

# THE POLITICS OF GLOBAL INFORMATION SHARING: WHOSE CULTURAL AGENDAS ARE BEING ADVANCED?

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## ABSTRACT

Open-knowledge communities, the public domain and public policies protecting the global sharing of information and resources seek to counter the last decade of IP maximalization. Such movements aim to rebalance 'public' interests within IP discourse. Historically, dispossession of Indigenous persons in settler communities was concomitant with their exclusion from 'the public'. This has significant consequences for Indigenous peoples struggling to regain control over knowledge resources today. This article considers the imaginary inclusions that underlie Anglo-Australian intellectual property law and considers problems with redressing past injustice by defining Indigenous difference in terms of a cultural exception within intellectual property law.

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## KEY WORDS

Empire; Enlightenment; Indigenous rights; information commons; intellectual property; public domain; race; sovereignty

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## INTRODUCTION

Until the early 1990s when Aboriginal people such as myself started documenting our communities in film, there was an estimated six thousand hours of material created *about* our communities, of which perhaps ten hours actually involved some Aboriginal input. It is the same with the images that were taken to document our communities in missions, in Settlements and in camps – they are not the images that we would have chosen to represent ourselves. (Kinnane, 2004: 257, emphasis in original)

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A DECADE OF intellectual property rights (IP) maximalization has invigorated a global counter-movement in support of open-knowledge communities, the public domain, creative commons, and public policies protecting the global sharing of information and resources.<sup>1</sup> For an academic project, the IP 'access movement' is unusually forward-looking with overt political ambitions. Activists seek to win hearts and minds – to change the global knowledge culture and the IP practices of creators, innovators and investors. Through a shift in the attitudes and practices of civil society, and especially by winning over large public institutions such as universities, libraries and museums, there will be pressure on legal policy makers to change jurisprudence to better reflect the 'public' side of the IP balance.

While open access, public domain and creative commons articulate themselves differently, they share motivations in terms of developing frameworks for social change with regards to how knowledge is to be accessed and circulated. As such they each rely upon, and fold into each other, ideational principles that oscillate around concepts such as 'freedom', 'public', 'openness', 'sharing' and 'commons'. Such concepts come with complex derivations, histories and politics, both in relation to their generic definitions, and more importantly, their place within liberal and democratic frameworks of action. As Tatiana Flesess (2008: 394) has observed in a recent edition of this journal, 'participants in the debates regarding the commons . . . are establishing (and then policing) the thresholds and boundaries between differing versions and visions of the past, of "us" and "them" and of what is available to be claimed for use and by whom'. Such terms, despite their appearance and constantly shifting nature, are not and have never been wholly inclusive of peoples, perspectives or cultures. Their borders are managed in order to establish normative orders for inclusion and participation. This reality runs like a fault-line through these movements, connecting them together in important ways, while at the same time compromising their promise to change global knowledge cultures. For their success, there must now be a serious commitment to understanding the ongoing instances where these movements, sometimes unwittingly, repeat significant historical exclusions.

The ethos of freedom, public, openness and commons is problematic because it does not properly deal with the baggage of the past. For many Indigenous people across the globe, there is no fuzzy, warm glow that automatically accompanies western words like humanity, culture, progress, freedom, openness, knowledge. For Indigenous people living in Australia there is no automatic sense of entitlement or inclusion that comes with notions of 'the public', the 'public good' or 'the public interest'. These idealistic political and cultural concepts were, and arguably still are, largely experienced by Indigenous people as terms of exclusion. These were the very terms that justified the denials of sovereignty, dispossession of culture and lands and removal of Indigenous children from their families and communities. The whole notion of 'the public' in intellectual property presumes a notion of inclusion and representativeness that is at odds with Indigenous experiences within colonial contexts. Indigenous people and 'the public' should not be assumed to share a common interest.

If the critical intellectual property scholarship is to maintain its progressive credentials and extend these in relation to Indigenous sensitivities, then Indigenous people's experience of exclusion from the 'public' must be recognized and adequately addressed. While there is a sensitivity to Indigenous inclusion, the problem remains that the discourses around access to knowledge continue to be largely conducted in global metropolitan centres, often within university and museum contexts, where Indigenous people remain outsiders to discussions about how and to what extent elements of their cultures are to be accessed, controlled and managed. This seriously limits the possibility for Indigenous representation, and the much needed space to deconstruct what that politics might entail.

Alongside these intellectual debates, Aboriginal and Torres Strait Islander Australians are struggling to regain control over their physical and intellectual property, much of which has been taken from their communities in the past 200 years. Much of this material is held abroad in museums, universities and private collections in the form of human remains – craniums, teeth, artworks, craft, other artefacts, recordings of ceremonies and songs. The notion of this knowledge as 'shared' fosters an historical amnesia about the knowledge accumulations of the past. It also fails to account for responsibilities for these collections today and in the future. Much of the material that was collected and made to represent Indigenous life and culture is not how Indigenous people would have chosen to represent themselves.

As Australian academics invested in extending and enhancing critical discourse around IP law and developing frameworks for ethical action, we agree with the principles that underpin the initiatives for redrawing relationships within the knowledge/access paradigm. Our problem, however, stems from a fundamental concern that the politics of access to knowledge unwittingly provides support for those who seek to prevent and delay the repatriation and restitution of stolen Indigenous cultural and intellectual property. This raises critical questions that we strongly believe require more considered attention and discussion. Namely, who benefits from greater access and whose cultural agendas are being advanced through this politics?

This article derives from our personal responsibilities to redress the past and present colonialism. Our experiences working in law and government, and working in, and for, Aboriginal organizations and Aboriginal rights advocacy, leave us uneasy with the stated motivations and goals of accessing knowledge. Unease manifests around questions of power relations, presumptions of liberal freedom, the politics of sharing, the construction of subjectivity and the space made for an active citizenry, including for Indigenous resistance. We believe those supportive of raising the profile of 'public' interests in intellectual property need to properly consider the significance of this history and politics and face the challenges that it raises.

This is not to deny that there are nuances in how advocates for an expanded public domain or creative commons licensing system conceptualize their role and function in relation to developing and promoting alternative processes and frameworks for knowledge access. But there is yet to be a consideration of the extent to which developing frameworks for greater knowledge access

perpetuates historical exclusions of Aboriginal voices and politics. This history continues to have profound effects upon the very real circumstances and experiences of significant groups of peoples.

