

CHANGING THE DEFAULT: TAKING ABORIGINAL SYSTEMS OF ACCOUNTABILITY SERIOUSLY¹

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On November 20, 2003 the Australian Attorney General Phillip Ruddock, addressed conference goers at the “Copyright Law and Practice Symposium” in Sydney. He began by acknowledging, “the traditional owners of the land we meet on—the Gadigal people of the Eora Nation.” He then went on to list the importance of copyright to aiding global trade, decreasing music piracy and to protecting creators. In particular, he argued that, “Copyright law can also play a vital role in fostering and protecting our indigenous and cultural heritage.” To that end he announced the government’s commitment to a “communal moral rights bill” aimed at protecting “the integrity and sanctity of indigenous culture” (Ruddock 2003). Although it has yet to be ratified, the proposed bill situates Australia’s Aboriginal population at the crossroads of a growing global debate concerning intellectual and cultural property rights, the usefulness of expanded copyright laws as a means to protect culture and the role of nation-states in defining indigenous property claims.

In what follows, I examine how recent indigenous digital projects challenge both expanded copyright laws as a means to “protect” indigenous culture and the very notion of “communal” rights as the primary state apparatus for doing so. To work through this complex terrain, I draw on my digital collaborations with Warumungu people in the Northern Territory of Central Australia and their conceptual overlap with recent national copyright legislation and intellectual property rights (IPR) movements. What emerges is both a workable methodology for adapting to and adopting local sets of intellectual property systems through processes of digital translation and co-production and a challenge to the contemporary intellectual property rights climate in Australia and globally.

Copyright Claims

In 1993 three Aboriginal artists filed a copyright infringement suit against Indofurn Pty Ltd for the unauthorized reproduction of their artwork on a series of carpets (Janke 1995). Although there were copyright infringement cases filed by Aboriginal people prior to 1993, and, in fact, scholars and Aboriginal activists had been arguing for the use of intellectual property rights as one means of redressing the appropriation of indigenous knowledge throughout the 1980s, the “carpets case,” as it is called, brought indigenous copyright claims into the national spotlight (Anderson 2003). This case was about more than challenging property relations or redefining indigenous knowledge within intellectual property rights talk—although both of these were concomitant developments—this was about asserting and reclaiming a place in a nation that has worked overtime to keep Aboriginal people at the nation’s margins.

The “carpets case” emerged at the height of a legislative and political moment in Australia’s history that made it ripe for a reevaluation of intellectual property laws. In 1992, the Federal court acknowledged that native title had existed prior to the British invasion in 1778 and that in *some* cases native title *may* still exist (Reynolds 1996). With the reevaluation of territorial rights through Native Title claims, Aboriginal people also asserted a link between tangible and intangible property via cosmological connections uniting “country” and traditional knowledge. That is, ownership in land is inherently linked

to ownership of knowledge. Thus, newly imagined territorial rights provide a partial vocabulary for intellectual property rights.

Earlier land rights legislation limited to the Northern Territory invented the term “traditional owners” to classify Aboriginal claimant groups and sort out the multiple types of connections people have with land (Maddock 1983).² In Native Title cases, indigenous communities must first prove a “continuous connection” with their territorial homelands in order to secure title and thus attain a status similar to that of “traditional owner” (Povinelli 2002, Merlan 1998).³ What is significant in both of these pieces of legislation is that complex local systems for defining relationships to land have been standardized around fairly static notions of tradition, ownership and distinct community groups. Tradition is assumed to be rituals, songs, myths, etc. *from the past*; ownership is perceived to be the organizing principle of socio-territorial relations; and communities are deemed to be naturally homogenous.

Although the Aboriginal claimants won the “carpets case” with the court finding that copyright existed in the works, the continued unauthorized circulation of paintings, carpets and tea towels bearing Aboriginal designs points to a long history of the simultaneous silencing and acknowledgement of Aboriginal people through the (mis) use of their cultural knowledge/materials. With an eye towards rectifying the on-going refusal to acknowledge Aboriginal intellectual property rights, on 19 May 2003 the Australian federal government committed itself to amending its original 1968 *Copyright Act* for the second time in as many years. In a joint statement by the Attorney General and the Minister for Indigenous Affairs, indigenous communities were promised “new protection for creative works” (McDonald 2003, 1). In December 2003, the first version of *the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* was sent to reviewers for comments. The ICMR amendment proposes to use copyright legislation to protect the “traditional culture and wisdom” of Indigenous communities (McDonald 2003, 2).

