and issues in the compulsory curriculum.

<sup>72</sup> Jane Anderson, The Pragmatic Politics of Protocols, AIATSIS Biannual Conference Indigenous Studies – Sharing the cultural and theoretical space, 25 November 2004. See also Stephen Gray, 'Imagination, fraud and the cultural protocols debate: a question of free speech or pornography?' (2004) 9(1) *Media & Arts Law Review* 23.

<sup>73</sup> See Department of Foreign Affairs and Trade, 'Australia Now- Indigenous Arts and Culture' <[http://www.dfat.gov.au/facts/indg\\_arts\\_culture.html](http://www.dfat.gov.au/facts/indg_arts_culture.html)>.

<sup>74</sup> (2005) Distributor: EMI.

the tennis court and contained images of the two together at Kakadu. McLeod began a legal action to stop Hewitt from releasing the DVD, claiming that Hewitt did not obtain permission from traditional landholders to use the footage. The complaint was initiated as part of a claim of deceptive and misleading practice under s 52 of the *Trade Practices Act 1974* (Cth). However the matter was settled and the DVD released unaltered. The joint statement released to the press smoothed over the issue of breach of protocol:

In a joint statement, they said they were 'pleased to advise that they have now resolved the recent issues which lead to the commencement of Federal Court proceedings'.

'The concerns in relation to the DVD arose largely as a result of misunderstandings about the way in which the DVD would be put together,' the statement said. McLeod said he had no objection to the release of the DVD without change.<sup>75</sup>

The alleged transgression was a matter that demanded some public redress and marketing spin, however how the matter affected sales is hard to determine.<sup>76</sup>

It could be argued that protocols are a meaningful mechanism enabling the expression of community autonomy regardless of their informal status. A question remains if management of the relevant protocol can be meaningfully administered at the community level. The more it requires legally trained experts to interpret and negotiate the relevant requirements, the closer the matter returns to that existing under more positivistic engagements with custom. On the other hand, the requirement that indigenous communities have the interest and capacity to educate and negotiate as to what the appropriate protocol demands with all comers who decide they want to interact with the community may also be an unrealistic and onerous expectation, especially given the nature and level of poverty and disadvantage in many communities.<sup>77</sup>

The general policy guidelines that so many organisations are now producing provide a useful starting point for education in regard to the issues to be broached when conducting more situated negotiations.<sup>78</sup> Further the recent example of the

<sup>75</sup> See 'Hewitt, McLeod, Settle DVD Dispute', *The Age* (Melbourne), 14 November 2005 <<http://www.theage.com.au/news/Sport/Hewitts-DVD-dispute-in-court/2005/11/14/1131816841054.html>> 27 August 2006.

<sup>76</sup> One fansite argues that the dispute was actually over fallout concerning McLeod's wife's continuing friendship with Hewitt's ex Kim Clijsters and a missing wedding invitation. See <[http://www.protennisfan.com/2005/11/hewitt\\_pr.html](http://www.protennisfan.com/2005/11/hewitt_pr.html)> 27 August 2006. It has also been suggested that the entire controversy was manufactured in attempt to attract media interest to an otherwise unnoteworthy commercial product.

<sup>77</sup> This is one of the problems in creating a meaningful regime for communal moral rights. see Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *University of New South Wales Law Journal* 585.

<sup>78</sup> See also Matthew Rimmer, 'Bangarra Dance Theatre – Copyright Law and Indigenous Culture' (2000) 9 *Griffith Law Review* 274.

feature film, *Ten Canoes*,<sup>79</sup> a collaboration between Rolf de Heer and people living around the Arnhem Land community of Ramingining and recorded in Aboriginal languages, shows that it is possible, with the patience and commitment of all those involved, to negotiate a way of presenting an Aboriginal story, incorporating an Aboriginal ‘way of knowing’ and ‘way of telling’ a story. This film was internationally recognised at the 2006 Cannes Film Festival.<sup>80</sup>

In the film one of the recurring points is that the telling of the story is as important as the story itself, and the story must be told the correct way, at the right time. But now the story has been made into a mass spectacle – a feature film, where it is accessible by anyone, permanently, at any time, whether they are ready for it or not. The film is (obviously) a commodity and marketed as authentic Aboriginality, curiosity and exotica.<sup>81</sup>

In an impromptu conversation about the film with writer/producer/director Rolf de Heer, I asked him about the filmmaking process. What authorisation was negotiated to:

- tell the story?
- to tell the story in a particular way?
- and to participate in the story and its telling?