This article strives to allow Indigenous people to speak about the problem of exclusion. It is structured around artistic expressions to help frame the dimensions of the problem that we are addressing. Art provides a subtle and poetic form of expression, and is a more sophisticated medium for addressing our concerns for representation and Indigenous subjectivity. This is because painting, more than text, can create a space that 'speaks to' but does not necessarily 'speak for' this subjectivity. We have chosen post-modern art precisely because of the heightened level of awareness and engagement with issues of subjectivity and the authority of the speaker that comes with post-modern expressions.

This methodological approach of centring Indigenous voice and using art to 'speak to' is at odds with the majority of approaches to this subject of Indigenous interests in intellectual property. Most of the writing around traditional/indigenous knowledge matters centres on the law as the leading issue, where white experts then summarize, parody and essentialize Indigenous views in order to demonstrate the 'ill-fit' with the law. In doing so, such work maintains discourses that generally keep an emotional distance from the realities of Indigenous life and experience. There is an insularity in this work that reinforces the distance of law and perpetuates the violence of colonialism.

As an effect of the access movement's response to maximalist IP and the treatment of Indigenous peoples within IP law, Indigenous exclusion is explained as cultural while knowledge itself remains disassociated from cultural politics, contemporary economic agendas and new projects of governance. This speaks to the developed reliance upon 'culture' as an explanatory tool for Indigenous differentiation and exceptionalism within the IP system more generally (Anderson, 2008). To press our point further, this article includes coal-face examples of the problems that are ongoing in certain Indigenous communities today with regard to digital media and the internet. This is to resituate what is at stake for Indigenous people in relation to the politics of accessing knowledge, and why Indigenous people must be engaged and recognized as holding legitimate positions within such debates.

### EMPIRE

The notion that the natural world was given to all humanity, and that knowledge is placeless and belongs to no 'one' in particular, is common to many western philosophical traditions – Greek, Christian and empiricist portrayals of scientific knowledge most obviously spring to mind. Here 'the place of knowledge is nowhere in particular and anywhere at all' and 'the significance of place is dissolved' (Chambers and Gillespie, 2000: 228).

It is useful to reflect on an Aboriginal perspective of the humanity of the commons. Gordon Bennett's painting *Empire* is a meditation on point (Figure 1). In relation to his post-modern art Bennett (1999: 8) says,

FIGURE 1

Gordon Bennett, *Triptych: Requiem, Of Grandeur, Empire*, 1989  
(Detail: Empire)



Oil on Canvas  
120.0 × 120.0 cm

Collection: Queensland Art Gallery, Brisbane

Purchased, 1989 under the Contemporary Art Acquisition Program with funds from Hill & Taylor, Solicitors through the Queensland Art Gallery Foundation

The images I select exist between the pages of art books and history books . . . By reconceptualizing images subtracted from this grid of Euro-Australian self-representation I attempt to show the constructed nature of history and of identification as arbitrary, not fixed or natural but open to new possibilities of meaning and of identification.

Bennett's work problematizes the centred European subject, his gaze on the world, the fabrication of civilization and alienation from Nature. Such concepts have a direct bearing on the construction and valuing of knowledge and

the right to claim it. Conversely, this painting also references the repression of Indigenous ways of knowing and subjectivities, and the representation of Indigenous knowledge as primordial, mythic and, compared with the hard-line precision of mathematics and science, ephemeral.

To Australian viewers, Bennett's red ochre (sienna) palette is iconographic of Australia's red desert heart, signalling the white view of the emptiness and inaccessibility of the country (*terra nullius*). This is conventional Australian imagery and identity (Ryan and Crabbe, 2004), here made ironic by situating the Indigenous viewer as distanced from their land and cultural possessions. More optimistically, the strong red, yellow and black colours of the original painting in Figure 1 also signal the Aboriginal flag and the determination for an Aboriginal perspective to be counted.

Bennett's centring of the Indigenous subject is perverse fun. In problematizing the naturalness of the construction of notions of civilization, knowledge, science, progress and complexity – all characteristics of an Euro-Australian gaze – Bennett reminds us that such an epistemology founded the right to claim Indigenous land, knowledge and possessions. Bennett's discourse on Empire refuses to divorce questions of sovereignty, land and injustice from the presentation of perspective and access to knowledge.

#### THE COMMONS AND RACE

Enlightenment philosophy, as expressed in the *Statute of Anne* 1710 is often heralded as the origin of copyright law. The encouragement of learning is cited as the core foundation for this law's public values. As Deazley (2004: 164) sees it,

The central focus of the statute was, and remains, a *quid pro quo*. Parliament was not concerned with the recognition of any pre-existing authorial right, nor was it primarily concerned with the regulation of the book trade. Rather it sought to encourage 'learned Men to compose and write useful Books', through the striking of (an) economic, social and cultural bargain.

What is not usually mentioned in copyright's celebration of Enlightenment philosophy and the associated foundation of 'public rights', is the cultural particularity of the public domain:<sup>2</sup>

Enlightenment philosophy was instrumental in codifying and institutionalizing both the scientific and popular European perceptions of the human race. The numerous writings on race by Hume, Kant and Hegel played a strong role in articulating Europe's sense not only of its cultural but also racial superiority. (Chukwudi Eze, 1997: 5)

It is well recognized that dispossession and appropriation accompanied the age of Empire. Industrial espionage, piracy and pillaging of texts and inventions at will, between European powers and from within their colonial outposts, characterized much of the period (Harris, 1998; Ben-Atar, 2004; Schiebinger, 2007; Schiebinger and Swan, 2007). However, civilized modern

nations developed modes of diplomacy and, by the mid-late 19th century, treaties to accommodate reciprocal IP recognition and rules of 'sharing'. This has led to a misconception that, so far as the history of intellectual property is concerned, the politics is primarily about the parameters of the right to private property and implications for access to knowledge (Boyle, 2003; Deazley, 2006; May and Sell, 2006). However, to have access to any ownership and control entitlements, one first needed to be accorded a status among the 'civilized'. It is that legacy which endures.

In part because of a strong German Enlightenment tradition focusing on the study of languages (Sanskrit, Hindi, Persian, Turkish, Chinese, Arabic in particular), the 'Orient' was seen to generally exhibit key elements that fitted it (and the vast peoples and territories therein) into an emergent concept of civilization, and what that constituted (Mulhearn, 2000). Distinctions were established between categories of 'advancement' and between what were considered 'primitive' and illiterate, Oriental and literate peoples. Oriental languages were documented, classified and contextualized and placed in a position of supremacy to that of 'primitive' languages.