The *Indigenous Communal Moral Rights* bill proposes a communal frame to rectify the single-author focus of the original 2000 amendments and a moral rights commitment to address the specific needs of indigenous cultural knowledge (McDonald 2003). The ICMR bill lists five formal requirements for a claim to be filed: 1) there must be a “work,” 2) the work must draw on traditions and customs of the community, 3) an agreement must already have been entered into between the community and the creator of the work, 4) there must be acknowledgement of the indigenous community’s association with the work, and 5) “interested parties” in the work must have consented to the rights arising. In each case, the onus is still (as it has been without legislation) on indigenous artists and/or communities (ambiguously defined) to get agreements up front and to define their work in either familiar author-centric terms or vague traditional/ communal ones (Anderson 2004).

Working from assumptions about indigeneity that make communal property rights the antithesis of individual ownership, the bill misses the nuance and complexity of indigenous property and distribution systems.⁴ Community (or the idea of a traditional group) stands in for a network of related groups and just how to sort them out is not addressed. As the legislation awaits further analysis, the legislative emphasis seems to be on making indigenous systems fit into national legal imaginaries (which are predicated on international standards). What also needs to be addressed are the practical matters of negotiating overlapping property regimes within indigenous communities and leveraging digital technologies to privilege indigenous systems in cross-cultural exchanges.⁵

“Chuck a Copyright on it”

Over the last decade, Warumungu people collaborated with a number of organizations, researchers and government agencies to open the Nyinkka Nyunyu Art and Cultural Centre in the town. Most of my fieldwork coincided with this project, and I became very familiar with the types of alliances and negotiations that surrounded this articulation of Warumungu culture.¹ As Warumungu people met with national

museum staff to repatriate objects taken by Australian explorers, and as former missionaries came forward with thousands of photos for return to the community, the talk at the Centre turned to protection, preservation and the possibilities of enlisting digital technologies in both these projects. The confluence of these events gave Warumungu people a new language for articulating their own system of cultural rights management.

During this time I worked with rotating groups of Warumungu people and contractors aiding in the collection of content for two different websites, a set of visual displays for the community center and a DVD (Christen 2005). When I met with Narrurlu, one of my female collaborators, in the final stages of content gathering for one of the websites, she looked again at the photos and the information that we had agreed upon and then paused; “Well,” she said, “just chuck a copyright on it and it’ll be right.” Her directive to me signaled her willingness both to engage with this new digital medium, as well as her desire to protect that which she knew would be vulnerable once online. She was keenly aware of both the transgressions and misuse that could happen as well as the primacy of the legal system in controlling and monitoring such misuse.

Narrurlu, like many thirty-something adults in Tennant Creek, grew up with land rights and Aboriginal self-determination politics (Rowse 1998, Cowlshaw 1998). She routinely uses the language of “traditional owners” and land groups taken from the 1976 Aboriginal *Land Rights (Northern Territory) Act* when discussing and deciding on viewing practices with both Aboriginal and non-Aboriginal people. Narrurlu is no stranger to “remixing” whitefella laws —adapting where necessary the language of Australian law to fit the cultural and economic needs of the Warumungu. When she invoked the necessity of copyright she was not eschewing Warumungu notions of cultural property—particularly, its distribution and reproduction. Instead, she was addressing the overlap of audiences, the dynamism of the digital format and the dominance of legal solutions. She knew that Warumungu protocols for viewing images would not be upheld online —this was simply an unreasonable request. Instead, the language and practice of copyright has become *another* tool enlisted by Warumungu people to maintain some control over the use and distribution of their cultural materials. Copyright does not replace nor does it replicate; *it adds an additional layer to an already-existing cultural management system.*

The Warumungu system of accounting for and acknowledging the proper circulation routes for cultural knowledge and objects is a dynamic structure with two seemingly fixed points: open and closed (Christen 2005). That is, in English, Warumungu people often refer to knowledge or objects as either being open or closed. But this apparent dualism is not a rigid divide. Instead, it marks two nodes in a continuum of accountability where factors such as age, gender, ritual affiliation and country-associations all dictate variables of openness or closure. Knowledge is never static —it is never locked into one of these points. Its status is continually negotiated.

