

Culture, Autonomy and *Djulibinyamurr*: Individual and Community in the Construction of Rights to Traditional Designs

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The possibility of granting proprietary rights in indigenous intangible cultural property – including artwork, cultural items and, more recently, traditional knowledge – has been and continues to be an area of considerable controversy, and the subject of discussions in various international organisations. It is widely accepted that present intellectual property regimes are structurally inadequate. The author focuses on the particular problem of traditional designs, and seeks to analyse critically the justifications that are advanced for extending existing regimes or introducing a sui generis right: in particular, the protection of ‘cultural integrity’. The aim is to elucidate some of the theoretical problems with this rationale, and to extrapolate, from arguments regarding the importance of culture and cultural integrity, to the form and scope of rights that such an argument might require. In particular, the author believes that such a rationale has implications in determining how conflicts between communal and individual interests are to be resolved.

[T]here are situations which no amount of reflection will resolve and where thoughts act out, as it were, a conflict of interest. . . . I could not bring my two minds together.¹

Thus did Marilyn Strathern describe the intellectual dilemmas regarding the application of intellectual property rights to traditional knowledge; her comments are equally applicable to the whole spectrum of indigenous intangible cultural property. When considering legal protection of indigenous ‘folklore’, now more commonly (and broadly) referred to as indigenous cultural and intellectual property,² one is invariably pulled in contradictory directions, both morally and logically. Strathern’s statement captures well the inevitable sense of intellectual schizophrenia.

It is therefore hardly surprising that such issues have long been debated in numerous fora without resolution.³ Several factors have contributed to a recent increase in the international profile of this area: the rising value of indigenous art;⁴ publicity concerning (and protests over) efforts to exploit traditional knowledge by multinational pharmaceutical companies; World Intellectual Property Organization (WIPO) discussions regarding a possible international convention;⁵ the discussions

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- 1 M. Strathern, ‘Exploitable knowledge belongs to the creators of it’ (1998) 6 *Social Anthropology* 109,109.
- 2 A compendious term of contested content: M. Blakeney, ‘What is Traditional Knowledge?’ (1999) (WIPO/IPTK/RT/99/3) 2.
- 3 T. Janke, ‘UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural and Intellectual Property’ (1997) 2 *Art, Antiquity & Law* 405, 406.
- 4 T. Janke, *Our Culture, Our Future* (1999) ch 2 (available at www.icip.lawnet.com.au).
- 5 WIPO Secretariat, *Protection of Traditional Knowledge, A Global Intellectual Property Issue*, WIPO/IPTK/RT/99/2 (22/10/1999) (note that this is an idea that WIPO refused to acknowledge as within its mandate only as recently as 1995).

concerning Article 8(j) of the Convention on Biological Diversity (CBD),⁶ and the heightened visibility of indigenous peoples' concerns worldwide, including assertions by non-government organisations (NGOs) and various indigenous fora of ownership of intangible cultural property.⁷

Many who advocate legal protection for indigenous cultural and intellectual property argue that a *sui generis* regime is required.⁸ There is broad agreement in the literature that Western intellectual property law does not fully protect such intangibles, particularly owing to structural features such as the duration of rights, requirements of originality (copyright) or novelty and inventive step (patent) and the focus on protecting the work of individual, identifiable authors or inventors.⁹ In addition, the whole structure of Western intellectual property law is arguably inconsistent with indigenous customary law, worldviews, and attitudes towards intangible property.¹⁰ Such structural issues have been extensively considered elsewhere. In this paper, I am concerned with analysing in some depth the *justifications* that are most commonly raised in support of the grant of proprietary rights in intangible cultural property, and the implications that the pursuit of such rationales have for the form and scope of such rights or interests. In particular, I will consider arguments founded on a concern with the protection of culture; the communal nature of the interests to which such a rationale leads. I then draw on the literature regarding group rights and group interests in looking at how such interests interact with other potential interests in the relevant cultural products.

Some provisos are required. First, in order to confine the issues, I will focus on traditional ('pre-existing'¹¹) designs in Australian Aboriginal art: designs handed down through generations of an Aboriginal community and re-embodied in new 'artworks' by individual artists. I thus distinguish between different subject-matters in a way many consider illegitimate;¹² nevertheless, I hope that at least some of this discussion will be relevant to other subject-matters.

6 Convention on Biological Diversity Executive Secretary, *Legal and Other Appropriate Forms of Protection for the Knowledge, Innovations and Practices of Indigenous and Local Communities*, UNEP/CBD/WG8J/1/2 (10/1/2000) (available at www.biodiv.org).

7 *UN Draft Declaration on the Rights of Indigenous Peoples* ('UNDDRIP'), Art. 29, 12; and indigenous declarations: *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* (1993); *Kari-Oca Declaration* (1992); *Charter of the Indigenous-Tribal Peoples of the Tropical Forests* (1993); *Recommendations from the Voices of the Earth Congress* (1993); *Statement from the COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity* (1994); *Julayinbul Statement on Indigenous Intellectual Property Rights* (1993). These instruments are reprinted in D. Posey and G. Dutfield, *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996).

8 Most submissions to Janke, n 4 above, favoured a *sui generis* response (§18.2); E. Daes, *Protection of the Heritage of Indigenous People* E/CN.4/Sub.2/1995/26 (United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Final Report, 1995) Guidelines 13–15. *Sui generis* protection is not universally endorsed: K. Puri, 'Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action' (1995) 9 IPJ 293, 327. Arguments *against* include enforcement difficulties, and access to legal resources: M. Brown, 'Can Culture be Copyrighted?' (1998) 39 *Current Anthropology*, 193, 204; S. Brush, 'Whose Knowledge, Whose Genes, Whose Rights?' in S. Brush and D. Stabinsky, *Valuing Local Knowledge* (Washington DC: Island Press, 1995) 1, 10; R. Coombe, 'Intellectual property, human rights and sovereignty' (1998) 6 *Ind J Global Legal Stud* 59, 96.

9 J. McKeogh and A. Stewart, 'Intellectual Property and the Dreaming', in E. Johnson, M. Hinton and D. Rigney, *Indigenous Australians and the Law*; (1997) 53, 62; Puri, *ibid* 305 ff.

10 A. Pask, 'Cultural appropriation and the law: an analysis of the legal regimes concerning culture' (1993–4) 8 IPJ 57, 61–62.

11 D. Ellinson, 'Unauthorised Reproduction of Traditional Aboriginal Art' (1994) 17 UNSWLJ 327, 330.

12 E. Daes, *Protection of the Heritage of Indigenous Peoples* (UN Human Rights Series, UN Office of the High Commissioner for Human Rights, 1997) s 21; Declarations, n 7 above.

Second, I will not attempt further to define the protected subject matter. Serious problems arise here also: for example, in identifying and enforcing proprietary interests in designs lacking a material form; how to allow for incremental development without unduly restricting other artists (particularly non-indigenous artists); and finding an alternative to 'originality' to act as a threshold test. Further questions arise concerning the practical feasibility of protecting Aboriginal or other indigenous 'styles' (eg dot painting). These are exceedingly difficult issues; nevertheless, for present purposes, I will assume that the subject matter can be identified.

Third, the focus will be on issues in framing *sui generis* protection in the style of an intellectual property regime – providing rights in intangibles akin to property rights.¹³ Some commentators question whether private law remedies are applicable at all in this context;¹⁴ nevertheless, such a regime must be considered as one of the alternatives presently 'on the table'. There are other possibilities: in relation to traditional knowledge, for example, arrangements based on private contract and/or multilateral agreements have been mooted.¹⁵ Such approaches are *not* so widely advocated in the artistic field; perhaps in part because, at least *prima facie*, they are likely to be more useful where specific knowledge and (relatively) specific uses can be pre-identified, and where access to the relevant intangible brings users in direct contact with indigenous owners. A further option is a public trusteeship model.¹⁶

Finally, the Australian Aborigines whose designs are considered here are an *indigenous* people. Such peoples are characterised by continuity with pre-colonial populations, continuing distinctness from the rest of society, and determination to 'preserve, develop and transmit to future generations their . . . ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'¹⁷ Given their distinct identity, and the special protection accorded indigenous peoples in international law, if a case can be made for recognition of communal interests in traditional designs, indigenous designs are the archetype. Extension of similar rights to tribal peoples, local communities, or minorities is a separate debate.¹⁸

The first section uses Australian materials to provide some background – exploring the nature of customary interests in traditional designs. The second section considers possible purposes served by protecting communal interests in such designs. The key reasons usually cited in this context are cultural – ie the need to protect certain elements of culture especially of indigenous groups. Conclusions from this section will then provide a framework for considering certain practical problems regarding the exercise of group property rights (the third section) and interactions between group and individual interests (the fourth section).

13 Cf Posey and Dutfield's 'traditional resource rights', n 7 above, which provide, not self-executing rights, but a framework of legal principles for appropriate relations with indigenous communities, and criteria for evaluating planned laws such as the *sui generis* regime considered here: n 6 above, s 50.

14 eg R. Coombe, 'Critical Cultural Legal Studies' (1998) Yale J L & Human 463.

15 Summarised by N. Roht-Arriaza, 'Of seeds and shamans: the appropriation of the scientific and technical knowledge of indigenous and local communities' (1996) 17 Mich J Int'l L 919, 958 ff.

16 Blakeney, n 2 above, 10, 12. Public trusteeship-type models have been adopted in the copyright legislation of some African nations, see Kuruk, n 18 below.

17 M. Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations* (E/CN.4/Sub.2/1986/7/Add.4) s 379; Blakeney, n 2 above, 3–4.