While this was just one way of ordering the stages of civilization and histories of human development, it affected and effected how Indigenous people were identified and classified. The presumptions, expanded upon more thoroughly in the Romantic period, informed readings about the (natural) relationships between Indigenous people and nature, as against those of culture (and civilization).<sup>3</sup>

How and through what means Indigenous people became the subjects and objects of study is as complex and diverse as the histories of colonialism and Empire (Fulford et al., 2004; Wilson, 2004). Nevertheless, there was relative consistency in the frameworks that were developed to interpret the 'Aboriginal' within the stages of human development. As a result of their presumed inferiority in the scales of civilization, anything and everything about 'primitive' peoples was on offer, including skulls and body parts, as objects of scientific and later, other kinds of inquiry. So, for example, one of the roles of Sir Joseph Banks, explorer, naturalist, Gentleman, President of the Royal Society 1778–1820, Privy Counsellor, and as one biography entitled him, the 'Father of Australia' (Maiden, 1909) was, as a fellow scientist, to assist the work of the German physiologist and pioneer of physical anthropology, Johann Blumenbach, by putting contacts at his disposal to assist in the provision of craniums. Gascoigne (1994) attributes Banks with founding the trade in Australian Aboriginal remains that are at the centre of political movements today for repatriation and ritual reburial.

Significant 'indigenes' accumulations were one consequence of the violence done to Indigenous people in 'settler' communities. Racist readings of this same archival material were also used to justify maintaining the political non-status of Indigenous people as the philosophy of *terra nullius* came to be challenged by the reality of living among Indigenous populations 'sharing' the lands. As early as 1825, claims about Aboriginal physiological weakness and the fiction of Aborigines as a dying race were read into the bones by

comparative anatomists and phrenologists (Fulford et al., 2004; Turnbull, 2007). This biological gloss was (and still is) deployed as a political tool to undermine and silence ongoing Indigenous political claims.

The rearticulation of the imperative of public information and a commons is used as an argument *against* repatriation of Indigenous remains today. A significant number of cultural and scientific institutions, nationally and internationally, maintain arguments that such repatriation to Indigenous peoples will deny the future possibilities for scientific access and inquiry. The insistence on keeping these materials taken from Indigenous peoples for future study in the 21st century demonstrates the relations of power that first, enabled such institutions to hold 'on trust', or own such materials, and second, the continuum of these power relations with the (re)articulated denial of access. It is unthinkable that any European human remains from the Boer, World Wars or 20th-century conflicts in Asia would be treated the same way.<sup>4</sup> That the Indigenous case for repatriation still has to be argued, illustrates ongoing hierarchical distributions of the entitlements of 'global' citizenship and the imaginary inclusions that are presumed in contemporary articulations of the 'public'.

It is at the nexus between historical action, and contemporary reaction to these kinds of accumulations and studies, that the particularities in the origins and modern history of the commons idea is perhaps most explicit. While it may superficially appear possible to explain this history as one of the unfortunate byproducts of Empire, the wrongs inscribed in the takings cannot be simply undone by finding goodwill to return remains and denouncing the associated racist sciences today. The problem lies with the hierarchies of knowledge formation that support the legitimacy of western law in settler polities and the ongoing presumptions of our legal categorizations that 'speak for' and define the 'Native'.

#### SOVEREIGN PUBLICS?

The access movement is supportive of a more culturally inclusive notion of public. There seems to consistently be two imperatives: (a) to reaffirm the place of 'public' authority over the content and justification for law; and (b) for academics to serve as mediators of 'the public' and the legal expression of their needs. However, these imperatives are informed by the current state of play where maximalist treaty making, domestic law making, and associated judicial interpretation of the new provisions have advanced without appropriate, or perhaps without any, real reference to the public and their interests. In response to this situation, reaffirmation of a public space and public voice is deemed to be of the utmost importance, because that is what is taken to have been denied, suppressed and ignored. But in the contemporary context, who is entitled to speak of or for the public? And how and when can a notion of 'the public' be taken as inclusive of Indigenous subjects?

Colonial Australian administration has always refused to recognise that there is no one Aboriginal culture but hundreds of them, as there are hundreds of distinct languages, all insistently autonomous. Local political systems promoted no 'leader' to be taken to, a problem that apparently stymied Captain Cook and has plagued 200 years of subsequent race relations. The overarching class 'Aboriginal' is a wholly European fantasy, a class that comes into existence as a consequence of colonial domination and not before (although Aborigines will make concessions to this fantasy seeing possibilities thereby for political and economic power). (Michaels, 1994: 150)

Critical legal histories of IP are aware of the imperialism inherent in the origins of patent and copyright (e.g. Drahos, 2002; Sell and May, 2006). However, the 'international context' of intellectual property law is really only dated from the mid-late 19th century, fixating on the passing of the Paris and Berne Conventions. At this point, colonial relations are just taken for granted, with the main jurisprudential problem presented as that of managing the Common-Wealth, that is relations between Mother country and her current and former colonies, and between Empire and Empire.

Colonial intellectual property, (if considered at all), is treated as a special sub-set of IP history, dealing with managing the jurisdictional problems of Empires. The development of an international legal infrastructure in the late 19th century allowed for the ongoing expansion and development of the law, through supplementation, and clearer demarcation of the rules for discrete territorial contexts. However, there was not even an Indigenous IP presence in intellectual property law until the late 20th century (Anderson, 2005a).

In the history of IP law there has been little sophisticated engagement with the question of law securing access to 'whose knowledge'? At the relevant period of the origins of colonization, IP was too 'undeveloped' to bear any responsibility for dispossession. Subsequently the problem of legal responsibility for Indigenous dispossession is largely assigned to another category of law – to public law and European notions of natural law, sovereignty, and then to the private law of real property. The gaze is turned away from any detailed consideration of the broader global political context of intellectual property law, and the subjugation of Indigenous persons throughout its history. It is only later, in the 1980s that IP lawyers become almost self-congratulatory in their capacity to try to respond to the Indigenous subject, by making it an area of specialization, instead of recognizing Indigenous relations as always already imbricated in IP laws.

*WHAT ALLOWS FOR THE (LATE) RECOGNITION OF THE  
INDIGENOUS SUBJECT IN IP LAW?*

The problem of Indigenous exclusion from IP became a mainstream consideration in the 1980s and 1990s.<sup>5</sup> Indigenous peoples are recognized as not 'fitting' into the law. However, a preoccupation with Indigenous 'difference' means 'they' become a sub-specialization contained within the broader fields of copyright and patent.

In copyright the stumbling block for Indigenous inclusion is attributed to romanticism and private property relations (e.g. Bellagio Declaration, 1993). These associations affect the copyright story, and lead to the essential marginalization of Indigenous subjects in three ways.