People referred to as “bosses” for ritual songs, dances, body designs, etc., must maintain their status through performances, country visits, and collaboration with knowledgeable members of other kin groups (Dussart 2000). Bosses have a privileged position to be sure, but they do not alone dictate distribution or access. An ancestral song series might be restricted based on gender, it may be for women only. It may be further limited to women of a particular kin grouping who together determine how and to whom the songs may be distributed. Similarly, a ritual dance might involve a particular ancestral track that crosses through two distinct territories. Thus, rights to perform the song are negotiated by those who are related to those territories. Or an elder may pass away and their knowledge of a particular territory may be inaccessible for some time.

The scenarios are endless. What is significant is the relation between people, places and ancestors continually combines with variable protocols to determine access, rights, and privileges. This is a dynamic system that tacks back and forth between a fixed —but not static— set of criteria for the distribution, reproduction and creation of knowledge in both its tangible and intangible forms. People interact with

insiders and outsiders, with “information” and “knowledge” not as a whole a community, nor as unrelated individuals, but as sets of related family networks, or what Aboriginal people refer to in English as “mobs.” This commonly used term does not deny the importance of kin-groups or extended families within communities, but it does suggest that there is more than one way of reckoning relatedness between Aboriginal community members (Merlan 1998, Christen 2004). Within these networks, ethical relations informed by social practices, territory-relations and histories of engagement inform modes of engaging with newness. In fact tensions surrounding the negotiation of knowledge production fuels the continuation of “tradition” in its many guises (Christen 2004).

Certainly as Narrurlu and I drove around Tennant Creek seeking permission from various groups to replicate digital video and still images online and for a community DVD we were met with a range of reactions: from “NO,” to lengthy negotiations over payment and access, to debates about back-up images in case of a death. Permission was granted, denied and haggled over as cultural knowledge was repackaged. The open-closed continuum ensures circulation while also accounting for change.

It's not just like...

When I defined the Warumungu “open-closed continuum” for a group of mainly technical consultants, they were quickly inspired—it’s just like a Creative Commons ‘some rights reserved’ license,” one of them announced. As I thought about the similarities, I reminded him that Creative Commons has been around for about a year in the US and the Warumungu system significantly longer. I found myself suggesting, uncomfortably, that perhaps it was the Creative Commons system that was mirroring the Warumungu one. But my unease wasn’t about duration (it’s older so it must be better, or more authentic...); it was about substance and rhetoric. Why is it that this audience (and, in fact, this happened to me more than once) wanted to make the analogy? What about this indigenous system made it appealing as a source of comparison?

Over the last several years, the “commons” has become a predominant metaphor for politicizing and spatializing the types of social relationships between people, ideas and new digital technologies. This “commons talk” has taken liberties with anthropological literature concerning “gift economies” — where “sharing” and “redistribution” are presumptively linked to communal sociality and knowledge circulation (Barlow 1996, Bollier 2004). But it is not just, or only, that the “facts” are being interpreted “incorrectly.” It is also that the reliance on and misrepresentation of indigenous property and exchange systems offers the commons movement an *anchor*. This anchor provides the illusion of a past in which a commons-approach to the distribution of and access to property (tangible and intangible) existed in a form similar to that of the “share-alike” or free/libre and open source software movements that have recently emerged (Kelty 2004 & 2005, Coleman 2005). While certainly these modes of collaboration and distribution differ from contemporary corporate-driven models, they do not, on the other hand, mirror past or present indigenous systems. *Both* are more complex and historically specific.