18 P. Kuruk, 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the US' (1999) 48 Am ULR 769, 839.

Collective interests in traditional designs

The issue in this first section is this: how do Australian Aboriginal communities characterise interests in traditional designs, and what are their key concerns? There is no unified 'Aboriginal viewpoint' on these issues, nor do I purport to speak for Aboriginal people. The following¹⁹ draws particularly on evidence of indigenous community members in Australian copyright cases; and a recent report produced for the Aboriginal and Torres Strait Islander Commission (ATSIC).²⁰

Traditional designs in Australia

The cases

Several Australian cases have considered copyright issues relating to Aboriginal artworks incorporating traditional designs. The first of these proceedings, brought in 1989 by Aboriginal artists against a T-shirt manufacturer for copyright infringement in specific existing works of art, were settled in the artists' favour.²¹ In *Yumbulul v Reserve Bank of Australia*²² (a case concerning the design of the Australian ten dollar note), the relevant Aboriginal community from whom the artist derived his customary right to use particular designs asserted a communal interest in the artwork (a sculptural work in that case); the Court, however, could not find accommodation for such interests in Australian law, noting (perhaps in understatement) that 'it may . . . be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.'²³ Similar criticisms were expressed by the Court in *Milpururru v Indofurn Pty Ltd*,²⁴ a case concerning reproduction of artworks on carpets. *Milpururru* is significant chiefly because the Court awarded additional damages for cultural harm.²⁵

In *Bulun Bulun v R & T Textiles Pty Ltd*,²⁶ the Court was specifically asked to consider whether 'communal title in [Aboriginal peoples'] traditional ritual knowledge, and in particular their artwork, [could be] recognised and protected by the Australian legal system'.²⁷ The artwork, 'At the Waterhole', was of sacred significance. The waterhole itself, *Djulibinyamurr*, is the 'spring, life force and spiritual and totemic repository for [the artist's] lineage of the Ganalbingu people.'²⁸ The traditional designs depicted represented the 'number one item' of *madayin* (sacred or ritual knowledge).²⁹ The Court, asked to determine whether the artist *Bulun Bulun* held the copyright as a fiduciary and/or on trust for the Ganalbingu, found that the intention required to create an express trust was lacking.³⁰ However, a

19 The focus of this section is on traditional communities. I return to the issue of 'urban' indigenous artists below.

20 Janke, n 4 above.

21 C. Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' [1989] 10 EIPR 346, 347.

22 (1991) 21 IPR 481 ('*Yumbulul*'). The actual results in this case turned on agency and contractual issues.

23 *ibid* 490.

24 (1994) 130 ALR 659 ('*Milpururru*').

25 *ibid* 692.

26 (1998) 157 ALR 193 ('*Bulun Bulun*').

27 *ibid* 195. That it was designed to be a test case for this particular issue is clear from the fact that the action was continued even after the complete capitulation of the respondent.

28 *ibid* 198.

29 *ibid* 199, 200.

30 *ibid* 206–207.

fiduciary relationship arose from the grant of permission by the Ganalbingu to Bulun Bulun to create the work, the use by the artist of ritual knowledge, and the requirement that that ritual knowledge be used in accordance with customary law.³¹ Thus customary law regarding communal interests was part of the factual matrix that allowed the Court to find a fiduciary relationship. The remedial consequences of this fiduciary relationship were confined, however, at least in that case to the internal relations between artist and community. Bulun Bulun as fiduciary was obliged not to exploit the artwork contrary to Ganalbingu law, and to take appropriate action to restrain and remedy copyright infringement.³² In the result, no relief was available since Bulun Bulun had taken appropriate action.³³

Themes: customary law and community

Several themes worth noting may be teased out of the cases and other literature. The first relates to the special, integral role traditional artwork fulfils in Aboriginal communal life and spiritual beliefs, and the deep attachment Aboriginal communities feel towards traditional designs. Traditional designs are a defining element of the communal and indigenous identity of Aboriginal groups;³⁴ an expression of the continuity of the community. Artworks are inseparable from the relationship between the community and its traditional land, so foundational to Aboriginal cultures (in common with many indigenous cultures).³⁵ In *Bulun Bulun*, evidence emphasised that the Ganalbingu were given designs by their Creator Ancestor *Barnda* together with the land, as ‘part of [a] bundle of rights in the land [which] must be produced in accordance with Ganalbingu custom and law.’³⁶ Different designs serve different functions in communal life: for example ceremonial functions, the recording of history, culture and stories, and the education of younger generations.³⁷ For example, ‘Morning Star Poles’ like that featured in *Yumbulul* are used in ceremonies commemorating important persons’ deaths, in gift exchange and inter-clan bonding. In Aboriginal traditional art, ‘inside meaning’ encoded in some artwork, recognisable only to the initiated, records communal ritual and law.³⁸ The whole community – not only particular designated ‘artists’ – is expected to reproduce traditional designs.³⁹ Thus traditional designs are integral to every aspect of the culture, communal life and identity; their embodiment in artwork in accordance with custom is considered essential to the maintenance of the community’s vitality and traditions.⁴⁰

A second theme is the *communal* nature of interests in traditional designs, and the role of customary law in defining those interests.⁴¹ The complex kinship system central to Aboriginal customary law⁴² shapes rights and responsibilities regarding designs. The ‘rights’ in customary law in this context are more akin to

31 *ibid* 210.

32 *ibid* 211.

33 *ibid*.

34 Puri, n 8 above, 294–95, 297; Daes, n 12 above, s 21.

35 Puri, *ibid* 307; S. Gray, ‘Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land post-Mabo’ (1993) 63 *Aboriginal Law Bulletin* 10, 11.

36 *Milpururru*, n 24 above, 663; *Bulun Bulun*, n 26 above, 198; *Yumbulul*, n 22 above, 483.

37 *ibid* 662.

38 *ibid* 662, n 26 above, 200.

39 Golvan, n 21 above, 348.

40 Puri designates traditional art ‘social cement’: n 8 above, 300.

41 I generalise; but it is important to realise that Aboriginal law is far from homogenous: Ellinson, n 11 above, 338; J. Toohey, ‘Understanding Aboriginal Law’ (unpublished; on file with author) 13.

42 Toohey, *ibid* 19.

'custodianship' than 'ownership',⁴³ a 'bundle of relationships, rather than a bundle of economic rights',⁴⁴ involving responsibility to past and future generations (in strong contrast to more usual Western notions of proprietorship).

Custom defines not only who may depict designs, but to whom designs, and their inner meanings may be revealed.⁴⁵ The degree and nature of customary controls, as well as who must be consulted before a design is used, depend on the design and the nature of the proposed use;⁴⁶ even widespread commercial use of some designs may be allowed after appropriate (though extensive) consultation.⁴⁷ An individual's entitlement under customary law to depict certain designs depends on a (varying) combination of factors such as age, descent, gender, initiation,⁴⁸ skill, and experience in the corpus of ritual knowledge.⁴⁹ Moreover, control is dispersed among different groups and individuals.⁵⁰ The right of any given artist to depict traditional designs is subject to various (non-exclusive) rights and responsibilities of other traditional owners,⁵¹ and must be exercised in compliance with custom and not contrary to the community's interests.⁵²

In short, the evidence reveals a complex matrix of interlocking rights and responsibilities.⁵³ In *Bulun Bulun* the artist, by right of seniority, initiation, skill, and kinship, was permitted to depict 'At the Waterhole'; another applicant, Milpurrurru, the artist's '*Djungayi*' (a particular kind of kinship relation, of more than familial significance, involving as it does a certain level of responsibility⁵⁴), had the right to be involved in important decisions regarding its use; and consensus of all traditional owners was required for some uses.

The third theme concerns the role of the artist. Individual artists are not automatons controlled entirely by custom:⁵⁵ they have distinctive ways of expressing designs,⁵⁶ varying in skill, detail, and particular compositions of designs and techniques.⁵⁷ Thus although customary dictates are important,⁵⁸ development and incremental change are not thereby precluded.

Finally, two key concerns are expressed by Aboriginal people. The first is economic – there is a robust market for traditional and traditional-inspired artwork, and so unauthorised reproduction of works, or the construction of 'pastiche' works purporting to be 'Aboriginal' damages valuable economic interests. The second, more important set of frequently raised concerns relate to communal, cultural and spiritual integrity. Given the intimate connection between designs and communal identity emphasised above, it is not surprising that unauthorised reproduction causes deep offence;⁵⁹ such use is considered an attack on identity and the

43 Janke, n 4 above, s 1.3.4; *Milpurrurru*, n 24 above, 663.

44 Daes, n 12 above, s 26.

45 *Milpurrurru*, n 24 above, 662, 664.

46 *ibid* 664.

47 *ibid*.

48 *Yumbulul*, n 22 above, 483.

49 *Milpurrurru*, n 24 above, 662.

50 *ibid* 663; Ellinson, n 11 above, 335–337.

51 J. Weiner; 'Protection of Folklore: A Political and Legal Challenge' (1987) 18 IIC 56, 72; *Milpurrurru*, *ibid* 663.

52 Janke, n 4 above, s 1.3.4; Daes, n 12 above, s 29; *Bulun Bulun*, n 26 above, 209.

53 K. Maddock; 'Copyright and traditional designs – an Aboriginal dilemma' (1989) 2 IP 7, 8–9.

54 Explained by Ellinson, n 11 above, 335–336; *Bulun Bulun*, n 26 above, 199.

55 Janke, n 4 above, s 1.3.3, s 18.4.7; Department of Home Affairs and Environment; *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra: AGPS, 1981) ('Folklore Report') s 505.

56 Golvan, n 21 above, 349–350.

57 *Milpurrurru*, n 24 above, 665.

58 *ibid* 662.

59 *ibid* 663; *Yumbulul*, n 22 above, 483; *Bulun Bulun*, n 26 above, 199.

community, an interference in the relationship between the artist, their ancestors and the Creator Ancestor(s).⁶⁰ *Bulun Bulun* summarised these concerns:

Unauthorised reproduction of 'At the Waterhole' threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threaten[s] our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations.⁶¹

Communal and customary control is considered necessary to protect the community and its vitality.

Customary laws vary widely between indigenous peoples and between countries,⁶² and not all interests in indigenous cultural items assume a collective form.⁶³ Nevertheless, strikingly similar themes and concerns are expressed in the international sphere. UN Special Rapporteur Erica-Irene Daes found that indigenous people view heritage not as property but rather 'in terms of community and individual responsibility'; and as 'a communal right, associated with a family, clan, tribe or other kinship group'.⁶⁴ Indigenous declarations,⁶⁵ recent WIPO studies⁶⁶ and other writings⁶⁷ highlight not only economic concerns, but more importantly the integral role that indigenous cultural and intellectual property fulfils in indigenous communities, and the importance of control over cultural items in maintaining indigenous identity, communal life and vitality.⁶⁸

Return to Bulun Bulun

I will not consider in detail the application of trust or fiduciary law in *Bulun Bulun*.⁶⁹ *Bulun Bulun* was an attempt to gain explicit recognition of customary communal interests in traditional artwork by drawing analogies with Western concepts – and, no doubt, to highlight inadequacies of the law in this area. Analogies may be helpful, but owing to differences regarding concepts of property and ownership, we must question the appropriateness of imposing cultural values embedded in our legal system on the resolution of such claims.⁷⁰ Certainly classical Western intellectual property law or more general property concepts do not capture the *cultural* importance of artwork and designs. Both trust and fiduciary law envisage a concentration of rights, duties and responsibilities in the fiduciary/trustee;⁷¹ and are not designed to regulate the complex of interlocking, non-exclusive, contingent rights and responsibilities described above. Most

60 *Bulun Bulun*, *ibid* 199.

61 *ibid*.