First, for scholars influenced by humanities readings of copyright law through the guise of the author-function, copyright and authorship become synonymous with private rights and the protection of the subjectivity of the individual author. The justification of the law is couched in terms of protection of private property rights, including rights of attribution and integrity of authorship.

Indigenous subjects, entering the discourse primarily through the expertise of anthropological study, are attributed with a homogenous, pan-indigeneity. As a plural and collective subject they are bound by reference to the absence of the requisite modern private property relation, a category itself culturally particular. Hence the ascribed (primitive) Indigenous collective subjectivity and the (modern) copyright private subjectivity are irreconcilable.

The second deployment of romanticism is among scholars sceptical of the place of romanticism in Anglo jurisprudence. Here romanticism is treated as a marginalized discourse because, unlike in Continental law, there is no formal recognition of romantic philosophy underpinning Anglo copyright law. The most important case law about the foundation of copyright (*Donaldson v Beckett*, 1774) casts doubt that this or any philosophy really fits with the rights the legislature created (Deazley, 2004). However, notwithstanding the position that it is not helpful to align the content of the formal tale of origins of these legal rights with philosophy or art theory, romanticism has had and continues to have a strong social presence. Phantoms of romanticism ground conventional views about high art and culture and are never far away from critiques of copyright law from the perspective of the humanities. For example, 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 created (McKeough et al., 2002/2007).

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 idealization of the Savage, of the 'indigenous' and the associated spirituality. Such literature also evoked the state of nature as a communistic original state, divorced from concerns of a modern economy and alienated private property relations (Fulford and Kitson, 1998; Makdisi, 1998). Because the Romantic does not fit comfortably in Anglo copyright, and because Romantics, in a special sense, identified with the 'indigenous', this led some intellectual property commentators to assume that as a matter of common sense the 'indigenous' cannot fit into modern western copyright law.<sup>6</sup>

The focus on Indigenous spirituality has encouraged a reification of Indigenous culture as universally religious and sacred, and fundamentally opposed to *any* form of commodity relations. One problem with this trajectory and

how it seeks to include the 'indigenous' subject, especially within Australia, lies in the (impossible) exclusion of Indigenous people vis-à-vis the market. There is a reluctance to recognize that it was commercialism of Indigenous art in kitsch souvenir form that led to Indigenous demands for entry into IP and the consequent court action.<sup>7</sup> Further, the reality is that art sales have provided a fundamental economic resource base in many Aboriginal communities, funding projects such as return to country, or more recently health care needs popularly considered as not the responsibility of the government (Johnson, 1996; Myers, 2002).

The divergent accounts for Indigenous people's exclusion from copyright law point to the real instability and incoherence of the legal principles presumed to prevent inclusion (Bowrey, 2001; McKeough et al., 2002). In the first account of romanticism and copyright, the 'indigenous' is excluded because of the union of law and romantic subjectivity. In the second more jurisprudential reading of copyright law's history, both the romantic and the 'indigenous' are united under the banner of legally marginalized interests. The law's failure to interrogate its philosophical underpinnings or account for them, except in positivist terms, is taken to serve commodification, at the expense of consideration of the creative and other interests of all humanity.

A third version of the story accepts that, notwithstanding the romantic definition of private property being formally rejected as a legal foundation of Anglo property, what continues to circulate is a broader notion of copyright as a 'private property right'. Here Locke's labour theory of value is often (wrongly) transposed to the cause of supporting exclusive private property rights in cultural products, and to assist in justification for the private right. Despite some philosophical vagueness to the property claim, the notion of copyright as property is read exclusively in terms of 'individual ownership' (Rose, 1993; Drahos, 1996). And this of course (therefore) precludes the typologically 'collective' interests of Indigenous citizens.

In relation to patents, the exclusion of the 'indigenous' is of another kind. It comes with the notion of scientific knowledge, with the distinction between discovery of scientific principles and applied knowledge, and hierarchies of value. From the Enlightenment period, science came to be understood in conjunction with objective truth. Discovery related to the disclosure of Facts:

[A] discoverer is one thing and an inventor is another. The discoverer is one who discloses something which exists in nature, for instance, coal fields, or a property of matter, of a natural principle: such discovery never was and never ought to be the subject of a patent. (Webster, quoted in Sherman and Bently, 1999: 45)

What then was required in order to move from the realm of discovery to that of invention? The simple answer was that it was necessary to show that abstract principles had been reduced to practice, that Nature had been individualized or activated. (Sherman and Bently, 1999: 46)

While the modernization of patent law was a long and complex process, tied up with 19th-century political debates about how best to advance the national

interest in trade and manufacturing, the award of a patent came to be tied to the development and systematization of legal-scientific expertise, stressing the importance of classification, nomenclature, definition, verification, and publication.

The modern notion of invention leaves Indigenous people as unindividuated subjects within Nature. Like the plants, animals and minerals of the Natural world, they too can become objects of discovery through specific fact-finding endeavours – through the gaze of specifically targeted disciplines on the ‘study of man’ and specifically targeted fact-finding missions of the World Intellectual Property Organization (WIPO, 2001). But Indigenous peoples are not credited with agency in relation to either discovery or invention. The construction of the ‘indigenous’ is antithetical to the subject position of science and applied knowledge.

Indigenous subjects have become a focus of the international IP regime through the intervention and expertise of WIPO. WIPO’s Indigenous interest was initially in folklore.<sup>8</sup> However, faced with encroachment of mainstream international economic agendas by the World Trade Organization (WTO) (that sponsored the multilateral negotiations resulting in the Trade Related aspects of Intellectual Property Rights (TRIPs) agreement; see Ryan, 1998; Arup, 2000; Okediji, 2003), WIPO has given issues of ‘culture’ a higher profile, in order to remain internationally relevant.