Creative Commons is a non-profit organization offering—free of charge—a range of copyright licenses that undo the rigidity of the traditional copyright system where one automatically defaults to an “all rights reserved” model. Creative Commons “offers flexible copyright licenses for creative works” based on a “spectrum of possibilities” (<http://creativecommons.org/learnmore>). Using the language of rights, this system draws a linear trajectory from all rights reserved to no rights reserved. The Creative Commons license system provides an alternative middle ground where individuals may choose from a range of licenses to fit their particular wishes for distribution, reproduction and re-mix.

While I recognize the similarities, I am also apprehensive about making a too quick analogy. An analogy allows one to compare two things in order to clarify; but analogies also always mask fissures. In this case, both of these systems articulate sets of restrictions within social networks based on dynamic notions of culture and property. Yet at the same time the two systems make different assumptions about

the dynamism of those networks and the modes of sociality that uphold them. One looks to an international legal system as its foundation and a virtually networked community for its flexibility, the other relies on territorial networks for its boundary making and adaptable kin-groups for its innovative impulses.

In his work on the founding of the Creative Commons, Christopher Kelty shows that culture was quite intentionally mobilized as a way to uphold a range of copyright licenses. Cultural norms, would be, a sort of back up plan or a catch all for those awkward legal moments when the language of law was either too illusive or too tedious (2004: 550-553). The Commons then, was imagined as a creative space where individuals create, remake and distribute works all the while maintaining control. In the words of their promotional video, Creative Commons allows one to, “skip the intermediaries,” and “stand on the shoulders of your peers” to co-author creative works without “ever meeting someone face to face” (<http://creativecommons.org/learnmore>, “Get Creative” movie).

Here, the Internet, coupled with Creative Commons’ licenses, produces a space for innovation and knowledge sharing. And while the Internet is gestured to as a space for collaboration—that is, as a technological advance that aids in innovation—the downside, the unwanted collaboration, the unasked for distribution and the very real lack of access and control over how knowledge is dissected into bits and bytes is not addressed. *This* commons wipes away the contingencies necessary for other types of collaboration.

As an antidote to the corporate eagerness to make the public domain work for commercial innovation alone, Creative Commons is a very practical tool. But, as a rearticulation of the relationships that constitute the commons or the social relations through which property is being made, remixed and circulated, this Commons privileges a very limited type of sociality and it maintains the property values that are, in fact, central to the traditional copyright system: author-centered works, the public domain as the preeminent space for innovation and creation, and originality as the mark of a creative “work” (Coombe and Herman 2004, Christen 2005, Berry and Moss 2005).

Certainly Creative Commons did not set out to promote indigenous or other property systems. They set out to correct an existing legal system that—through recent legislative turns—has used copyright to privilege corporate rights. The problem of aligning the Creative Commons strategy with the Warumungu system of cultural rights management expressed in the open-closed continuum is that one allows us to work within the dominant US property regime; another calls attention to its limits. One enables and demands celebratory notions of an information commons, one calls attention to the denial of subjects within that commons. Instead of repurposing the Warumungu distributional imaginary within the idea of a commons, our focus turned to just how we might encode this alternative system into the frameworks used by those who uphold the unquestioned ideal of “information freedom.”

Encoding Culture

In 2002 when my partner Chris Cooney and I were working with several Warumungu community members on two websites it was clear that Warumungu protocols functioned not only in the collection of the content for the sites, but also for the on-going interaction with the materials. Michael Jampin, an elder in the community and keen cultural ambassador, immediately saw the potential of the Internet to educate. If “just about everyone” could access the site, he imagined the same global audience could learn about Warumungu culture. But the type of information sharing he is interested in is based on an understanding of Warumungu protocols for the distribution and reproduction of knowledge.

So when Chris and I received a fellowship in 2005 to produce a website based on Warumungu protocols for information “sharing,” we wanted to integrate Jampin’s interests into the design and architecture of the site to produce a different type of “learning experience.” The *Vectors* online journal

is a new project sponsored by University of Southern California's Annenberg Center and the Institute for Multimedia Literacy. Their goal is to bring together scholars and technical consultants to "focus on the ways technology shapes, transforms and reconfigures social and cultural relations" (www.vectorsjournal.org). Pushing scholars to articulate their academic arguments through the languages of new media, *Vectors* provides a prime opportunity to produce an online space where users can engage with Warumungu protocols for knowledge distribution, reproduction and creation.