62 Four Directions Council, quoted in G. Dutfield, 'Between a rock and a hard place: indigenous peoples, nation states and the multinationals' (available www.fao.org/docrep/w7261e/w7261e06.htm).

63 Coombe, n 8 above, 108; S. Harding, 'Value, Obligation and Cultural Heritage' (1999) 31 *Ariz St L J* 291, 305–306.

64 Daes, n 12 above, ss 26, 28.

65 n 7 above.

66 eg WIPO Secretariat, *Report of the WIPO Fact-Finding Mission on Traditional Knowledge, Innovations and Culture to Central America* (WIPO/FFM.C-AM/IMR/99/5) (20/10/1999), 5 (www.wipo.org).

67 Daes, *ibid*, ss 30, 115, Principle 171; R. Coombe, 'The Properties of Culture and the Politics of Possessing Identity' (1993) 6 *Can J L & Juris* 249, 284.

68 Daes, n 12 above, s 30; Kuruk, n 18 above, 781–786.

69 See A. Kenyon, 'The 'Artist Fiduciary' – Australian Aboriginal Art and Copyright' [1999] *Ent L R* 42.

70 C. Bell, 'Aboriginal Claims to Cultural Property in Canada' (1992) 17 *Am Ind LR* 457, 462.

71 cf the Ghanaian tribal head, an example cited by the Court, who resembles a trustee more than an Aboriginal artist: *Bulun Bulun*, n 26 above, 209.

importantly, even equitable ownership of copyright by a community cannot provide interests in the traditional designs themselves.

No doubt some aims of the litigation were achieved; nevertheless, equitable ownership of copyright is useful chiefly as a ‘stop-gap’ measure,⁷² and to force the Court to recognise the *existence* (if not the full force) of customary communal interests.⁷³ The characterisation of the artist as fiduciary has these limited practical benefits, but on another level is also deeply problematic – potentially, it allows Courts applying fiduciary law to intervene in intra-community relations and even potentially to enforce (their interpretation of) customary law, but at the same time offers no protection against the actions of non-members of the community not bound by customary obligations.

Justifications for legal protection of traditional designs

Structural reasons for copyright law’s inadequacy in protecting traditional designs are examined in more detail elsewhere.⁷⁴ In considering whether (and how) a *sui generis* regime may address the communal interests and concerns outlined in the first section of this article, we must consider what justifications, arising from such communal interests and concerns, could or would support such a regime of communal rights to (a) control use⁷⁵ and (b) derive profit from the exploitation of traditional designs.

Traditional designs presently fall within the ‘public domain’. As a result, even those who are sympathetic towards the cause of indigenous peoples thus run up against the not insignificant problem that allowing any such claim leads to further ‘partitioning’ of the cultural ‘commons’. A claim to exclusive access to part of that ‘pool’ of otherwise unprotected ideas and expressions restricts other people’s liberties to express themselves in certain ways, and hence requires strong justification.⁷⁶ ‘Mere attachment’ to designs, even if deeply felt – ie, the fact that designs are significant, even sacred to certain people – cannot be enough: if all such designs were protected, the public domain would be obliterated.

Cultural integrity

We have many particular things which we hold internal to our cultures. These things are spiritual in nature ... They are *ours* and they are *not* for sale. ... such matters are our ‘secrets’, the things which bind us together in our identities as distinct peoples. It’s not that we never make outsiders aware of our secrets, but *we* – not *they* – decide what, how much, and to what purpose this knowledge is to be put. That’s absolutely essential to our cultural integrity, and thus to our survival as peoples.⁷⁷

The more important concerns of indigenous people expressed in the first section were ‘cultural’ concerns – the desire to nurture cultural vitality, and to protect culture from interference. These concerns may be encapsulated in the concept of

72 cf C. Golvan, ‘Aboriginal Art and the Protection of Indigenous Cultural Rights’ [1992] 7 EIPR 227, 230. Golvan considers the possibilities of equitable ownership.

73 S. Gray, ‘Black enough? Urban and non-traditional Aboriginal art and proposed legislative protection for Aboriginal art’ (1996) 7 *Culture and Policy* 29, 39.

74 Puri, n 8 above; Ellinson, n 11 above; Janke, n 4 above, ch 5.

75 cf Folklore Report, specifically rejecting such a right: n 55 above, s 1221(b).

76 J. Waldron, ‘From authors to copiers: individual rights and social values in intellectual property law’ (1993) 68 *Chi-Kent LR* 841, 887.

77 Quoted in Coombe, n 67 above, 279.

‘cultural integrity’. It is argued that control over the use of traditional designs is essential to maintain the cultural and spiritual integrity of an indigenous community and that this is sufficient reason to grant rights of control over traditional designs to the community.

What is ‘cultural integrity’, and why is it valuable?

‘Cultural integrity’ is a contested and problematic concept. ‘Culture’ as used here refers to the culture of a community as a whole, including traditional ways of life, communal institutions, languages, and distinct forms of cultural expression.⁷⁸ This broad definition reflects the concerns and understandings expressed by indigenous advocates themselves. ‘Integrity’ denotes the continued distinct existence of that culture without unwanted interference. The term ‘cultural integrity’ is used by advocates, and in international arenas, in which indigenous peoples are increasingly asserting, in ‘rights-language’ and in the language of property, their *rights* to cultural integrity and to control their cultural heritage,⁷⁹ frequently as one aspect of wider claims to self-determination.⁸⁰ Simple assertion however of such broad, categorical ‘rights’ or moral values does not advance our understanding very far: assessing the practical implications, and their weight in the inevitable conflicts with other interests, requires us to consider more critically why cultural integrity is *needed*, and the purposes it may serve. As the present concern is rights and interests in intellectual and cultural property, I will not enter into the broader controversy regarding the meaning of ‘self-determination’. Whether or not ‘cultural integrity’ is an *aspect of* self-determination,⁸¹ it warrants separate consideration.

The benefits of cultural integrity, and cultural diversity more generally, as well as the special claims of indigenous and traditional peoples have been averred in international debates.⁸² Addressing only one aspect traditional designs the Court in *Bulun Bulun* asserted:

The evidence is all one way. The ritual knowledge . . . embodied within the artistic work is of great importance to members of the Ganalbingu people. I have no hesitation in holding that the interest of Ganalbingu people in the protection of that ritual knowledge from exploitation which is contrary to their law and custom is *deserving* of the protection of the Australian legal system.⁸³

Such arguments are intuitively powerful – undeniably, equal respect is due to indigenous cultures⁸⁴ – but what is the source of this ‘desert’? Benefits to society from simple ‘cultural diversity’ would not justify special protection for any

78 One of Coombe’s three meanings of ‘culture’: n 8 above, 73–5; D. Réaume, ‘Justice between cultures’ (1995) 29 UBC L Rev 117, 120. Even the definition of ‘culture’ is debated: Coombe, *ibid*.

79 Exact terminology varies: J. Anaya, ‘The Capacity of International Law to Advance Ethnic or Nationality Rights Claims’ in W. Kymlicka (ed), *The Rights of Minority Cultures* (Oxford: OUP, 1995), 325; F. Naqvi, ‘People’s Rights or Victim’s Rights: Re-examining the Conceptualization of Indigenous Rights in International Law’ (1996) Ind L J 673, 714 ff; Declarations, n 7 above. Some use ‘cultural integrity’ referring only to the integrity of cultural/artistic productions: eg Janke, n 4 above, s 3.15; *Bulun Bulun*, n 26 above, 210. Such a reading is more narrow than the concerns considered here.

80 eg *Mataatua Declaration* (Preamble); *COICA Statement* Art 3, n 7 above.

81 The broad definition of ‘culture’ brings ‘cultural integrity’ closer to questions of self-determination: both are concerned to some extent with independence and continuation of autonomous institutions; however, debates regarding ‘self-determination’ tend to focus on *political* self-determination, rather than the broader cultural concerns considered here.

82 Daes, n 8 above, Principle 1; UNDDRIP, n 7 above, Art 29.

83 *Bulun Bulun*, n 26 above, 210–211 (emphasis added).

84 Art 1, *UNESCO Declaration on the Principles of International Cultural Cooperation* (1966).

particular culture.⁸⁵ Arguments such as these, applied universally, would lead to a highly balkanised society and, as suggested earlier, the complete privatisation of the cultural commons.

A number of theories purport to explain the values enhanced by the continued existence of distinct cultures. One strong argument is based on the importance of group membership to individuals: culture, and in particular one's *own* culture, is essential to self-identification,⁸⁶ and to individual autonomy; it provides the context and alternatives essential to facilitate the pursuit of individual conceptions of the good.⁸⁷ Réaume on the other hand argues that an individual-centric approach fails adequately to address the collective (non-individualisable) nature of the interest in culture.⁸⁸ Gare't's more radical approach asserts the intrinsic value of 'groupness'⁸⁹ as an essential component of human life.

The nature of the interests involved, and in particular, determination of the question whether the value of cultures is founded on individual benefit, or on the intrinsic good of the group, may determine priorities between group and individual rights.⁹⁰ Approaches based on individual benefit tend to prioritise individual rights over group interests; 'group good' approaches allow, at least in some circumstances, priority to the collective interest. Such questions are hotly contested, and the final choice between approaches may depend on one's politico-philosophical approach. It is not possible to resolve this theoretical debate here, but it is important to recognise its existence: these issues will resurface later when I come to consider conflicts between group and individual interests. In terms of providing a foundational justification for a *sui generis* regime, most important is the 'brute fact'⁹¹ that people's sense of identity, and self-respect, *are* bound up with their group cultures. This is consonant with the concerns referred to at p.221 above. Equally clear is that the interests concerned have a collective aspect; they cannot be enjoyed alone; their value lies in their collective creation and enjoyment.⁹²

Such theories would not justify protective measures for every culture, even if effectively subsumed within a dominant culture. Rather, active legal protection which affects non-members' interests is most readily justified in the case of 'societal' cultures:⁹³ those which provide members with 'meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres'⁹⁴ – those with the most comprehensive influence on individuals alone and collectively, and so those most likely to be missed if removed. In these cases, protection may be justified even at some social cost. Indigenous communities, who are characterised by their separateness from the dominant society and their determination to remain distinct, are (at least in some cases) the archetype of a societal culture.

85 Réaume, n 78 above, 119.

86 A. Margalit and J. Raz, 'National Self-Determination' in Kymlicka, n 79 above, 79, 87; J. Raz, 'Multiculturalism: A Liberal Perspective' (1994) *Dissent* 67, 71.

87 W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: OUP, 1995), 82–93.

88 n 78 above, 130; L. McDonald 'Can collective and individual rights co-exist?' (1998) 22 *Melb ULR* 310.