I was puzzled by his response, which was that it was all a matter of trust, and beyond that, such questions don’t have an answer.

I did not get the impression he was fudging the issue. It was more, that as a filmmaker what mattered to him, and as he spoke of them, to the community, was the decision to make the film collaboratively. Once that decision was made, there was negotiation of the seemingly ‘smaller’ decisions as the need to arose – detail about what the story involved, use of languages, casting decisions, inclusion/exclusion of particular people and events, accommodating Aboriginal ways of managing conflict, obligations of family that would intrude on the recording from time to time etc. It occurred to me that to extrapolate from those situated decisions, and to try and ‘find the rules’, ‘principles of engagement’ and even locate ‘ownership’ and ‘responsibility’ was not all that relevant.<sup>82</sup> That close collaboration had occurred, and those involved were all seemingly happy with the

<sup>79</sup> *Ten Canoes* (2006) Producer: Rolf de Heer, Julie Ryan; Director: Rolf de Heer, Peter Djigirr; Writer: Rolf de Heer. Website <<http://www.tencanoes.com.au/>> 27 August 2006.

<sup>80</sup> It received a Special Jury Prize in the Un Certain Regard section.

<sup>81</sup> As Watson observes in relation to trying to understand the decision of elders not to pass on their knowledge, ‘the colonial frame, could give no proper space to their knowledge, for knowledge which had no utility within a colonised space, and held no context beyond the risk of commodification as a form of exotica. To becoming knowledge not adhered to but voyeuristically observed as a form of entertainment.’ Above n 1.

<sup>82</sup> Presumably there may, in time, be profits from box-office and other rights. There are many spin-off initiatives involving the community too. It is not clear from public documentation what legal arrangements exist here.

versions of the film produced, was what mattered. In the Sydney Film Festival discussion following a screening of the ‘making of’ documentary<sup>83</sup> de Heer noted that, beyond agreement with the community not to have to withdraw the film on the death of a participant, problems will be dealt with, if and when they do.

In our conversation he went on to suggest that the film was a product of Aboriginal law, and it now served as a form of Aboriginal law, notwithstanding that the story is not ‘traditional’ in the sense that it is faithful to a story that has always been told, that has been redramatised. It is a telling of the law/lore, of a story that ‘did not exist’ until the collaboration. He stressed that, to the indigenous communities, the film was a great source of community pride, and seen as a tool for educating the Balanda (white man) about Aboriginal ways.

Returning to western law, and the *Bulun Bulun* case specifically, it seems plausible, that by participating in the making of the film on these terms, the western filmmaker is not simply acting in accordance with protocols. He, and the other participants in the film, would presumably, because of their own conduct, have a fiduciary duty towards the indigenous communities and people who understand the story – or elements of it – as ‘theirs’. The obligation would be to protect the stories and ensure that the film, as both resource and product, was presented and used appropriately. This would encompass enforcing copyright and other legal and non-legal tools available to redress perceived wrongs.

We, as a general audience, may not be able to read the film, except as exotica, spectacle or entertainment. However is this not the situation facing any mass media production? With this particular film, there is some capacity to regulate uses considered inappropriate to Aboriginal law, to protect Aboriginal law, using western legal resources.

#### V *SUI GENERIS* RIGHTS

In trying to accommodate indigenous knowledge in the conventional IP system, Oguamanam notes that ‘there appears to be no consensus over the nature of the *sui generis* concept. While some consider the option as one that must *ex necessitate* have the likeness of conventional IPRs, others are not similarly inclined or, at best, they are ambivalent about it’.<sup>84</sup> For the reasons already discussed, I do not believe that seeking ‘likeness’ to conventional law is all that helpful, but this should not mean that conventional legal tools are cast aside.

In the North American context, Angela Riley says that an indigenous cultural property system should reflect tribal law because,

<sup>83</sup> *The Balanda and the Bark Canoes* (2006). Also known as *Making Ten Canoes*. Directors: Molly Reynolds, Tania Nehme, Rolf de Heer.

<sup>84</sup> Oguamanam, above n 26. 136. fn 4.