The first phase involved organizing the content. Because place is the predominant way in which people organize social relations (with property relations being just one layer) it was the logical first level of content organization. Each bit of content (photos, movie clips, audio files) is identified with a specific "country" (the term Warumungu people use for specific territories). The content is also tagged with one of eight tracks. These tracks emphasize the overlap of various groups within Warumungu life: miners, tourists, other Aboriginal groups, settlers, etc. In the final virtual site these tracks provide an historical reference point for users as well as a visible depiction of the coexisting and overlapping sets of interests that inform knowledge production.

The work of tagging all the content provided an overall framework from which to understand the relations between content and allowed us to then sort the content into groups around the central themes Warumungu people identified: women's ceremonies, station life, ancestors, etc. We then generated content groups around specific protocols (eight in all, although this is not exhaustive). The protocols serve as the main sorting function—when users interact with the content they are forced to engage with a *different information system*. The protocols dictate how, when and in what guise "content" can be accessed.⁸

In order to present the content in a way that encouraged users to maneuver through the site and at the same time reflected the dominance of place-related knowledge to Warumungu people, we worked with several Warumungu artists to generate an appropriate design. The main interface is a recreation of Rose Namikili's depiction of the main places associated with the content for the website. Rose graphically represented Warumungu places using overlapping circles in red and yellow with white dots to offset the circles (Figure 1). This was always to be a *rendering* of place, not a map of specific geographic locations. That is, this was not a map in the sense that one could use it as territorial information.

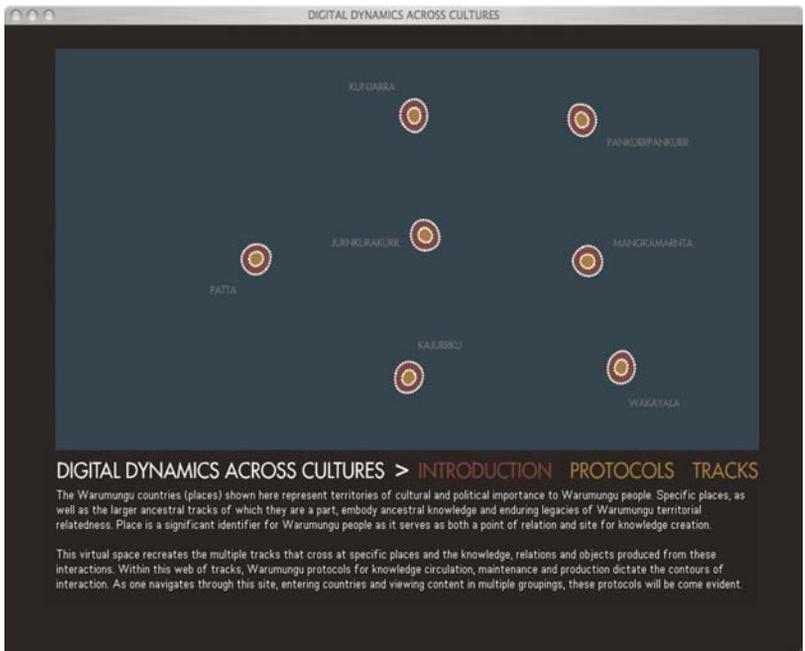


Figure 1.

Knowing the cultural restrictions surrounding the circulation of specific knowledge about place locations, I had purposely directed the U.S. designers of the website to randomize the places. When I visited Tennant Creek in February 2006 before the launch of the site to get final community approval and to work with local artists on the interface, I met over and over with the same complaint: the places on the interface we had created were “not proper.” That is, the places were not in the correct geographic relationship to each other and to what has become the standard default referent: town. Without fail, the first comment every Warumungu person who saw the prototype of the main page had was that it just wasn’t right. Namikili’s representation of the country places them in relation to town and to the Stuart Highway. Although the highway is not visible on the drawing, anyone familiar with the area can easily imagine its location and its physical relationship to the named places. My attempt to avoid making a protocol blunder resulted in the realization of another protocol at play: geographical orientation. Places should not be out of place. In the final version of the site each place in its proper place.