89 R. Gare't, 'Communitality and Existence: The Rights of Groups' (1983) 56 *S Cal LR* 1001; T. Dougherty, 'Group Rights To Cultural Survival' (1998) 29 *Columbia Human Rights Law Review* 355.

90 D. Johnston, 'Native Rights as Collective Rights: A Question of Group Self-Preservation' in Kymlicka, n 79 above, 179, 188ff.

91 Margalit and Raz, n 86 above, 87.

92 McDonald, n 88 above, 317–318.

93 Kymlicka's term. cf Johnston, n 90 above, ('multi-dimensional'); Margalit and Raz, n 86 above ('pervasive cultures').

94 Kymlicka, n 87 above, 76.

It is important to note that the reasoning considered here supports the protection of a distinct but presently existing culture – not the preservation of particular historical practices. Protection of cultural integrity means protection, not of the historical ‘authenticity’ of particular practices, but of the distinct existence of a multi-dimensional culture. It is their cultures as whole, living cultures, that indigenous peoples assert a right to defend.

Relationship with traditional designs

A broad concern with cultural integrity may justify a law granting exclusive rights in traditional designs to an indigenous community, depending on their significance. If designs occupy a central role in a societal culture, and if, as is argued,⁹⁵ their capacity to fulfil that role is damaged by use of designs contrary to customary law, or which dilutes the meaning and significance of important designs, or which deeply offends the community, eg through disrespect to sacred designs, and if the resulting cultural damage threatens or seriously harms the ongoing distinct existence of the culture (immediately or cumulatively), then *sui generis* legal protection is arguably justifiable to protect cultural integrity. This admittedly high threshold of seriousness is appropriate since even abuse of traditional designs does not directly raise serious questions of oppression, or forced assimilation.⁹⁶ In a mixed society, not every affront to cultural integrity or identity will warrant legal restriction.

It is almost impossible empirically to *prove* cultural harm, which is likely to be incremental.⁹⁷ There is however abundant supportive evidence, some of which has been described above: eg the offence caused by inappropriate use, the distress which has caused some Aboriginal artists to temporarily cease painting,⁹⁸ and views expressed by indigenous people as to the importance of cultural integrity.⁹⁹ Whether that evidence is sufficient to suggest that cultural integrity is threatened is a matter for assessment, and will depend on surrounding circumstances. That it *could* have such an effect seems clear.

A further argument which links cultural integrity to protection for traditional designs is that such protection is required in order to respect customary law, by recognising the ways in which customary law allocates control over designs.¹⁰⁰ The courts in the Australian cases frequently comment on the failure of Australian law to recognise customary interests in designs.¹⁰¹ Such statements recognise the legitimate existence and ongoing influence of customary law for community members.¹⁰² Respect for, or recognition of, an important institution central to the distinctness of a societal culture supports the right of members to its continued existence, and will undoubtedly enhance its ongoing relevance. This argument is the strongest in favour of a *sui generis* system granting rights of control, since it is at least arguable that the right to be protected from offence would not support a full property right.

95 At 219–221 above; A. Jabbour, ‘Folklore Protection and National Patrimony’ (1983) 18 *Copyright Bulletin* 10, 11; Puri, n 8 above, 295.

96 The threshold may vary with the level of legal protection proposed; relatively stringent property rights considered here justify a high threshold.

97 Janke proposes a study: n 4 above, recommendation 2.2.

98 Golvan, n 72 above, 228.

99 Janke, n 4 above, s 3.15.

100 Ellinson, n 11 above, 343; Puri, n 8 above, 316 (arguing traditional designs *are property*, relying on customary law); *COICA Statement, Julayinbul Statement*, n 7 above. McDonald offers a similar argument in relation to native title: n 88 above, 317.

101 eg *Yumbulul*, n 22 above, 490, *Milpururru*, n 24 above, 664–665; *Bulun Bulun*, n 26 above, 195.

102 Consonant with native title decisions: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo’*).

Strengths and weaknesses of the cultural integrity argument

The cultural integrity rationale has several merits. First, it directly addresses concerns with cultural integrity and communal identity expressed by indigenous peoples. Second, it specifically justifies *communal* rights in traditional designs. If the aim is to support the community's culture, then the community's own (customary) rules must determine use of traditional designs. That interests in cultural integrity must be communal is also clear from the fact that such interests are 'non-individualisable'.¹⁰³ The individual of course has an interest in cultural integrity but not one that can be enjoyed alone.¹⁰⁴ Third, cultural integrity provides guiding principles for framing legal protection: any departure from customary rules tends to undermine the purpose of protecting cultural integrity, and requires independent justification. Finally, it provides some answer to a concern raised in the literature,¹⁰⁵ namely, how to limit the groups that can claim designs – although problems distinguishing those cultures which are 'societal' will remain.

The cultural integrity rationale supports a right to *control* use of traditional designs, including the right to prevent inappropriate commercialisation. It less obviously warrants a positive right to extract economic benefits. Practically speaking, rights to control lead inevitably to rights of exploitation: the alternative would be complete withdrawal of traditional designs from the market, with consequent detriment to society as a whole. A further indirect argument is that cultures survive through use:¹⁰⁶ for traditional designs, this means keeping alive meanings, traditional techniques, and customary laws. Economic incentives may support independence and encourage intergenerational transfer of skills,¹⁰⁷ thus furthering the ultimate aim of supporting distinct cultures.¹⁰⁸ Individual incentives are likely only partially to achieve such purposes,¹⁰⁹ and risk giving priority to personal gain over community interests. One study even suggested that, in remote Aboriginal communities, significant art production is maintained only where there is access to markets.¹¹⁰

One criticism of the right to extract economic benefit and Western intellectual property laws in general is that commercialisation corrupts, or irrevocably changes a culture, rather than protecting its 'distinctness'.¹¹¹ While the sentiment thus expressed sounds paternalistic, the effect that full property rights have on a culture is a relevant consideration. On the other hand, some method for dealing with the reality of the capitalist economy is required: rights of control may even be necessary to *prevent* commercialisation.¹¹² Property can forestall a free-for-all, allowing the group to assert control as against the world, while maintaining distinct intra-group relations of responsibility and obligation. In fact, various declarations

103 Réaume, n 78 above, 124–5.

104 J. Waldron, 'Communal goods as human rights' in J. Waldron, *Liberal Rights: Collected Papers* (Cambridge: Cambridge UP, 1993) 339, 354–358.

105 eg M. Brown, 'Reply' (1998) 39 *Current Anthropology* 218, 218.

106 Coombe, n 8 above, 93.

107 See similar arguments in the CBD: UNEP/CBD/TKBD/1/2 ss 11, 62.

108 C. Jacoby and C. Weiss, 'Recognizing Property Rights in Traditional Biocultural Contribution' (1997) 16 *Stan Envtl LJ* 74, 94.

109 Coombe, n 8 above, 109.

110 Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry* (Canberra: AGPS, 1989) 286–287. This finding cautions against ignoring interactions of different influences, market and non-market, although it can be explained consistently with sources emphasising cultural reasons for art production (eg broader appreciation contributes to art production by stimulating pride in culture; economic independence facilitates cultural production).

111 S. Gudeman, 'Sketches, Qualms, and Other Thoughts on Intellectual Property Rights' in Brush and Stabinsky, n 8 above, 102, 112.

112 M. Da Cunha, in Strathern, n 1 above, 112.

of indigenous peoples display a consciousness of the danger of ‘commodifying’ culture;¹¹³ in Australia, custom has often led to ‘appropriate’ uses eg for display in museums or as ‘high art’.

There are however two more serious problems with ‘cultural integrity’ as a rationale for the grant of proprietary rights.

The first raises difficult and controversial political issues. The point of cultural integrity is that it justifies legal protection which ensures that a societal culture can remain distinct from the broader society. Is this not ‘apartheid of the mind’?¹¹⁴ Similar arguments in other contexts have justified apartheid-like special provisions such as separate schools or administrative systems. Minow warns of the dangers of ‘crude notions of identity’: ‘balkanisation, fragmentation, fundamentalism, illiberalism, segregation and prejudice’¹¹⁵ (not to mention racial discrimination). However, control over traditional designs is unlikely in itself to fragment society: it may be the bare minimum that can be offered, positive in effect and limited in impact on non-members. On the other hand, the association drawn by indigenous people between control of intangible cultural property and questions of self-determination heighten the potentially divisive effect.¹¹⁶ Such issues, of course, are not exclusive to traditional designs; there is no space here to enter into the broader political debate. The divisive potential of cultural integrity is a danger to be taken into account. The wise law-maker in this politically charged arena walks a tight-rope between proper protection for minority interests, and accusations of apartheid and paternalism.

The second challenge however goes to the validity of the underlying core concepts. The concept of ‘culture’ defies the kind of definition that would support rigorous analysis. The essence of the second challenge is that cultures have no boundaries or fixed existence – they influence and are influenced by other cultures, and shade into one another – so that integrity is meaningless and culture itself too fluid and contested to be a valid basis for legal distinctions. On this view, any attempt to found legal rules on cultural integrity reifies a purified, static image of culture.¹¹⁷

To put it crudely, we need culture, but we do not need cultural integrity . . . In general, there is something artificial about a commitment to *preserve* minority cultures. Cultures live and grow, change and sometimes wither away; they amalgamate with other cultures, or they adapt themselves to geographical or demographic necessity. To *preserve* a culture is often to take a favored ‘snapshot’ version of it, and insist that this version must persist at all cost, in its defined purity, irrespective of the surrounding social, economic, and political circumstances.¹¹⁸

Waldron argues that any attempt to protect cultures insulates them from forces that allow them to operate in a context of genuine choice¹¹⁹ – contradicting the

113 D.A. Posey, ‘Comment’ (1998) 39 *Current Anthropology* 211.

114 Brown, n 8 above, 204.

115 M. Minow, ‘The Constitution and the Subgroup Question’ (1995) 71 *Ind LJ* 1, 24; P. Descola, ‘Comment’ (1998) 39 *Current Anthropology* 208; T. W. Pogge, ‘Group Rights and Ethnicity’ in I. Shapiro and W. Kymlicka, *Ethnicity and Group Rights* (39 *Nomos*) (New York: New York University Press, 1997), 188–189.

116 Declarations, n 7 above; T. Simpson, *Indigenous Heritage and Self Determination: the cultural and intellectual property rights of indigenous peoples* (IWGIA, 1997) s 8.9; Blakeney, n 2 above, 14–15.

117 Coombe, n 67 above, 266; S. Gray, ‘Squatting in Red Dust: Non-Aboriginal Law’s Construction of the ‘Traditional’ Aboriginal Artist’ (1996) 14 *Law in Context* 29, 32.