Unlike top-down legal systems, tribal laws reflect tribal economic systems, cultural beliefs, and sensitive sacred knowledge in nuanced ways that national and international regimes simply cannot.<sup>85</sup>

The tribal law, which provides vital cultural context, must serve as the foundation. Because it is suited to indigenous groups' particular cultures and normative framework, tribal law is inimitably capable of capturing and accommodating the unique features of the tribal community. Tribal cultures are not all alike; tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot. Thus, attention has recently turned to the *sui generis* laws of indigenous peoples as the source for developing legal regimes to protect indigenous works.<sup>86</sup>

Riley's paper documents the significant efforts of American tribal councils to implement indigenous forms of cultural protection. Her study includes analysis of tribes' codified preservation laws, and a discussion of the challenges involved in developing and enforcing such laws. She notes,

[c]ritics charge, justifiably, that *sui generis* laws are limited because they are typically unenforceable outside of the communities in which they develop. Critics argue that, in the absence of corresponding state-sanctioned enforcement mechanisms, focusing on tribal law systems is futile. This Article acknowledges that there are genuine jurisdictional limits on the ability of tribes to enforce tribal laws outside of their geographic territories. Despite these limitations, however, the development of tribal law is critical for indigenous peoples to direct their own cultures and destinies in a technological world. Sovereignty for indigenous peoples means exercising their inherent authority to define tribal laws and be governed by them. This is the case even when tribes do not have the power to enforce those laws outside of their territorial bounds. The authority of sovereignty must not be limited by the colonizers' narrow vision of tribal power.<sup>87</sup>

The *Ten Canoes* example suggests that lack of enforceability, and clear delineation of the indigenous as 'within community' and the white actors as 'outside community', need not be conceded so readily in this country.

I think we should take care in branding such initiatives as new kinds of '*sui-generis*' legal developments. The rival uses of the term, where *sui generis* does not denote assertion of indigenous sovereignty, but denotes indigenous incommensurability with the mainstream, robs it of much emancipatory power. It casts doubt on the need for compliance. In this context, advancing the case for *sui generis* law is to court marginality.

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<sup>85</sup> Riley, above n 7, 69.

<sup>86</sup> Riley, above n 7, 74.

<sup>87</sup> Riley, above n 7, (citations omitted).



## VI FREE AND OPEN SOURCE SOFTWARE LICENSING (FLOSS) AS CUSTOM

Is the licensing that originates from FLOSS communities all that different to the legal situation of indigenous protocols? FLOSS communal production provides for community authority and control, and through licensing seeks to have that authority legally recognised.

Common terms of copyright licenses establish a sharing norm: if you use this computer code for free, you need to also make your own source code available to all others for free.<sup>88</sup> I am not here suggesting that these forms of sharing norm have any connection with indigenous notions of ownership. In FLOSS literature there are attempts to evoke that connection, by drawing upon anthropological literature about gift economies.<sup>89</sup> Such literature evokes the state of nature as a communistic original state, where relations are founded on exchange that has symbolic value, and exchange creates relations of co-operation. This model is presented in contradistinction to private property, contractual exchange, capitalist competition and exploitative relations. Participants in FLOSS production are interpreted as 'gifting' their code, in exchange for social status and reputational advantage. The code gift thus consolidates the community and its ordering based on status.

I find this literature of dubious worth. This deployment of the idea of the 'gift' is underpinned by ignorance - a romanticised notion of pan-indigeneity that erases the cultures of all indigenous peoples with an ascribed universal value of co-operation, and the norm of shared property within the group. It conjures the notion of freedom as a fictional return to that original state, in order to suggest a schism between FLOSS production, private property, and the capitalist economy. The notion of the gift is used here to deflect the reality that FLOSS sits within a capitalist economy and commodity culture, where 'symbolic exchange' and 'status' has little meaning except in relation to that all pervasive framework. The foil of the gift encodes an ideological separation of communal and private property that overlooks the real complexity of the legal relations of 'private' capital accumulation - the mortgage, the corporation, the massive accumulations under the trust form. I think the notion of the gift economy is a self-serving reference that is deemed useful because of a presumed necessity of relating FLOSS production to theories of exchange in order to be accepted as legitimate.

Most political theorists of FLOSS production today do not subscribe to gift economy discourse. The more Marxist inspired now locates the place of FLOSS within a stage of capitalist production, but note that it houses the potential for a

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<sup>88</sup> Lawrence Liang, *A Guide to Open Content Licences* (2004) <[http://www.pzwart.wdka.hro.nl/mdr/research/liang/open\\_content\\_guide](http://www.pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide)> 27 August 2006.