As users maneuver through the online space and enter certain places they can click on content groups to access more information. Yet at every site they encounter Warumungu protocols for viewing material, reproducing images, listening to ritual knowledge, etc. A video clip may stop halfway through because the material is restricted by gender. Or, a photo may be only half visible because some people in the photo have died. Audio of a song may fade in and out because elements are restricted to only those who have been ritually initiated. In every case, users must grapple with their own biases about information “freedom” and knowledge “sharing” as they seek to “learn” something about Warumungu culture. The content is secondary to the intended disruption of dominant ways of information gathering online through the invocation of the protocol screens. When content is blocked—completely or partially—a protocol animation is generated (Figure 2). Users can then listen to and watch an explanation of the Warumungu protocol. Here again we used designs by local artists combined with voice-over narrations by Warumungu community members to present the guidelines for proper interaction with and circulation of cultural knowledge (Figure 3).

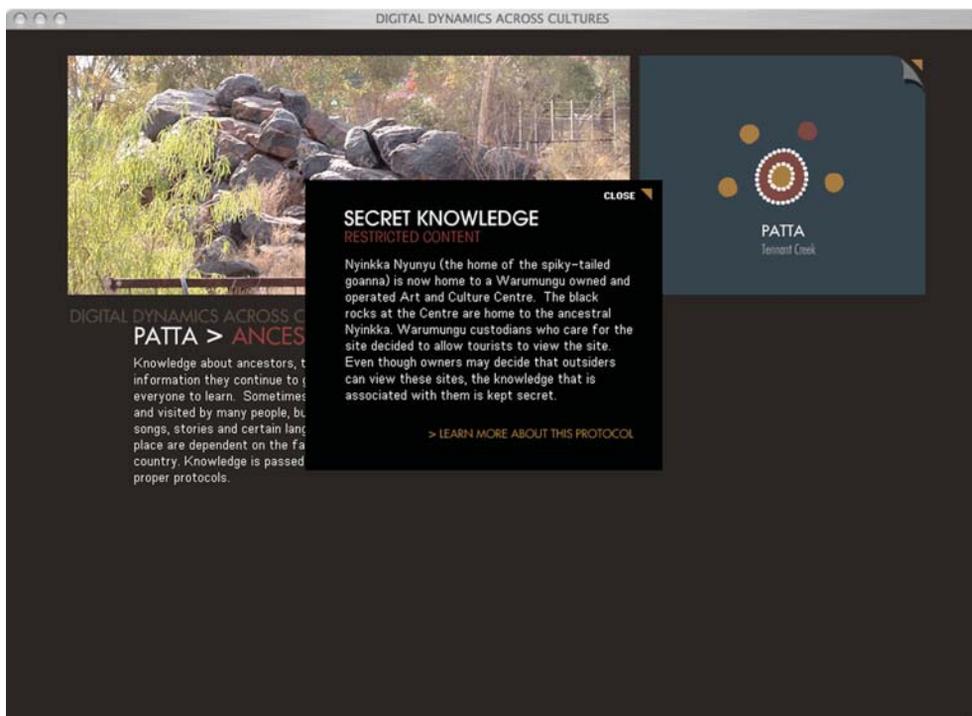


Figure 2.



Figure 3.

This is *not* a learning site—in the sense that users will come away knowing about “the Warumungu” in any complete sense. In the design concept we wanted to stay away from what I clumsily labeled a “video-game” feel. That is, we did not want to give users the “experience” of being (via an avatar-like persona) an Aboriginal person for a day. Nor did we want people to feel as if they could learn about Warumungu culture whole cloth through this site. This was not because of some lurking Luddite sensibilities or knee-jerk Humanities reaction to “dumbing-down” the complexity of cross-cultural exchange. Instead, the site is designed to alter the way in which “learning” about other cultures is perceived and presented. By presenting content through a set of Warumungu cultural protocols that both limit and enhance (depending on who you are) the exchange and creation of knowledge, the sites internal logic challenges conventional Western notions of the “freedom” of information and legal demands for single-authored, “innovative,” original works as the benchmark for intellectual property definitions.