118 J. Waldron, ‘Minority cultures and the cosmopolitan alternative’ in Kymlicka, n 79 above, 101, 109–110.

119 *ibid* 110.

underlying rationale in so far as it facilitates autonomy.¹²⁰ Furthermore, protection of a culture's 'essence'¹²¹ has paternalistic overtones.

Indigenous groups have responded by criticising the focus on authenticity, and emphasising their right to protect their distinct, not simply authentic cultures.¹²² Characterisation of cultures as societal in the sense that they have a complex, present influence presumes living, changing cultures; the underlying aim of cultural integrity need not refer to the traditional authenticity of particular aspects of the culture, like artwork, but rather the protection of the culture's distinctness.¹²³

But such responses do not fully answer the key criticism: that culture is too amorphous to found enforceable legal rights. This issue divides the literature. To deny the distinctness particularly of indigenous cultures, or their importance to members, is to deny reality – and claims that are fundamental to the people concerned. To the extent that they can be identified, distinct cultures, with their strong potential to affect individuals' lives, are worth protecting,¹²⁴ if it is possible without impermissibly encroaching on other interests. But it is equally unconvincing to assert that distinct cultures can be unambiguously defined. Perhaps the only conclusion – however unsatisfying – is that the concept of a distinct societal culture is one end of a spectrum where the other pole is Waldron's cosmopolitanism. Any law actually framed will likely fall back on approximations; particular care would be required to ensure that such concepts did not unduly stray from the underlying justifications. The wise law-maker's tightrope is not only thin but obscure and constantly shifting.

Other justifications

A number of other arguments focusing on economic interests are found in the literature. On examination, it is clear that these arguments are insufficient on their own to support full property-style rights of both control and economic exploitation.

Free-riding

One common argument may be loosely characterised as 'unjust enrichment': it is unjust, or unfair that commercial users profit using traditional designs without benefits going to traditional owners.¹²⁵ Such arguments have obvious instinctive appeal, however, some underlying factor is required to make such commercial profiteering 'wrong' – since we all frequently reap where we have not sown,¹²⁶ particularly in using public domain material. We need to understand *why* the community is the better claimant.¹²⁷ The first reason is that the community has the better claim to designs that are significant to its culture, or because it has such interests in customary law – this clearly relies on the same cultural integrity arguments outlined above.¹²⁸ The second possible basis is that the community has

120 At 224 above.

121 M. Minow, 'Identities' (1991) 3 *Yale Journal of Law and the Humanities* 97, 97–8; L. Prott, 'Cultural Rights as People's Rights in International Law' in J. Crawford, *The Rights of Peoples* (Oxford: OUP, 1988) 93, 95.

122 Janke, n 4 above, s 18.4.7; Réaume, n 78 above, 133–135.

123 Naqvi, n 79 above, 726.

124 Different considerations might arise in relation to oppressive cultures.

125 Jabbour, n 95 above, 12; Puri, n 8 above, 296; Weiner, n 51 above, 80.

126 W. Gordon, 'On Owning Information: Intellectual Property and the Restitutory Impulse' (1992) 78 *Va LR* 149, 178–180.

127 M. Spence, 'Passing Off and the Misappropriation of Valuable Intangibles' (1996) 112 *LQR* 472, 489 ff.

128 Such arguments are insufficient to sustain property rights, but may supplement a 'cultural integrity' argument, explaining why communities are entitled to full market value.

the better right to the designs as products of the community in the intergenerational sense. The difficulty here is that the classic Lockean argument 'I made it therefore it's mine'¹²⁹ is less compelling as an argument based on merit or desert when reframed 'our ancestors made it, therefore it's ours'. The element of property through labour that supports a classical Lockean argument is absent. Nor could a desert-based argument justify intergenerational property claims. Moreover, even if we accept that the community in some broader sense did 'create value' in traditional designs, that does not lead ineluctably to property rights, and particularly control.¹³⁰ Other forms of compensation or benefit-sharing are also possible.

Economic harm

An alternative argument that aims at the same alleged 'wrong' is the claim that commercial use by non-members of the community causes economic harm to the Aboriginal community – for example, through mass-produced cheap imitations,¹³¹ or by crowding the market and damaging opportunities (and prices) for traditional artists. Again, an antecedent basis for a community claim is required.

Broader distributive concerns

Another argument is that existing intellectual property regimes protect Western intellectual products, but systematically ignore or undervalue the intangibles of indigenous peoples¹³² or (to extend the argument further) protect the products of developed, not developing nations.¹³³ On this view, reciprocity requires the same recognition be given to the intellectual products of different cultures.¹³⁴ Again, despite the clear moral force of the argument, there are difficulties in using this argument to justify property rights in this case.

First, the application of 'special measures'¹³⁵ is (unfortunately) an easy target for critics who will claim that it extends the rights of indigenous people beyond those accorded to other individuals.¹³⁶ This is an argument for 'formal equality', and subject to the usual criticisms of formal equality (which need not be rehearsed here), though experience suggests it may have considerable political appeal. A stronger counter-argument is that although items such as traditional designs have some features in common with subject-matters protected by intellectual property law, there are also crucial differences, such as the lack of material form, which may justify different legal treatment and found an argument that, while compensation or 'equitable benefit-sharing' is required, property rights are not, owing to the indefinite nature of that which is claimed.¹³⁷ Furthermore, the rights claimed by indigenous people are different in scope from Western intellectual property law:

129 E. Hettinger, 'Justifying Intellectual Property' (1989) 19 *Phil & Pub Aff* 31, 38–39.

130 Gordon, n 126 above 167.

131 Janke, n 4 above, s3.15.4.

132 A. Gupta, 'Building on what the poor are rich in' (www.csf.colorado.edu/sristi/papers/building.html); Kuruk, n 18 above, 775.

133 Gupta, *ibid*; E. Marden, 'The Neem Tree Patent: International Conflict over the Commodification of Life' (1999) 22 *Boston College International and Comparative Law Review* 279, 295.

134 cf C. Rose: *partial* propertisation leads to conflict and injustice: 'The Several Futures of Property: of Cyberspace and Folk Tales, Emission Trades and Ecosystems' (1998) 83 *Minn LR* 129, 152.

135 UNDDRIP, n 7 above, Art. 29.

136 This argument was raised by the US against the present form of Art. 29: *An Analysis of the UN Draft Declaration on the Rights of Indigenous Peoples* (1999) (available www.atsic.gov.au).

137 CBD signatories were able to agree to 'equitable benefit sharing' with indigenous peoples, but have not agreed to appropriate mechanisms: Convention on Biological Diversity, *Report of the Panel on Access and Benefit Sharing* (UNEP/CBD/COP/5/8). I choose the lack of material form because this feature is one which renders it very difficult to identify the precise subject matter of any proposed property rights.

for example, indigenous peoples claim rights of perpetual duration.¹³⁸ An argument from reciprocity or equal treatment would not support such a claim.

*'Restorative'*¹³⁹ arguments

A final rationale is that as a result of colonisation, indigenous peoples have suffered the loss of most resources including land; they therefore have a stronger claim to cultural expressions, as one of their few remaining resources.¹⁴⁰ This is a policy argument of great moral force, but does not support any particular form of rights. There are many ways in which historical inequities and disadvantage can and should be addressed.¹⁴¹

I wish to make it clear that I am not dismissing the arguments criticised above as irrelevant. The point is that despite the moral force of such arguments, the reasoning tends ineluctably to return to the underlying rationale of protecting culture, as it is only this aspect which distinguishes the claims of indigenous peoples from any other groups who may be economically harmed by some public domain activity and 'appropriation'. There is truth in the cliché that property does not arise merely from the existence of (monetary) value. The above considerations are relevant to political debate as strong additional policy arguments lending moral weight to the claim for protection of traditional designs.¹⁴² Alternative justifications based on economic considerations are inadequate to support the rights of control at the heart of indigenous demands. Stronger reasons founded in culture are required, and since mere attachment cannot be sufficient, we fall back on arguments concerning the protection of cultural integrity – which are strongest where 'societal' cultures are involved. The corollary is that so long as 'culture' is a contested concept, the justifications for a *sui generis* regime are likely to remain highly controversial, and potentially divisive. In situations where no distinct societal culture is identifiable, of course, there may be alternative legislative models dictated by policy – for example, the government holding designs on trust as the common heritage of the nation,¹⁴³ or forms of equitable benefit-sharing.

The corollary of communal interests arguments: groups as rights-holders?

Accepting that communal property rights in traditional designs seem justifiable, practical problems remain: who is to exercise such rights – and how, consistent with arguments thus far?

Nickel¹⁴⁴ highlights two potential deficiencies of groups as rights-holders pertinent to any consideration of the grant of proprietary rights to a cultural group: effective *agency* (the ability collectively to form goals, act deliberately, etc); and clear *identity* (ie group membership and boundaries). Both of these problems have been raised in arguments against granting property rights in intangible cultural items. But not all groups are deficient by these standards. Group agency and

138 Janke, n 4 above, Recommendation 18.3.

139 Naqvi's term: n 79 above, 720.

140 Puri, n 8 above, 300.

141 Naqvi, n 79 above, 721.

142 Such arguments might also provide policy reasons for lowering the 'damage threshold' – cf n 96 above.

143 Kuruk, n 18 above, 799ff.

144 J. Nickel, 'Group Agency and Group Rights' in Shapiro and Kymlicka, n 115 above, 235; similarly Rose, n 134 above, 140.

identity may exist by virtue of new or extant autonomous institutions:¹⁴⁵ a characteristic of many indigenous peoples. The extent to which agency and identity are *actually* features of particular indigenous groups is a matter for assessment and will vary.

First, we must be precise about which group we are talking about. In Australia, a significant proportion of the Aboriginal population lives in urban areas; only some live in communities on traditional lands, and there is no one coherent Aboriginal identity.¹⁴⁶ But we should not seek group agency at the broadest level. Given the variation between Aboriginal communities, smaller ownership groups are more likely to possess distinct societal cultures.