<sup>89</sup> See for example, Richard Barbrook, 'The High Tech Gift Economy' (1998) 3(12) *First Monday* <[http://www.firstmonday.org/issues/issue3\\_12/barbrook/](http://www.firstmonday.org/issues/issue3_12/barbrook/)> 27 August 2006; David Zeitlyn, 'Gift Economies in the Development of Open Source Software: Anthropological Reflections' (2003) 32 *Research Policy* 1287.

different kind of freedom to that of private property.<sup>90</sup> The commons and the singular are not here counterposed, but sought to be related by a form of identity politics – this incorporates the politics of difference (at least at a theoretical level).<sup>91</sup>

IP literature generally refers to FLOSS freedom in more rationalist terms of it providing best service to the God of innovation. The argument is that the computing industry only grew so fast in the 70s and 80s because intellectual property rights were not strongly enforced. Explaining this movement has become a specialist area of IP, and there are many justificatory theories that relate the normative practice with law and economics rhetoric.<sup>92</sup>

This jurisprudence, which focuses exclusively on the logics of network relations in the information economy, is far removed from discussion of the authority of traditional notions of time-honoured custom. My reason for relating them is not motivated by a desire to ascribe similarity in motivation or in property relations. Rather, as earlier stated, the reason I am interested in relating the two areas relates to exploring the freedom to define and enforce quite diverse legal relations in global legalism. The sharing practices of FLOSS indicate a legal norm-creating potential, from which a politics of indigenous custom can draw strength.

Free software and Open Source licenses are largely privately enforced by communal sanctions in the computing industry.<sup>93</sup> As with protocols there are doubts about specifics of aspects of their formal enforceability.<sup>94</sup> But for all that discourse, it is interesting that there has been so little need for litigation. They have been around for a number of years and FLOSS dominates in some segments of the computing market. FLOSS licensing is so ubiquitous that were the courts to find the licenses unenforceable – for reasons of privity, lack of formality, consumer and competition law etc – it would be a problem of enormous complexity to unravel, affecting multi-national corporations and bedroom programmers alike. It could be argued that, because of the havoc that would result from unenforceability, the general intent of these licenses would need be observed of necessity.

In practice these licenses are able to be enforced through community sanction, shaming, outing, social exclusion. These communities are well placed to regulate

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<sup>90</sup> MacKenzie Wark, *A Hacker Manifesto* (2004); Michael Hardt & Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (2004); David Berry and Giles Moss, 'The Politics of the Libre Commons' (2006) 11(9) *First Monday*, <[http://www.firstmonday.org/issues/issue11\\_9/berry/index.html](http://www.firstmonday.org/issues/issue11_9/berry/index.html)> 14 September 2006.

<sup>91</sup> Where this commons leaves the indigenous is taken up in Jane Anderson and Kathy Bowrey, 'The Imaginary Politics of Access to Knowledge', above n 52.

<sup>92</sup> The best known would be Yochai Benkler, 'Coase's Penguin, or, Linux and the Nature of the Firm' (2002) 112 *Yale Law Journal* 369; 'Freedom in the Commons: Towards a Political Economy of Information' (2003) 52 *Duke Law Journal* 1245.

<sup>93</sup> This is discussed in more detail in Kathy Bowrey, 'Chapter 4', above n 10.

<sup>94</sup> On unenforceability see Andres Guadamuz, 'Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licenses' (2004) 26(8) *European Intellectual Property Review* 331.

their copyleft relations without recourse to formal law.<sup>95</sup> There is however a lot of policing of language to help define who is in and who is 'out' of the community.<sup>96</sup>

Where individuals are 'free' to engage with the FLOSS production or not, there can be problems in maintaining group cohesion and collective identity. Many corporate entities now adopt FLOSS production where there are strategic and commercial advantages in so doing. Observation of indigenous protocols would also, no doubt, be considered for this reason. This fluidity and lack of real commitment to shared norms houses great potential to destabilise communal authority.