To give ‘culture’ a profile, Indigenous subjects are rendered visible by expert knowledges, much more than through their own agency and articulation (Frow, 1998; Ryan and Crabbe, 2004). The making of such visibility again draws from the same early colonial knowledge in order to justify the inclusion, while also emphasizing the newly respected difference:

The denial of the complex local and global historical processes that factor into the creation of Indigenous identities often results in a reliance on an imperially-informed dualism of indigenous/non-indigenous, developed/developing, or Western/non-Western that serves to create a sense of ‘otherness’ when referring to Indigenous communities. (Baxter, 2003: 1237)

A Romantic appeal to natural, original existence continues to feed law’s current fixation with Indigenous culture’s apparent static ‘boundedness’. WIPO has not only identified Indigenous interests as special and particular, but in this process sought to make it a ‘type’ of knowledge all of its very own:

Traditional knowledge is created, originated, developed and practiced by traditional knowledge holders . . . From WIPO’s perspective, expressions of folklore are a subset of and included within the notion of traditional knowledge. Traditional knowledge is in turn, a subset of the broader concept of heritage. Indigenous knowledge being the traditional knowledge of Indigenous peoples, is also a subset of traditional knowledge. As some expressions of folklore are created by Indigenous persons there is an overlap between expressions of folklore and indigenous knowledge, both of which are forms of traditional knowledge. (WIPO, 2001: 26)

Endless new categories and subsets are being created in order to accurately capture the difference. Indigenous knowledge and Indigenous people are tied

to a distinct, if not also unitary, heritage. Indigenous people as 'traditional knowledge holders' are imagined as existing somewhere outside modernity as they 'create, originate, develop and practice traditional knowledge in a traditional setting and context' (WIPO, 2001: 26). This invariably plays into perceptions of Indigenous identity – from both Indigenous and non-Indigenous perspectives. However, to the extent that the Indigenous issues are discussed and spoken of as needing protection, this is in exceptionalist terms – narrowing the conditions under which Indigenous interests can be considered on the same terms as other IP issues.

Enforced exile for Indigenous people means that they are left in contexts that endorse and ultimately reify 'culture' as their singular point of reference and marker of difference. This has further ramifications for the Indigenous subject seeking to claim full citizenship in the information economy (Bowrey, 2006).

For Indigenous people, the rise of the network society has enabled new forms of voice and representation. It means visibility in international contexts, even if that comes with the burden of making new frameworks for individual and group identification and participation. However, the implication is that by having a voice, Indigenous people are empowered and the historically constitutive boundaries of exclusion for Indigenous participation are released.

### WHO AM I?

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. (Watson, 2007: 31–2)

To be recognized as qualified to speak for Aboriginal culture there is enormous pressure to perform, and conform to, an expected 'authentic' indigeneity in Australia (Povinelli, 2002). Not only is this an onerous and unwelcome expectation, the capacity to 'speak for' and be 'representative of' any particular indigeneity is now expected to be addressed by Indigenous Australians before they can speak in their own voice. As Watson (2007) has clearly articulated, this requirement of 'representativeness' of a peoples is itself colonial in framing. Further,

The captured voice of the 'native informant' is accommodated and becomes characterized as being representative of 'their' people. This has been repeated throughout Australia's colonial history, and it continues today. Political models and structures are imposed by government and adopted by communities who are wanting to or are forced due to economic necessity to engage. However it is these practices which erode Aboriginal models of engagement . . .

. . . the question of Aboriginal representation, functions within a colonial context; the idea of representation is a false one, whereas an Aboriginal context is something else, still waiting the time and space to emerge, for that impossible space to open up. (p. 33)

It would be naïve to assume those spokespeople currently with access to the international frame can speak for all. Further, it is not clear how broadening

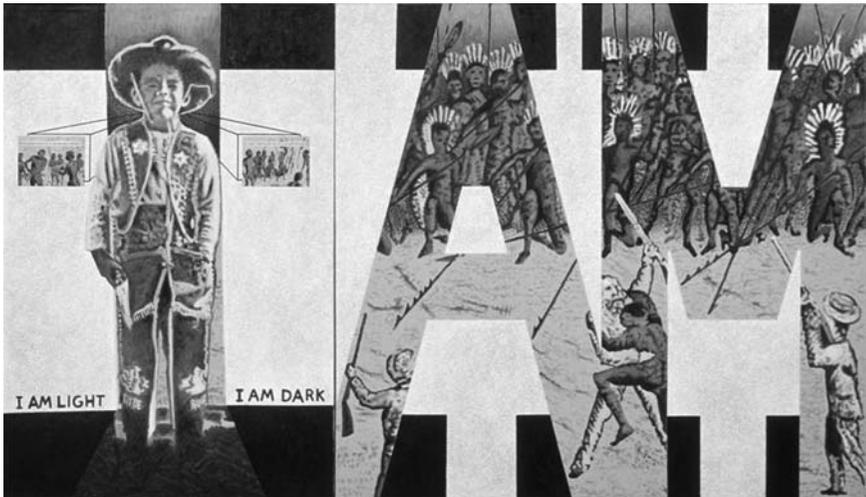
access to the international networks, assuming this is even desirable to those excluded, would better resolve the situation. The problem of speaking for the exclusion, is a problem about adequately capturing the diverse interests articulated *locally*. Who is authorized to do this, and on what terms is not clear on an international level, nor is it necessarily clear on an institutional or local level. For advocates of access to knowledge, this is a double bind. First, to what extent can the movement speak for or to Indigenous interests, and, second, to what extent can it break from the abstraction of representing Indigenous interests as specifically a product of Culture?

*I AM*

Gordon Bennett's self-portrait (Figure 2) is concerned with the effects upon one's identity of (historical and self) categorical confinement. He brings the issue of Indigenous subjectivity into sharp focus. The binary that Bennett evokes is deliberate. He is pointing to the problems of the undifferentiated Aboriginal subject, to constructions of Aboriginality and the limited spaces in which Aboriginal people are subsequently required to 'play' with, as well as more permanently occupy. The slippage between Aboriginal Australian, Indian and Cowboy imagery illustrates Bennett's concern for how Indigen-

FIGURE 2

Gordon Bennett, *Self-portrait*  
(*But I Always Wanted to Be One of the Good Guys*) 1990



Oil on Canvas  
150.0 × 260.0 cm  
Private Collection, Brisbane

ous cultures are reified as singular points of reference despite different histories, politics, ontologies and epistemologies.

Bennett's stated desire for inclusion ('I always wanted to be one of the good guys') is in tension with histories and knowledges that (re)make him as 'Other' to that broader frame. The work questions how identities are formed, who qualifies for which subject position and importantly, who decides. These are not just abstract problems of identity. For the most part, Aboriginal Australians have had limited power to self-define an identity, as self-definitions have intersected with official 'public' determinations of one's 'racial' status. As Marcia Langton (2003: 109, 116) explains,

Who is Aboriginal? What is Aboriginal? For Aboriginal people, resolving who is Aboriginal and who is not is an uneasy issue, located somewhere between the individual and the state. They find white representations of Aboriginality disturbing because of the history of forced removal of children, disenfranchisement from civil rights, and dispossession of land.