However, the coherence even of these communities is controversial.¹⁴⁷ Using concepts like agency and identity reflects the tendency to imagine the community as a 'person' with a coherent identity for the purposes of holding rights. 'Group as possessive individual'¹⁴⁸ is the dominant metaphor in world political cultures – making claims framed in these terms more likely to succeed.¹⁴⁹ But critics¹⁵⁰ argue against this tendency, for reasons already mentioned above, pointing out that the boundaries of cultures are fluid: individuals fall within communities to greater or lesser degrees; individuals within communities hold differing views; and there may be sub-groups within the community.¹⁵¹ Nor is there any guarantee that the boundaries of a political community correspond to the group claiming interests in a design.¹⁵² Can rights, or property interests, be based on such 'fuzzy' distinctions?¹⁵³

Admitting the impossibility of theoretical perfection, nevertheless, if protecting cultures is sufficiently important, then compromises may be needed to frame workable regimes. If control is to lie with the community, and unless we allow a complete overhaul of the dominant legal system, we must be able to identify a rights-holder capable of exercising rights. This is arguably even more important where the subject matter concerns intangibles. In practical terms, agency is more important than identity. Difficulties in defining the entire membership of a group should not be reason for denying the existence of a group proprietary right.¹⁵⁴ If rights can be exercised by some institution recognised both externally and internally as legitimate, then problems in identifying membership can also be managed through that institution. This would accord with the preference of Australian Aboriginal people; moreover, there are dangers of seeking to define a group from outside.¹⁵⁵ Internal relations may be governed by internal rules such as

145 Nickel, *ibid* 252–3.

146 P. O'Shane, 'Aborigines' future rests with empowerment' *Weekend Australian* 22–23 April 1995, 30.

147 For some it may not be possible: R.V. Anuradha, 'In Search of Knowledge and Resources: Who Sows, Who Reaps?' (1997) 6 *Review of EC and International Environmental Law* 263, 270.

148 cf M. Strathern, 'Potential property, intellectual rights and property in persons' (1996) 7(1) *Social Anthropology* 17, 23.

149 R. Handler, 'Who owns the past?' in B. Williams, *The Politics of Culture* (Washington DC: Smithsonian Institution Press, 1991), 63, 71.

150 Coombe, n 67 above, 254, 265; C. Severi, 'Comment' (1998) 39 *Current Anthropology* 214, 215; Descola, n 115 above, 209.

151 Kuruk, n 18 above, 769; J. McGowan and I. Udeinya, 'Collecting Traditional Medicines in Nigeria' in T. Greaves (ed), *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Oklahoma: Society for Applied Anthropology, 1994) 59, 62.

152 Also n 18 above, 803, F. Granero, 'Comment' (1998) 39 *Current Anthropology* 214.

153 Pogge decries the idea: n 115 above.

154 Brennan J, *Mabo*, n 102 above, 61.

155 J. Cardinal-Schubert, 'In the Red' in B. Ziff and P. Rao, *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 122, 132; R. Paschal, 'The Imprimatur of Recognition' (1991) 66 *Wash LR* 209.

customary law,¹⁵⁶ without harming a group's capacity to be a rights-holder, provided the group has some mechanism for interacting with the broader society.¹⁵⁷ I do not underestimate the difficulty of identity questions, but the law has coped with such issues in the past;¹⁵⁸ on the other hand, agency is necessary before such decisions can even be mediated internally.

As for agency, one difficulty is determining what are legitimate institutions – democratic institutions in the familiar Western sense, or traditional (potentially non-democratic) institutions? In cases where suitable autonomous institutions do not already exist, a second difficulty is the apparent contradiction between creating institutions, and the aim of affirming the community's own culture.

In practice, states have either created new institutions, or defined relevant property-owning communities to include only those already given legal recognition – eg those already incorporated or possessing representative organisations.¹⁵⁹ Janke in her report for ATSIC outlines a range of different possible entities, and notably does not base her recommendations on institutions wholly traditional in form – proposing use of either existing land councils, or new regional and community-based organisations to exercise rights, with some central organisation to deal with inquiries and direct potential users to relevant groups, and a tribunal to mediate disputes – the emphasis being on the ownership rights remaining with and being controlled by the community.¹⁶⁰ Such approaches illustrate a pragmatic attitude towards the exercise of rights by the community.¹⁶¹

Are such institutions legitimate, according to the purposes considered earlier? This is questionable; however, once again we must beware of determining 'legitimacy' according to fixed notions of authenticity. If cultural integrity protects presently existing cultures, then institutions need not be the same as in pre-colonial times. Questions of cultural integrity depend on the distinct existence of a societal culture, which may – but will not *necessarily* – be threatened by introduced institutions. Legitimacy today should depend on community involvement in institution-building, and use of community norms and laws: for example, institutions that use kinship relations (eg *djungayi*) are more legitimate than a democratically elected land council only if preferred by group members. Individuals within communities, and those that speak for communities are political and social actors, with a role in the creation and recreation of communal institutions in changing circumstances, and perhaps in reaction to external influences. This is not necessarily an artificial process; such developments may even assist in strengthening underlying group identity. The additional danger that new bureaucracies will develop their own self-perpetuating logic – and overwhelm customary methods¹⁶² – is not confined to the arena of cultural control and traditional designs.

156 But see 235 below.

157 This is a 'limited common property' idea: Rose, n 134 above, 132.

158 N. Lofgren, 'Defining Aboriginal Identity' (1995) 73(3) *Aboriginal Law Bulletin* 18.

159 eg the Australian *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth), which Golvan suggested might be extended to intangible property: n 72 above, 231. The Philippines adopted a similar approach regarding traditional knowledge: D. Daoas, 'Efforts at protecting traditional knowledge: the experience of the Philippines' (1999) (WIPO/IPTK/RT/99/6A).

160 Janke, n 4 above, Recommendations 18.13, 18.15, 18.16.

161 D.A. Posey envisages the *community* taking responsibility to establish consensus on representation etc: 'International Agreements and Intellectual Property Right Protection for Indigenous Peoples' in Greaves, n 151 above, 225, App I, Principle XII. This is less workable in the artistic context, where connections between indigenous group and user are less direct.

162 Brown, n 8 above, 204.

Further problems may arise where more than one community is associated with a particular design: for example, where a number of different Aboriginal communities have relationships with the same Creator Ancestor.¹⁶³ The only just solution is for all concerned groups to have rights in such designs; this is compatible with an aim of protecting cultural integrity for all Aboriginal communities equally. There is no reason to think that a *sui generis* regime could not be framed so as to cope with multiple interests, something copyright law already frequently does.

The interaction between group and individual interests

What solomonic process will sort out and create enlightened, sustainable policy upon the balance of rights among individuals, culturally identifiable collectivities, commercial interests, and the long-term public good?¹⁶⁴

Thus far the focus has been the community's perspective, however in justifying property rights, the more important consideration is arguably what such rights *prohibit* people from doing.¹⁶⁵ Private property enhances one person's freedom at the expense of others;¹⁶⁶ *communal* property may enhance the power of a community acting communally, at the expense of both members' *and* non-members' liberties.

Interests liable to be affected include authors' copyright interests, and individual interests in free (artistic) expression. Three main categories of persons may be burdened:

- Non-indigenous individuals/corporations;
- Indigenous community members;
- Non-traditional indigenous artists.

Non-indigenous individuals

Inappropriate commercial use of traditional designs by non-Aboriginal people is, owing to both its economic and cultural effects, the most frequent source of complaint by Aboriginal groups.¹⁶⁷ Government papers¹⁶⁸ – and even critics of property rights in indigenous cultural intangibles¹⁶⁹ – tend to agree indigenous peoples are entitled at least to remuneration for the commercial exploitation of traditional designs. Most agree there should be a right to prevent such use; and certainly in the archetypal situation of mass-produced consumables, it is not unreasonable to require potential users to obtain permission. But there is no bright line between morally permissible and impermissible uses;¹⁷⁰ controversy surrounding less clear-cut cases is illustrated by the 'cultural appropriation'

163 This may be in part a question of defining the subject matter.

164 D. Tuzin, 'Comment' (1998) 39 *Current Anthropology* 217; Report of the Committee of Inquiry into Folklife in Australia, *Folklife – Our Living Heritage* (AGPS: 1987) 256 (referring to the intertwined rights of individuals and communities, and ethical and economic dimensions as a 'Gordian knot').

165 Waldron, n 76 above, 842.

166 Hettinger, n 129 above, 35.

167 Janke, n 4 above, ch 3.1.

168 Folklore Report, n 55 above, s 1219; Attorney-General's Department, 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' (Australia: International Trade Law and Intellectual Property Branch, 1994) s 30.

169 Brown, n 8 above, 204; L. Hiatt, 'Comment' (1998) 39 *Current Anthropology* 209.

170 D. Vaver, 'Some Agnostic Observations on Intellectual Property' (1991) 6 *IPJ* 125, 128.

debate.¹⁷¹ Imagine a contemporary non-indigenous artist, expressing a political comment on contemporary Australia, in a way that incorporates the symbolic power of a traditional design.¹⁷² The wise law-maker, seeking a law in accordance with ‘the prevailing sense of what is just’¹⁷³ here encounters a dilemma somewhat like that referred to by Strathern.¹⁷⁴

On one hand, freedom of artistic expression is important,¹⁷⁵ as is the encouragement of varied artistic productions. Symbols are a powerful means of expressing messages or meaning, potentially even hostile views, opinions, or attitudes.¹⁷⁶ An artist may plausibly argue that *only* the particular design suffices to convey the intended meaning, and may suffer genuine distress if prevented from using it.¹⁷⁷ Nevertheless, while artistic freedom and individual autonomy are potentially compromised, arguably, the artist’s self-identification is not affected in the same way as that of group members. And the restriction on artistic liberty is limited: traditional designs are a small proportion of available sources when considered against the background of all possible contents of the public domain.

On the other hand, as argued above, the cultural harm to indigenous people that results from inappropriate use, especially of sacred designs, is undeniable. Furthermore, a community’s traditional designs are limited in number, and of irreplaceable significance.¹⁷⁸ Such factors strongly suggest a different level and kind of harm to that suffered by the artist. If the arguments above are accepted, the continued vitality of the culture is threatened.

Further arguments may support restrictions even in this sympathetic situation. We are not necessarily concerned here with a complete restriction: in some cases, permission may be obtained, as Daes suggests.¹⁷⁹ It is interesting too that arguments usually asserted against *commercial* appropriation of cultural symbols – that those who deliberately disseminate a potent cultural symbol have a less just claim to exclusivity in symbols thus *imposed* on the culture¹⁸⁰ – do not apply with the same force to indigenous peoples’ claims for control over these cultural symbols.

On balance, at least theoretically, it can be agreed that a *sui generis* system that prohibits use of traditional designs, without prior authorisation, by non-indigenous individuals and corporations in all circumstances is justifiable, most importantly because the interests involved for indigenous communities in these circumstances are of a different order to those at stake for non-indigenous individuals. Individual artists do have claims in these situations, and individual injustices will occur, but this is inevitable in framing a workable law.¹⁸¹ Provided that my earlier arguments

171 Pask, n 10 above, 58–62; Coombe, n 67 above.

172 This is not uncommon: Gray, n 117 above, 30–31.

173 W. Cornish, *Intellectual Property* (London: Sweet & Maxwell, 4th ed, 1999) ss 1–12.

174 Strathern, n 1 above.

175 For a rejection of free expression arguments: Daes, n 8 above, ss 24–26.

176 W. Gordon, ‘A property right in self-expression’ (1993) 102 YLJ 1533, 1568–1569; Coombe, n 14 above, 480; for an example, see the ‘parody’ cases, eg *Walt Disney Prods v Air Pirates*, 581 F.2d 751 (1978).