There are also questions about who is empowered to speak for the community. In Australia we recently have seen the Trade Marks Office make an adverse finding against Linus Torvalds seeking to register the Linux trade mark, on the grounds that it is a sign a whole of lot of traders, whether they are inside or outside the community, may want to use.<sup>97</sup> In other words, it is not for the Linux community to decide who deserves to be so named as a member - but open to all comers. Formal law is not necessarily going to go out of its way to empower these communities and recognise their authority over their language or culture. Interestingly here the relevant notion in trade marks that endangers registrability – a requirement of distinctiveness<sup>98</sup> – is a standard that purports to protect 'the language commons'. One oft-cited definition refers to trade mark law protecting 'the common right of the public to make honest use of words forming part of the common heritage, for the sake of the signification which they ordinarily possess'.<sup>99</sup> There is no space here to consider that the public, even understood as a body of commercial traders, may not be all of one kind.<sup>100</sup>

A potential ill fit with formal law is not necessarily a bad thing. I am sceptical of the utility of using law and lawyers to advocate these rights on behalf of communities, and of the purported value of legal expertise that can reconcile the

<sup>95</sup> However recently a community legal centre, *The Software Freedom Law Center* was established in the US, with a mission statement 'to provide legal representation and other law-related services to protect and advance Free and Open Source Software' <<http://www.softwarefreedom.org/>> 27 August 2006.

<sup>96</sup> See eg, Free Software Foundation, 'Terminology and Definitions' <<http://www.gnu.org/philosophy/philosophy.html#TerminologyandDefinitions>> 27 August 2006; Eric Raymond, 'Terminology Wars: A Web Content Analysis' <<http://www.catb.org/~esr/writings/terminology/>> 27 August 2006. See also my discussion of Chapter Four, *Law & Internet Cultures* website at <<http://www.chickenfish.cc/lic/>> 27 August 2006.

<sup>97</sup> It is reported to be under appeal, which is not uncommon in trade mark registration, see Renai LeMay and ZDNet Australia, 'Renewed Linux Trademark Bid in the Works', 3 February 2006, <[http://www.zdnet.com.au/news/software/soa/Renewed\\_Linux\\_trademark\\_bid\\_in\\_the\\_works/0,2000061733,39236435,00.htm](http://www.zdnet.com.au/news/software/soa/Renewed_Linux_trademark_bid_in_the_works/0,2000061733,39236435,00.htm)> 27 August 2006.

<sup>98</sup> *Trade Marks Act 1995* (Cth) s 41.

<sup>99</sup> *Clark Equipment Co v Registrar of Trade Marks* (1964) 111 CLR 511, 514 (Kitto J).

<sup>100</sup> There is a space in trade mark law for 'certification marks'. Part 16 of the *Trade Marks Act 1995* (Cth) which can be used to designate a mode of manufacture. However such marks are more administratively burdensome, requiring rules approved by the ACCC, and approved certifiers. It would be a costly mark to maintain, which probably explains the preference for licensing as the main mode of regulation within FLOSS communities.

informal communal relation of law with formal legal requirements.<sup>101</sup> Legal skills can be useful, but the need to include lawyers is also a sign of community disempowerment. It means the community cannot speak its own natural language, but has to have it translated into an expert one. One of the nominated goods of copyleft is the low level of legal and technical expertise required to get involved. Its pretensions as a social movement takes this informality for granted and it is certainly often nominated as a strength this code possesses over code administered under strong copyright provisions that few really understand.<sup>102</sup> The openness and simplicity of the legal conditions is also why works produced under these free forms of licenses are preferred as the basis for international technical standards, which are themselves a form of global technical law.

One of the reasons for the currency and proliferation of intellectual property discourses relates to the strength of community engagement and uptake of these copyleft customs *in their own terms*. From a lawyer's viewpoint, often the legal terms are misunderstood or misused. You get law blogs complaining about this spokesperson using the wrong term, or shifting its meaning. You get arguments about correct use, and particularly in the context of creative commons licensing,<sup>103</sup> alarm at the proliferation of licensing conditions. There are similarities in 'misuse' of IP terminology amongst indigenous communities in Australia, (though manners dictate that these ones are rarely corrected). Whilst the pedant in me always notes the legal confusion of non-lawyers, I actually enjoy the discomfort it causes in lawyers. I don't see the terminology wars as necessarily always a matter of non-lawyer naivety, or novice confusion with legal language or even representing a problem needing our attention. The legal misuse of terms can be read as a sign that there are other non-expert, community-based sources of authority competing over the language with the trained legal voices. Maybe these current language games prove that lawyers are not the exclusive masters of the intellectual property domain anymore. They've lost some of the authority over the language. If so, I don't find this scary but comforting, given what the correct legal language says it does and can recognise, and how clumsy and obtuse in intellectual property it generally is.