The label 'Aboriginal' has become one of the most disputed terms in the Australian language. There are High Court decisions and opinions on the 'term' and its meaning. Legal scholar John McCorquodale tells us that in Australian law there have been sixty-seven definitions of Aboriginal people, mostly related to their status as wards of the state and to criteria for incarceration in the institutional reserves. These definitions reflect not only the Anglo-Australian legal and administrative obsession, even fixation, with Aboriginal people, but also the uncertainty, confusion and constant search for the appropriate characterisation: 'full blood', 'half caste', 'quadroon', 'octoroon', 'such and such a admixture of blood', 'a native of Australia', 'a native of an admixture of blood not less than half Aboriginal', and so on . . . The fixation on classification reflects the extraordinary intensification of colonial administration of Aboriginal affairs from 1788 to the present.

The classification of Aboriginality, as with circumscribing any cultural or ethnic identity, is inherently unstable (Haebich, 2000). This is precisely what makes it difficult as a marker of identity and even political confinement.

In IP law, the politics of representation is compounded/confounded because recognition of indigenous knowledges has become dependent upon claiming a specific depoliticized construction of Indigenous as Same/Culture. That is, Aboriginality = (only) Culture within the legal categories of IP, and Indigenous issues relating to intellectual property are conceived as being relatively the same – that is, different from standard intellectual property issues but the same in their identification as 'indigenous' (e.g. Wright, 1996; Janke, 1998, 2003; Bowen, 2000). Curiously, within IP the problems of representing the Aboriginal and Torres Strait Islander view(s) that plague other areas of law, politics and governance, and are present in the themes of much contemporary Aboriginal art, are here absent. Though all Indigenous Australians may or may not have land and access to the other traditional legal signifiers of a collective polity, they all are taken to still 'share' a valuable cultural identity in IP, especially with regard to artistic practice and an interest in 'cultural expressions'.

The mode for identification of ‘indigenous IP’ allows little room for differentiation within the category (Anderson, 2005b). As Helliwell and Hindess (2000: 2) have observed,

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

Political differences experienced at a local, regional or national level are seldom articulated within national or international discourses on intellectual property.

#### ACCESS TO WHAT AND FOR WHOM?

The freedom to circulate information unfettered is antithetical to certain localized practices. Freedom does not mean that all knowledge is common or for the commons. Is there a space for meaningful articulation of such demands?

This tension is found in the current context of providing digital access to material held in cultural institutions and archives around the world. For the many decontextualized and disembodied *cultural* objects, which can now be digitally made available, there are competing interests involved in making such material available to all. Unlike the local context, in which meaning remains fluid, the esteemed institutions where such material is held will not necessarily be aware of the specific terms and conditions related to that material generated at the point of collection. That missing information (which often includes the *names* of the authors, singers, dancers and/or custodians of the knowledge) is, in part, a product of the values that were (and remain) implicit in the classification of the material upon collection. The information that institutions rely upon when making decisions about digitization is inscribed through culturally particular classificatory grids, for example, genre, composition, region, length, community. In the rush to make this knowledge available to all, these collections are in the process of being distributed globally, and in doing so they reproduce the old colonial frameworks. There has been limited thinking around the politics of seeking appropriate permissions or discussions that should ensue about these materials prior to and during this process of making content available. For institutions, the material’s ‘public domain’ status, signified by the apparent absence of assertion of copyright, is enough – a positivistic legal status minimizes the capacity to take a different perspective.

While the access movement does recognize Indigenous difference may mean different protocols should apply, there is confusion here about how what is free and what is for the common, can be determined. Where, if at all, can Indigenous opinion be made to count with the ‘owners’ of archives?

In 2005, the Smithsonian Institute decided to make its extensive 'world' music archive available online. The institution believes it owns all the music as for nearly a century it funded researchers to procure music from exotic and more local contexts. The original assumption was that legal permissions to digitally reproduce the music from these exotic locations were unnecessary. This should not be assumed under current Australian law (although legal resources to enforce the available rights are quite limited).<sup>9</sup>

When the original recordings were made, digital access and global dissemination of the music over the internet were not possible. There were no explicit agreements regarding future use, and of course, digital reproduction. Indeed, the problem of permissions is time-consuming. Were permissions to be sought, there is the problem of whom to ask. Names and details of performers were not generally included in the original recording processes and supplementary documentation. At best, the rubric 'various artists' captures the otherwise featureless musicians and performers.

One part of the digital archive contains 30 'albums' of recordings of Aboriginal and Torres Strait Islander music dating from between the 1940s and the 1990s. Several relate to the important Kangaroo and Dingo Dreaming – significant and secret male initiation ceremonies. There has been a serious oversight in allowing this material to be accessed. This is not material generally available to anyone outside the community. It is not material generally available to anybody *inside* the community. But with no documentation indicating whom should be consulted, and limited time to reassess the status of every recording, who within the institution is really going to know that this should be an issue of considerable concern? If the communities who would be affected by the public disclosure of this material are not digitally literate – does it matter?<sup>10</sup>

For the individuals, families and communities with a direct relationship to this material, the politics of the communications medium and of the content cannot be understated or separated:

In the past, when traditional Aborigines resisted literacy and remained outside the mass media distribution network, they rarely were aware of what happened to the words they allowed to be written or the images they allowed to be recorded . . . But with the extension of the national media network to the outback and with Aborigines' newfound ability to see what Europeans make of them, the consequences become real and undeniable.

Aborigines who are now regarded by their countrymen to have leaked information into the public network are now regarded by their fellows as having 'sold their Law' . . . The problem is grave, serious and 'Culturecidal'. (Michaels, 1994: 33)

The circulation possibilities of much cultural material have clearly exceeded original expectations. It certainly goes beyond what anyone thought was possible in the 1940s, and even through to the late 1980s, when material was still being collected and the internet unanticipated.

Does it matter that the increased potential for circulation of material with digitization and the internet is assumed to be of benefit for all, without

attention to what the people in the recordings might think? Does it matter that for a significant amount of this material, the performers would have had no idea about what was possible for its future? Are these issues now raised, as a matter of course, with the subjects being recorded today?