177 J. Boggs, ‘Who Owns This?’ (1993) 68 Chi-Kent LR 889; Spence, n 127 above, fn 43.

178 Space prevents me discussing the varying significance of designs and perhaps the varying degrees of protection justified. I suspect the attempt to draw such distinctions, even if theoretically ideal, would be unworkable.

179 Daes, n 8 above, Guideline 46. Whether this is realistic is questionable: cf the description of the artistic process in Boggs, n 177 above.

180 Waldron, n 76 above, 885; R. Coombe, ‘Objects of Property and Subjects of Politics’ (1991) 69 Tex LR 1853, 1872.

181 Janke, n 4 above, suggests there should be no innocent infringement exception (recommendation 18.12); however, framed restrictively, it might benefit individual artists.

above are sound, the balance of interests in most cases falls in favour of the community.

Community members

Two issues arise in this context. First, would a *sui generis* regime restrict the entire community to customary uses?¹⁸² Ellinson suggests consistency might require such a result¹⁸³ – but by precluding innovation, this could stymie the development and vitality of the culture. However, customary law regarding the use of traditional designs can and has changed over time.¹⁸⁴ I have argued that cultural integrity does not preclude such development; the state is not justified in interfering in the community's decisions on which traditions to keep, discard, or develop. For so long as designs play an integral role in the culture,¹⁸⁵ protection is justifiable.

More interesting issues relate to the allocation of power in community life, especially group control over individual action. The unitary action implicit in group agency means that granting group property rights in cultural expression will limit freedom of artistic expression *internally*. We must therefore consider the impact on the 'dissenting member', whose particular use of designs is not approved by the community acting through its institutions ('the community') either because the proposed use is non-customary, or because the dissenter is not entitled to use the designs at all.

The grant of group control over forms of expression sits uncomfortably within the framework of liberal individualism central to the Western democratic political system.¹⁸⁶ Criticisms of group rights often focus on potential restrictions to individual liberty, and this area is no exception – some critics have predicted dire consequences:

By conferring upon an ethnic nation the right to suppress ideas and productions deemed to be offensive to its subjects, it would in fact be equipping dominant factions with a legal mechanism for discouraging dissidence and silencing rivals.¹⁸⁷

Prior to creation of a work, this is probably a matter for the community and its social norms. The question for the dominant legal system arises once a work of art incorporating traditional designs has been created. Because copyright subsists in at least some, if not most works embodying traditional designs, an important question is whether continued existence of *individual* interests is appropriate, or whether works embodying such designs are to be excluded from copyright. This is an open question in the literature.¹⁸⁸ Golvan proposed that new rights would sit alongside the copyright system and continue after the copyright period ended.¹⁸⁹ Janke suggests that *sui generis* legislation would not override existing copyright, but would apply outside the copyright period or where copyright did not subsist.¹⁹⁰ The important question is one of priority, where the dissenting member wishes to use

182 Customary use would be allowed: *ibid*, recommendations 18.6, 18.12; Folklore Report, n 55 above, s 1227.

183 Ellinson, n 11 above, 340–341.

184 Toohey, n 41 above, 4.

185 Different questions might arise where designs no longer play such a role.

186 R.N. Clinton, 'The Rights of Indigenous Peoples as Collective Group Rights' (1990) 32 *Ariz LR* 739, 740–741; Pask, n 10 above, 85. For the international debate regarding collective rights: ATSIIC, *An Analysis of the UN Draft Declaration on the Rights of Indigenous Peoples* (1999) (www.atsic.gov.au).

187 Hiatt, n 169 above; also Brown, n 105 above, 218.

188 Ellinson reaches no firm conclusion: n 11 above, 343.

189 Golvan, n 72 above, 230–231.

190 Janke, n 4 above, s 18.10; recommendation 18.7; *Mataatua*, n 7 above, Principle 2.5.

copyright inconsistently with the community's dictates. What is the role of a *sui generis* law here?

First, the law could intervene to enforce communal interests. In effect,¹⁹¹ the community would have a right of consultation and veto. This was effectively the result in *Bulun Bulun*, where the Court found the artist was under a fiduciary duty not to use his copyright in ways contrary to customary law.¹⁹² Second, the law could abstain from enforcing communal interests against the individual, and so allow the artist to use their copyright even in conflict with the group's communal interests, subject only to communal mechanisms. Theoretically, the law could 'stay out' of the dispute – however, a limbo where neither copyright nor *sui generis* rights were enforceable is inconceivable as a practical matter.

Is there a principled basis for resolving these conflicts? A utilitarian approach is unhelpful – it is not sufficient to argue that the benefit of the many outweighs the sacrifice of individual interests.¹⁹³ Cultural integrity is not justified by strength of numbers; moreover, such a solution violates the Kantian injunction against using individuals as means rather than ends: we must consider the relative importance of the individual and group interests involved.¹⁹⁴ Nor is it sufficient to say that the individual has accepted membership on terms that rights should be exercised collectively,¹⁹⁵ by the time the individual is old enough to decide whether to accept membership, designs and expressions of that culture are already part of their identity. Another argument is that restrictions on the freedom of individual members are justified, provided the individual has the right to leave.¹⁹⁶ This too is unconvincing: the social dislocation involved in leaving may render the 'right' illusory (especially given the importance, mentioned above, of one's *own* culture)¹⁹⁷ and the *sui generis* regime would burden the individual even after departure.

An alternative approach may be to consider the underlying purposes of the competing group and individual rights, and the relationships ('internal relations') between such purposes, to determine whether in the context of this competition, one cannot be asserted consistently with those underlying purposes.¹⁹⁸ The situation of the dissenting community member involves a clash of identities: individual identity and self-expression as against the communal integrity and collective identity considered earlier. One justification of cultural integrity is the role of societal cultures in promoting individual autonomy, and facilitating individual choice. But free artistic expression is *also* an important element of individual autonomy – and arguably necessary if the societal culture is to provide a context for individual choice. The individual's interest in using the designs is even more powerful here than at p 234 above: in this case, the symbols involved are part of the individual's *own* culture *and* identity. If we accept that a purpose of both rights is to promote individual autonomy, then in this particular case, where

191 For present purposes, I set to one side the interests of third parties.

192 Janke's proposal could have the same effect if *Bulun Bulun*, n 26 above, remains good law, depending on the facts (*ibid* 209).

193 McDonald, n 88 above, 324.

194 J. Waldron, 'Rights in Conflict' in Waldron, n 104 above, 203, 210–212.

195 J. Triggs, 'The Rights of "Peoples" and Individual Rights: Conflict or Harmony?' in Crawford, n 121 above, 141, 149.

196 C. Kukathas; 'Are there any cultural rights?' in Kymlicka, n 79 above, 228, 238.

197 Y. Mokgoro, 'The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?' (1999) 52 SMULR 1549; L. Green, 'Internal Minorities and their Rights' in Kymlicka, *ibid* 257, 264.

198 Waldron, n 194 above, 220 ff; McDonald, n 88 above, 328–9.

individual autonomy is limited in an important respect by protecting cultural integrity, arguably the individual interest must prevail.¹⁹⁹

Such an approach, which subordinates group concerns to the interests of any individual member, essentially ignores any collective aspect to the issues involved, ignores interests of other members of the group in the culture fundamental to their self-identification, and could obliterate the purpose of group rights. To the extent that culture is a good that cannot be enjoyed alone, the assertion of autonomy in disregard of group norms by an individual may frustrate the whole purpose of cultural integrity. Furthermore, the individual artist using traditional designs as a personal (dissenting) expression may in some fundamental way deny other members the opportunity to pursue their (communal) interests. For while traditional designs are non-excludable, their power and significance to the group is diminished by misuse.

The complex of different interests involved (even ignoring economic interests) and the uncertainty surrounding the true purposes of cultural integrity (in particular, its group or individual nature) indicate that an internal relations approach will not provide an answer. A further approach to balancing conflicting rights is to assess the relative importance of the underlying interests. But even here we encounter complications: in so far as different views exist as to the relative importance of group and individual interests, balancing is impossible. Furthermore, if you take the extreme case, where the continued existence of the culture is at stake if restrictions are not imposed on the individual's freedom to act, and if you say that in that case restrictions are justified, you are asserting that the state will intervene to prevent (artistic) revolution, or rather, will intervene to preserve a community's preferred version of itself.

The attempt to balance interests is further complicated by certain imponderables: it is difficult, if not impossible to determine the extent to which control of designs is *necessary* to the continued survival of the distinct culture, as opposed to merely *assisting* that aim (how can we know ahead of time?); or whether perhaps only certain particularly significant designs are necessary in this sense (how are distinctions to be drawn?); or the extent to which the survival of the culture will benefit from being open to challenges (often argued, but unprovable). The difficulties of grappling with these issues in individual cases are multiplied by the need, in devising a legislative regime, to make some choices in advance. A regime based on consideration of how important the individual's claim to free expression was in a particular case would be unworkable; approximations and compromises therefore are necessary, but particularly difficult to assess in advance.

Given these difficulties, no wonder it is frequently asserted that western law should not intervene in non-traditional use of designs by community members, but should leave such matters to communal dispute mechanisms.²⁰⁰ This approach must be preferable wherever possible. But what is to be the relation between the *sui generis* system and copyright, and what is the court to do if asked to adjudicate? What of situations where third parties are involved, for example as copyright licensee?

Earlier I characterised the choice between prioritising group or individual interests as a political choice; as a result, the attitude one takes to this question also depends on a political choice between individual and group interests. My own (preliminary) view is that in principle, where no third party interests are involved,

199 This is consistent with Kymlicka's prohibition on 'internal restrictions': n 87 above, 152.

200 Janke, n 4 above, s 18.8; Coombe, n 67 above, 279; Gray, n 73 above, 35.

the Court should not be involved. If the underlying purpose is protecting the distinct existence of the culture, including its institutions and customary law, and if those community mechanisms are not sufficient to resolve an internal dispute, then the community should not then be able to call on state power to enforce its internal rules on the individual member.²⁰¹ An exception might apply in some cases: the law might refrain from intervening to assert a community's interests where individual artworks by a group member were involved, but intervene to prevent use of copyright by the individual artist for commercialisation, especially on a mass scale, based on the judgement that such use is more damaging to the culture and less justified by the individual's interest in free expression.²⁰² Similar reasoning might apply to cases of extreme offence to community beliefs – but that would be closer to a 'right against change' or 'right to be protected from criticism' and hence more problematic. Where third-party interests are involved, some court involvement may be inevitable. One possibility is that the *sui generis* system could provide for compulsory consultation with the community as well as the individual prior to use – so that potential difficulties within the community can be considered in advance. Court enforcement in the absence of consultation could be denied. This would restrict the freedom of the individual artist to deal with his or her work, but would at least air issues in advance of any direct involvement of third-party interests.