There is emancipatory potential in FLOSS, when it is considered as a political movement and as a contemporary expression of custom, (returning to the notion of custom as community-based lived experience and legal wisdom). At present, there does still seem to be some sense, and social accuracy, in accepting this characterisation of FLOSS. We should be able to recognise the contemporary expressions of indigenous custom on similar terms.

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<sup>101</sup> For an example of such a project see, Maureen O'Sullivan, 'The Pluralistic, Evolutionary, Quasi Legal Role of the Gnu General Public Licence in Free/Libre/Open Source Software (FLOSS)' (2004) 26(8) *European Intellectual Property Review* 340.

<sup>102</sup> For this reason there are ongoing 'simplification projects'. See University of New South Wales Cyberlaw & Policy Centre, 'Unlocking IP' *Research Project* <<http://www.cyberlawcentre.org/unlocking-ip/project.html>> 27 August 2006.

<sup>103</sup> Creative Commons <<http://creativecommons.org/>> 27 August 2006; Wikipedia, 'Creative commons' <[http://en.wikipedia.org/wiki/Creative\\_Commons](http://en.wikipedia.org/wiki/Creative_Commons)> 27 August 2006.

The connection may be considered incongruous if it is assumed that FLOSS is about open access to knowledge, whereas the politics of indigenous knowledge is about establishing stronger controls on circulation of knowledge.<sup>104</sup> However it should be remembered that the key difference between free software and open source licensing relates to the latter retaining the freedom to elect to control and enclose some aspects of one's own production. Free software licensing rejects this form of enclosure, seeing it antithetical to the broader objectives of FLOSS as a social movement.<sup>105</sup> My point is that FLOSS is not always unambiguously about 'openness', just as the *Ten Canoes* example shows that indigenous custom is not universally and consistently about closed or secret, sacred knowledge.

There is no need to circumscribe the community politics of custom and the pursuit of emancipation, with a notion of closure, openness, or any other general, eternal social good. Surely the point with respecting the authority of custom is that the relevant norm should be determined given the appropriate conduct in the particular circumstances, of that time? I think the cultural knowledge of both forms of community, FLOSS and indigenous, can be reconciled through a politics and process of custom.

In a 'political' view of FLOSS, the objective is to maintain community. This necessarily entails resisting capitalism's 'privatised, individuated and dispersed collection of objects and resources'.<sup>106</sup> It involves resisting the formation of laws that facilitate these alienating relations. Critiquing the creative commons movement, Berry and Moss argue,

the commons is an ethical and not just a legal matter. We underscore the point. The commons rests on commonalty, on ethical practices that emerge rhizomatically through the actions, experiences and relations of decentralised individuals and groups, such as the free/libre and open-source movement. For this reason, libre culture is far more than just a protest movement. It is not only reactive; it is productive. It creates new forms of life through its practices. It creates new possibilities. Yet, in our view, there has to be a political dimension to libre culture as well. This expresses itself through political imagining, action and a broader struggle for true democracy.<sup>107</sup>

They protest at the juridification that characterises the creative commons movement.

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<sup>104</sup> Although as discussed above in relation to gift economies, some seem to subsume both the indigenous and copyleft under one rubric of 'people who share'.

<sup>105</sup> See Open Source Initiative. 'The Open Source Definition' <[http://www.opensource.org/docs/definition\\_plain.php](http://www.opensource.org/docs/definition_plain.php)> at 27 August 2006; Free Software Foundation. 'Why "Free Software" is Better than "Open Source"' <<http://www.gnu.org/philosophy/free-software-for-freedom.html>> at 27 August 2006.

<sup>106</sup> David Berry and Giles Moss. 'On the "Creative Commons": A Critique of the Commons without Commonalty' (2005) 5 *Free Software Magazine* 1, <[http://www.freesoftwaremagazine.com/articles/commons\\_without\\_commonality/](http://www.freesoftwaremagazine.com/articles/commons_without_commonality/)>.

<sup>107</sup> Ibid 3.