For at least four hundred years, the world has witnessed the rise and growth of the technoscience movement, inculcating such enormous power and authority that it has been able to confront, overwhelm, and absorb the insights of traditional knowledge systems around the planet. This social and organizational triumph is sometimes interpreted as evidence of the universality of scientific knowledge claims. The locality approach focuses on the conditions under which the appearance of universality arose and is maintained. These conditions include, for example, Europe's successful politico-economic colonization of the world; the close integration of its institutions of technoscientific knowledge with its institutions of power; its unique social mechanisms of authoritative communication and intercultural exchange, employing new devices like laboratories for knowledge making and networks for retranscribing, moving and incorporating local knowledge into the global discourse; and, finally, the enormous instrumental successes of technoscience in the manipulation of nature and in the development of technologies of control. (Chambers and Gillespie, 2000: 239)

New communicative technologies that facilitate new kinds of access and new kinds of access communities, should lead to a reconsideration of the politics and practices that led to the studying and archiving of Indigenous people and their culture in the first place. There is no good to come from advocating access to Indigenous cultural materials if there is no space for real Indigenous engagement with the terms and conditions of such access. There are significant complexities of cultural authorization in Australian Indigenous communities that need to be considered. Further, within this context the notion of 'communal' property does not mean that any in the community can participate, represent or speak for others, because who is authorized to speak will depend upon the particular subject matter and interpersonal histories. This, combined with the high rates of Indigenous mortality, means community 'authorization' inevitably involves more than simply obtaining consent from original participants. The decision matrix involves extensive localized knowledge networks and institutions through which decisions about access can be negotiated and agreed upon.

The presumption of the good of access enables certain types of material to be classified (as songs or sound recordings, for example) in ways that renders invisible the cultural particularity of their collection and current location. Culture is called on to be present, in the sense that this is what makes the music unique and subsequently of 'interest' and of 'value'. But in institutional practice the 'culture' that is invariably present is dissociated from questions of ownership, control and autonomy. With the abstraction of the culture concept, localized contexts remain marginal to the greater humanitarian and commercial purposes of enabling 'public' access.

*THE 'RIGHT' IN ACCESS*

Appeals to access to knowledge also seek to evoke a concept of sharing. Yet the struggle for sharing remains caught in strategies of Empire and ongoing projects of control.

Open access, as a normative preference for the information age, is generally advocated on the grounds that it is most conducive to facilitating and servicing the innovation and information needs of global citizens and developing nation states. A policy of openness carries with it the suggestion of liberal and democratic accountability for choices around knowledge accumulation, circulation and distribution. Further it is a stance hard to argue with – who would argue against the value of ‘education’?

Despite the emotional pull of this politics, we feel strongly that we need to address the wrong contained in the collection of certain kinds of information *alongside* the emancipatory potential of knowledge. In the 21st century the research, study and collection of knowledge continue – there are many more individuals, agencies, corporations, organizations working with and in Indigenous contexts than there were at the height of the colonial endeavour.

Take, for example, one remote community about 1000km from the nearest centre that can only be found by Internet search engines because of its proximity to significant amounts of bauxite. The community consists of 2000 people, has eight major language groups, and not enough housing. Basic supplies come by boat once a week. It was a site for ethnographic and naturalist study in the 1930s, and missionary zeal in the 1940s. Even though there are few people who are digitally literate, there are currently four different database projects occurring in this one community. Most of the computers, if used in the community at all, are used for Internet banking.

One project is focused on the digital management of ethnographic materials (films, photographs, sound-recordings) from cultural institutions across Australia; another is a comprehensive database on plants and animals specific to the island; the third is a database on specific health issues within the community; the fourth seeks to map the local knowledge system into a digital form. Each project has a different source of funding. All have their own research agreements between the researchers, their funding agency and either the Land Council or Local Council. Some outsiders would have ethical clearance from their home institutions.

There is emerging contest over who ‘owns’ the plant and animal database. The anthropologist sees it as predominately owned by themselves. When they retire they will gift it to the community. The Land Council claims ownership because the information comes from the land, for which they are formally responsible. The Local Council claims ownership because they see themselves as more representative of the broader community interest, and are responsible for basic services that are urgently needed. There are thoughts to sell a copy of the database to the mining company. The company have made several enquiries into the content already, eager to match data to those collated in their own resources.

No one in the community knows about managing the rights to the content, or what the future of the material may be. Traditional law makes no explicit rulings for these new mediums about conditions of access and circulation. While the community has historically had local controls for managing knowledge and knowledge circulation, these do not translate easily for the new kinds of communications technology. There are emerging legal and cultural questions arising as to how to manage material and content, including information that is modified and recontextualized 'downstream'. What should happen to this material? Some community members as well as researchers are keen to see all this material on the web, so that others external to the community can learn more about the structure, history and politics that inform this locale. Others are a little more circumspect.

This community is just one of many grappling with new questions about managing access to knowledge. These political and cultural questions ultimately need to be determined at the local level. But there is limited capacity for thinking through and resolving these issues because there is little advice available. Advice from whom should be sought?

Advice is sometimes sought from lawyers, researchers and academics. But what advice can be offered? Is advocacy of broad public positions on the greater good of access at all useful here? How can the management of local complexities be advanced by advocacy for a global access to knowledge treaty? One possibility is that private law and negotiations could be utilized more carefully, as these might better reflect the nuances and local protocols as they develop in situ (Anderson and AIATSIS, 2007).

Our concern is that in advocating the global good of access, the number of projects continue to mass. With these projects the problems multiply, and institutions who promote and fund them are actively led away from a consideration of difficult local questions of responsibility and benefit. The ideals of global sharing masks historical, political and cultural tensions. Not adequately acknowledging and dealing with them perpetuates the disenfranchisement of Indigenous people from these decision-making centres.

#### ABORIGINAL AS ARTEFACT

... the old people in my life ... in their passing some took knowledge with them, not leaving traces of it behind because from my understanding of their views, it was knowledge they saw as no longer being relevant to this world. Why do you think they left without a trace? Mostly because of the impact of colonisation and genocide but also some of the old people made a conscious choice, that is, that their knowledge no longer belonged to this world. So where might it belong? I have struggled with this loss but I can understand now much better how our old people had come to this conclusion. That is 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. So how can I speak

beyond notions of exotica of a knowledge that still lives in the land and sings unheard? Is it impossible to engage with Aboriginal world views, and what is the future of the planet if we don't engage? Does it even matter? I think engagement is critical to the future possibilities of the planet and all peoples. (Watson, 2007: 34–5)

The global space, constructed as one of openness, moderated by the inclusion of Indigenous voices, leading to special negotiations, consents and exceptions, perpetuates colonial violence. It is part of a politics that Watson identifies as encouraging a more radical and complete information closure.

Even where the 'closure' is not complete or absolute, 'Western practices of seeing, including white perceptions of Aboriginal people, have precipitated a cycle of repression and self-doubt which is terminally regressive for all concerned' (Smith, 1999: 19). What is needed is a space for Indigenous inclusion that enables Indigenous autonomy and respect in Indigenous terms. This space needs to be one for Indigenous possibilities, where 'they' are not confined by 'their' difference – in IP and in relation to the commons.