The reader will appreciate that these suggestions favour individual interests where community solutions fail, and the view that state power cannot legitimately be used to suppress internal dissent – even artistic dissent. The argument is based on the view that cultural integrity is not enough to justify the suppression of individual autonomy and identity of members. Arguments against this approach would need to explain why the collective identity of the community is able to prevail over the individual interest in autonomy in self-identification and expression.

Non-traditional (urban) indigenous artists

Urban indigenous artists are not members of traditional communities, and hence are not bound by customary laws, nor do they have customary entitlements to use traditional designs. But they are also not in the same position as non-indigenous individuals, precisely because cultures shade into one another, and because cultural heritage and identity are personal as well as cultural concepts. Gray²⁰³ has considered the position of the urban indigenous artist, who may need to draw on traditional artforms in expressing their identity by reference to their Aboriginal heritage:

You have to understand my position of having no designs or images or stories on which to draw to assert my Aboriginality . . . Dots are my bridge to my Aboriginality. They connect to their obvious relationship to the Western Desert paintings and their relationship to reproductions and representations . . . I am continually searching for ways to express my Aboriginality . . .²⁰⁴

201 Different considerations could apply if (a) community mechanisms were oppressively harsh, and/or (b) community members were prevented from leaving. Use of traditional designs does not involve such extreme restrictions; compared, for example, with issues relating to female genital circumcision.

202 This approach would also take economic considerations at 228 ff above into account. This distinction between commercial use and 'high' art is justified by the different balance of interests in this case; cf 234 above.

203 Gray, n 73 above.

204 Gordon Bennett (an artist of Aboriginal descent), quoted, *ibid* 31. See also Ellinson, n 11 above, 341.

Traditional designs here play a different role: not as expressions of communal culture, but as articulations of political consciousness and identity. There is a strong basis for the claim that use of such designs is fundamental to these artists' identity and autonomy.

These are questions with significant practical consequences. Indigenous people are concerned about the use of traditional designs by non-traditional artists;²⁰⁵ even the major Aboriginal arts funding body has expressed disquiet.²⁰⁶ Such issues will only become more pressing, as the Aboriginal art market becomes more valuable, and as urban Aboriginal art gains popularity.²⁰⁷ Again, there are significant issues regarding the power of the community, and the relationships between the purposes of cultural integrity and the claims of an individual whose liberty is restricted. I focus below on features that differentiate the situation of the urban indigenous artist from the dissenting member.

First, communal mechanisms are unlikely to be sufficient to resolve disputes, and we cannot argue that, if the community's own mechanisms fail to resolve the issue the community is not entitled to seek state power in support – the state provides the only common *legal* system. There are also difficulties of principle with recognising these claims. By compromising the interests of the community which lives as a distinct societal culture, acceptance may expose cultural integrity to the criticism that it is, at core, a claim of ownership through peculiar attachment, that can be matched or overridden by opposed claims of attachment unrelated to any societal culture. The difficulties of drawing lines between individual cultural heritage and group cultures is exposed. Racial discrimination is also a problem: what other logical distinction can be drawn between an urban indigenous artist of mixed descent, and an artist brought up under the pervasive influence of Aboriginal culture but with no racial ties – are not such designs equally important to the latter individual's identity? And if so, can you go further and acknowledge the claim of an urban, non-indigenous artist for whom the influence of Aboriginal art has had a deep, personal effect that has shaped their perception of self? Furthermore, do we draw a distinction between urban indigenous *artists* and urban indigenous people with an eye for a commercial chance – and how? The distinction in principle lies in the importance of use of designs in self-fulfillment and the expression of identity²⁰⁸ – but how is this to form the basis of a legal distinction?

The literature offers no satisfactory solutions. Ellinson again points out that consistency requires that the law prevent use by urban indigenous artists, because the interests of the traditional community are no less affected by such use.²⁰⁹ Janke's report is notable for raising the issue, but suggesting only that legislation 'contain special provisions to protect the artistic heritage and cultural products of urban Indigenous artists' – without explaining what 'heritage' means or what relation it bears to traditional artforms.²¹⁰ Gray²¹¹ argues for consultation with urban indigenous artists in framing laws.

205 Janke, n 4 above, s 3.15.2; Ellinson, *ibid*.

206 Gray, n 73 above, 32.

207 *ibid* 33, 35.

208 This may suggest an implicit hierarchy prioritising individual identity over economic concerns. There is no space to enter here into a general discussion regarding prioritising of rights and interests.

209 Ellinson, n 11 above, 341.

210 Janke, n 4 above, s 18.4.7.

211 Gray, n 73 above, 42.

Strictly applied, a cultural integrity rationale requires that urban indigenous artists be prevented from using traditional designs without permission.²¹² In practice, the answer cannot be so categorical. No rationale could require protection at all costs, and provided the whole purpose is not thwarted, countervailing interests may sometimes prevail.²¹³ Applying the arguments explored at p235 above leads to recognition of the significant role that concerns of autonomy and identity must play in the calculus, and the role of art in such identity. Fundamental interests in identity are involved here for the urban artist as well as the group. We may conclude that Aboriginal communities cannot claim *automatic* precedence for the autonomy and identity of their members over the search for identity of urban indigenous artists.

I am led again to the conclusion that informal mechanisms, eg mediation and consultation between urban artists and traditional communities are to be preferred, but that, as a last resort, the law should not impose prohibitions on use of traditional designs by urban indigenous artists. Respect for cultural integrity issues could be encouraged by other means: for example, through education, facilitating consultation, or making consultation or non-use of traditional designs a condition of funding. This conclusion, despite its problems, recognises the importance of the claims to individual identity involved for the urban indigenous artists, which are no less significant than similar claims by community members. The contrary position is also likely to be interpreted as meaning that the only vision that the 'colonial' law considers worthwhile is traditional;²¹⁴ and risks creating classes and tension within the Aboriginal population. A final, perhaps obvious reason in favour of this solution is the general public interest in encouraging urban Aboriginal art – a generally well regarded art form.

In recognition of the explicit compromise being made between competing interests, some restrictions could be placed on use by urban indigenous artists: again mass commercialisation, or use of sacred-secret designs could perhaps be prohibited in recognition of the greater harm such use causes. *Essential* limits on use by non-members of communities (and more firm definitions of the limits suggested above) could perhaps be the subject of consultation in the drafting of *sui generis* legislation.

Conclusions

The claim to communal ownership of traditional designs by indigenous people is inextricably tied to concerns to protect cultures of indigenous peoples – cultures which are under threat. Cultural integrity, or control over culture, has become one of the key claims of indigenous peoples in their international efforts to gain recognition and accommodation of their interests in legal systems that have, in the past, ignored or excluded those interests. The political nature of such claims, and the potential of such claims to impact on a multiplicity of other interests and the liberties of many non-indigenous as well as many indigenous persons, makes it very important to articulate the justifications for such claims, and the values that they serve.

212 Ellinson, n 11 above, 341.

213 Coombe, n 8 above, 86.

214 See similar criticisms in Coombe, n 67 above, 268.

In this article I have sought to outline some of the assumptions and interests that underlie claims to traditional designs, in order to consider more closely how such interests may be reflected in rights capable of being exercised, and importantly, how such interests interact with individual freedom of artistic expression. It can be seen that while a principled argument can be made for such group interests, once they *are* recognised, complex and controversial decisions as to priority need ultimately to be made between individual and collective interests – issues that the same principled arguments will not necessarily resolve. The inseparable and contested nature of group and individual interests in culture make the effort to find laws that equate with our sense of justice exceedingly difficult.

Further, a fundamental uncertainty lies at the heart of the claim for cultural integrity, owing to the uncertain, fluid nature of culture in a increasingly interconnected world. The theoretical difficulties that this poses defy logical resolution; the practical implications may be more solvable, by seeking approximations or analogues to ‘societal culture’, in those instances (in those countries, by those groups) where a supportable claim is made. Even if such compromises are found, the uncertainty regarding underlying concepts will be a source of ongoing controversy.

Many questions remain. First, I have only considered traditional designs. Given the emphasis on cultural integrity, self-expression and identity, it appears that the arguments considered above will apply more directly to other artistic or cultural subject matters, but not so directly to questions relating to traditional knowledge. I suspect that economic considerations would figure more prominently in relation to traditional knowledge, although, even in that case, questions of spirituality are relevant (given the holistic world-view indigenous peoples adopt, and the ‘cultural’ implications of matters Western views would consider scientific), and questions of control and interference are likely to arise (for example, in relation to control of researchers interacting with indigenous people).

One major issue, which arises from the framework suggested here, and which I have not addressed, is how these same principles might affect the definition of rights to be attached to the designs (or other indigenous cultural and intellectual property), and specifically, the role of customary law in defining such rights. A key question in this context is whether rights are to be defined according to customary law values and ideas of appropriate use and treatment of designs, as opposed to more traditionally Western views. Indigenous advocates consistently emphasise the importance of treating indigenous intangible property in accordance with indigenous world-views and values. This would seem to be supported by an approach that focuses on protecting the integrity of the culture as a distinct whole. However, I have focused on the prior issue of control; the debate about the nature of the rights and interests to be asserted is a further, equally controversial question.

Some might say that the traditional designs of the Australian Aboriginal people represents the ‘easy case’ in assessing the interaction between communal and individual interests in valuable intangibles. They are, after all, an autochthonous people, clearly identifiable and possessing a distinct culture, as well as very distinctive traditional artforms in at least some cases associated with particular, relatively self-contained communities. They have greater access than many indigenous peoples to legal resources and so a greater capacity to articulate their claims both in terms of the dominant Australian legal system, as well as in their own terms. I have not had to consider the further complications that may arise where, for example, indigenous peoples straddle national borders or where survival

as a people is presently the more pressing concern, or where indigenous rights conflict with a country's 'right to development'.

Unfortunately, there is no pat response to such a comment other than the obvious: that principled arguments may first be considered fruitfully in the clearer case. The levels of complication that arise in the attempt to apply principle even in the defined circumstances considered here illustrate all the more graphically the intractable nature of these conflicts which led Strathern to express so vividly her own internal conflicts.