[w]hereas others who problematise these trends turn to the political, the legal professor's penchant is to turn to the field of law and lawyers. What follows is a technical attempt to (re-)introduce a commons by instituting a farrago of new legal licences in the existing system of exploitative copyright restrictions. This is the constructive moment of the so-called 'Creative' Commons.<sup>108</sup>

Legal academia, having discovered FLOSS, took up the idea of resisting private multinational control of cultural production by advocating creative commons licensing of copyright 'free' content (music, images, text, movies). This quickly led to a proliferation of such licences and terms, as individual users adopted legal forms, 'when and where they liked'.<sup>109</sup> There is now a global movement to solidify and homogenise these licenses, confine the ine xpert uses of legal language, and harmonise the lawyerly uses of terms, globally.<sup>110</sup> The benefits suggested include ease of use and understanding, and with that more popularity.

For many lawyers what the pursuit of simplification really brings is the conferring on copyleft legal relations, the benefits of positive law – enhancing the rule-character of the norms. Greater commercial attractiveness is also taken to flow from this kind of law reform.

This is 'top-down' global legalism that does little to disrupt alienating and exploitative political and economic relations. Here the requisite normativity – the global 'should' of 'sharing' and 'freedom' that defines new regulatory projects (some in the name of development) – is expressed at a high level of abstraction, seemingly blind to national or cultural circumstance. Power and authority is understood as enforcing an international consensus, administered over and above community. The arrogance inherent in this position is only obscured by reference to the 'right(s)' expertise of the academic speaker as eligible interpreter of humanity and its needs. In advancing these legal projects what is being endangered is the capacity to broker more suitable legal, economic and social relations within particular community contexts.

The translation of any social practice, of community experience and legal wisdom, takes place within power relations. When carried into any formal legal project, those relations are made more invisible. In this process of translation who speaks for the rights? Who has access to the corridors of power? Who authorises and administers these formal expressions of rights? These questions: *Who is the community? Who speaks for the rights? Who authorises them? are ever present when viewed through the domain of custom.* Those same questions are made invisible in the shift to formal law.

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<sup>108</sup> The legal professor complained of here is Professor Lawrence Lessig, Stanford University. Ibid 2.

<sup>109</sup> Ibid 3.

<sup>110</sup> International Commons (iCommons) <<http://icommons.org>> 27 August 2006.

Without clear address to the diversity and practical situation of local ‘communities’, there is a disturbing thinness in much IP global legalism. It feels very detached from history, experience and circumstance, and is curiously silent on whether here European Man, under the guise of human rights, freedom, and the commons, is still claiming the entire globe. With the land wars taken as done, it is intangible property that matters. And these new ‘freedoms’ remap the ‘order’ of civilisation via new network communication rights. The potential violence inherent in these newly sought global power relations requires careful contemplation.

#### VII ‘UNSUSPECTING EMANCIPATIONS’<sup>111</sup>

The conventional view of custom marginalises Aboriginal peoples and offers little by way of self-determination. This needs to be overcome. This paper suggests an avenue for addressing this, by taking advantage of the ‘unsuspecting emancipations’ in globalisation.

Whilst global legalism does not necessarily intend to empower indigenous people, the shift to private ordering allows for some management and negotiation at the local level. Indigenous people can avail themselves of this opportunity, as FLOSS communities have done. However the homogenising culture of globalisation also engenders broader appreciation of indigenous difference, and more willingness by others to negotiate, and to be seen to negotiate, relations with indigenous people in different ways to that of the past. Thus here Aboriginal cultural ‘marginality’ is also potentially a powerful tool.

The challenge is of allowing for productive ‘private’ negotiations that can present as alternative and distinctive, without allowing the formal legal order to presume that the indigenous case always falls outside of its categories and power. At the moment custom is overwhelmed by a discourse about cultural difference, where Aboriginal life is presented as both different and all of one kind.<sup>112</sup> There is no respect in the jurisprudence on custom for ‘customs in common’, where custom, community and the common are self-determined. To put it another way, what is lacking is the possibility of a creative, constituent power existing within the category of ‘customary law’. There is however a space for forms of autonomy and new kinds of ordering in private law. Thus it is by reinvigorating the legal idea of ‘custom’, and using the resources of private law and ordering, that there is potential to reconcile western law with self-determination and autonomy of communities, and to pursue alternative law(s) and politics.

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<sup>111</sup> Oguamanam, above n 26, 166.

<sup>112</sup> This is inherent in the notion of ‘*sui generis*’ law.