James Luna's 'The Artefact Piece' was first performed in 1986 at the San Diego Museum of Man where he included himself as part of a display on 'the contemporary Indian' (Figure 3). He says,

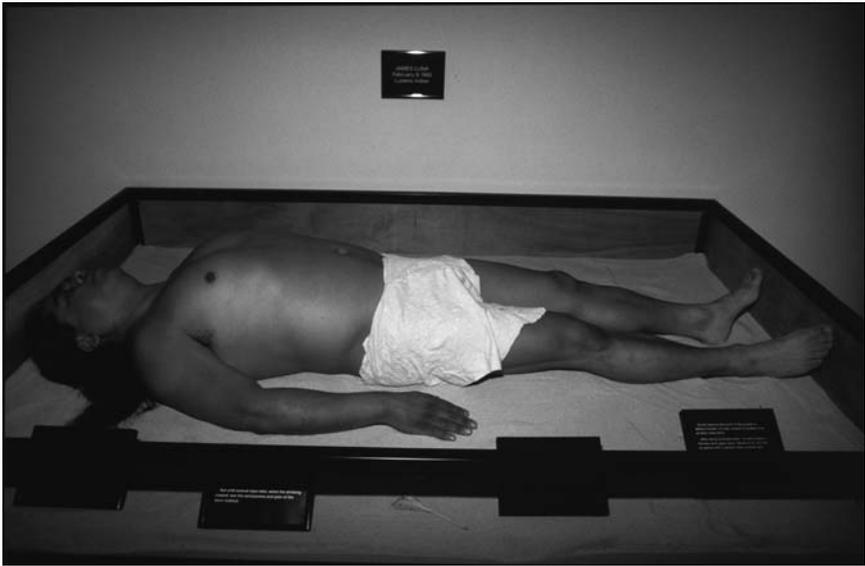
Many museum visitors as they approached the 'exhibit' were stunned to discover that the encased body was alive and even listening and watching the museum goers. In this way the voyeuristic gaze of the viewer was returned, redirecting the power relationship.

Through the performance piece Luna also called attention to a tendency in Western museum displays to present Native American cultures as extinct cultural forms. Viewers who happened upon Luna's exhibition expecting a presenting of Native American Cultures as 'dead', were shocked by the breathing, living 'undead' presence of luiseño artist in the display.<sup>11</sup>

We should know enough from the documentary projects of the past to be inherently suspicious of the categories within which indigeneity is able to be expressed and performed – in law and in society. Despite pretensions as a social movement, the global humanitarianism of furthering access has progressed with no Indigenous involvement, consent and inclusion. Because of the problems of sovereignty and political representation, the problems of its constitution as a social and political movement cannot be fixed by adding a forum for Indigenous participation. This just furthers the treatment of the problem as 'exceptional', not foundational. Finding a better method of engagement is all of our responsibility, despite the difficulties.

Most people who come into contact with 'Aboriginal affairs' remark (or are tempted to remark) on the difficulty of dealing with Aboriginal people and things Aboriginal . . . Talking to 'them' is confusing, disorienting. There is a danger. It is too hard. The overwhelming temptation of many non-Aboriginal people is to delegate their responsibilities to an Aboriginal person or committee . . . avoiding understanding. (Langton, 2003: 122)

FIGURE 3

James Luna, *The Artefact Piece* (1986)

It is not a case of waiting, listening and expecting Indigenous people to tell us what to do. It is time for a better interrogation of the construction of 'our' legal categories, principles and binaries within IP.

To the extent that this analysis of the access movement in intellectual property is understood as an article about traditional knowledge (TK), it is an argument against the construction of the category of TK within IP law. The problems we have identified relate to the construction of *mainstream IP* concerns, in both conservative and 'radical' guises. Further, a commons politics that housed a subcategory of TK would be simply a means of shoring up the old categories, maintaining historical exclusions and papering over these problems. It would serve mainstream needs to prove our liberalness and inclusiveness first and foremost, and have little to do with the interests and aspirations of Indigenous people in the contemporary struggle they find themselves in.

With or without any eventual global access treaty, the underlying problem of constituting a public in IP and the problem of advocating the generalized good of the commons remains. The popularization of network 'freedoms' only makes it harder for Indigenous concerns to be heard and be counted at the institutional sites where it matters most. From our Australian perspective the fight against IP maximalization needs to account for our colonial past and create the possibility of an 'Aboriginal dialogue', where Aboriginal people can participate as people of the 21st century, rather than as representatives of dead artefacts.

NOTES

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1. See, for example, The Adelphi Charter, <http://www.adelphicharter.org>; Consumer Project on Technology A2K Initiative, <http://www.cptech.org/a2k>; Creative Commons, <http://creativecommons.org/>; iCommons, <http://www.icommons.org>; The Yale A2K Initiative, <http://research.yale.edu/isp/events/a2k.html>; Unlocking IP Research Project, <http://www.cyberlawcentre.org/unlocking-ip/project.html>.
2. One recent exception is Guan (2008).
3. While the German Enlightenment period did not exhibit expansionist colonial ambition to the same extent as other European countries, it was nevertheless influenced by empirical Enlightenment theories provided through those other colonial projects. This meant that key theoreticians, such as Johann Gottfried Herder, became interested in measuring stages of humanity. For Herder and his interest in *Kultur*, language was the primary determiner for stages of cultural achievement. Analogies between culture and language became possible, setting new parameters that informed the lens through which Indigenous people were viewed and interpreted (see Zammito, 2002; Gingrich, 2005).
4. See, for example, *Asia Political News* (2005).
5. Authoritative documents include: WIPO (1982; 1998–1999), Department of Home Affairs and Environment (1981), Attorney General's Department (1994) and Janke (1998).
6. In Australia this belief predates, and now continues alongside, case law and legislative proposals that explicitly strive to accommodate Indigenous interests. This is critically discussed by Brad Sherman (Sherman and Strowel, 1994).
7. *Bulun Bulun v Nejlan Pty Ltd* (1989), *Milpururu & Ors v Indofurn Pty Ltd* (1994) and *Bulun Bulun v R & T Textiles* (1998).
8. This is exemplified through the WIPO/UNESCO (1976) model.
9. See Bowrey (2006). Recently enacted performers' rights provisions also create potential for Indigenous performers to assert a share of ownership in recordings formerly made (and owned) by others. See ss100AA–100AH, Copyright Act (Cth) (1968).
10. For the relevant Australian law, see *Foster v Mountford* (1976); *Pitjantjatjara Council Inc and Peter Nganinju v Lowe and Bender* (1982).
11. James Luna's website, which includes documentation of the Artefact Piece, is at <http://www.jamesluna.com>.

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