Changing the Default

The default logic of Australian copyright law—as well as the celebration of the commons as a space of creation and remix for everyone—maintains the conceit of property as separable from dynamic social networks and relations. Information as property is to be “protected” or “freed.” These *seem to be* the only options. But, as Rosemary Coombe and Andrew Herman remind us (and their first year law students), property “is a social relationship between socially recognized persons with respect to real and intangible things (and between peoples who as national may hold cultural properties) that is authorized and legitimized in particular cultural contexts. It is also a relationship of profound social power” (2004: 561).

The power yielded by IPR laws—in this case copyright—is not just, or even, I would suggest, primarily about regulating and protecting property. More fundamentally, this legal regime mobilizes an historical mode of *protectionism* towards indigenous peoples and their property in such a way that allows control to be conceived of as support for difference. Modeling the ICMR bill on an impractical notion of community sets indigenous people up to fail. If the amendment becomes law, it would align Aboriginal cultural knowledge with impractical and unrealistic definitional standards (Anderson 2004). Here, copyright law redefines not only what counts as worthy of protection, but also who counts. When the bland world of multicultural rhetoric is mixed with legislative imperatives to “protect” and “preserve,” (culture and culture as property) the outcome has been to deny the inequities inherent within specific property relations (Povinelli 2002, Anderson and Bowery 2006).

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<http://www.ram-wan.org/e-journal>

As Australia grapples with its historical legacy of erasure, it has turned again and again to legislation to try and reconcile its national past and reimagine its Aboriginal future. The fact the ICMR legislation has stalled for the last two years speaks to its failure as a practical model for dealing with cultural manifestations of difference and competing property systems. Spaces like the Vectors *Digital Dynamics* website eek out a place where indigenous knowledge systems can challenge dominant views. But the momentum needed to destabilize the uncritical acceptance of “communal” visions of indigenous distributional systems needs to come from critiques of this either/or property imaginary: either we have an information commons or corporate enclosure; one is either a purchaser or a pirate; information is public or private.

Both national copyright legislation that refuses to acknowledge on-going marginalization and social movements that celebrate the “commons” and “gift economy” cultures on the Web (Bollier 2004, Lessig 2004) are guilty of downplaying difference and ignoring the complexity of property relations. Taking indigenous property systems seriously shifts the emphasis of exchange systems from demanding information freedom or rigid holistic communities to seeing the coexistence of distributional routes and practices. A distributional imaginary that neither assumes the neutrality of market property relations nor denies the existence of power relations within the social spaces of property exchange is necessary to challenge the default logic embedded in both of these property models.

Notes

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² The 1976 *Aboriginal Land Rights (Northern Territory) Act* allowed Aboriginal claimants to seek ownership of unalienated Crown land. As part of the process Aboriginal communities had to document their relationships to one another and to their land. As defined by the *Act*, claimants had to designate “traditional owners” (kin groups) who had “primary spiritual responsibility” for the land. Making Aboriginal people-land-ancestor relationships fit into these newly-adopted categories caused considerable tensions within and between various communities. See Peterson and Langton (1983) and Hiatt (1984), Merlan (1998), Povinelli (2002), Gelder and Jacobs (1998), Christen (2004).

³ There is obviously a lot of legal ground to cover between the passage of the 1976 *Aboriginal Land Rights (Northern Territory) Act* and the 1993 *Native Title Act*. Juxtaposing the two I mean not to collapse them, nor to suggest that they do the same work. Instead, what is significant is that both pieces of legislation rely on idealistic, romantic and fantastic notions of Aboriginality as the basis for lodging claims. For more in depth analyses see: Povinelli (1999, 2002), Gelder and Jacobs (1998) and Bell (1998), Strelein and Muir (2000).

⁴ This same type of standardization took place during land rights claims in the Northern Territory under the Territory’s land rights legislation. See Merlan (1998), Povinelli (2002), Christen (2004) for more on the consequences of these practices.

⁵ For examples of these types of collaborative enterprises see: Anderson and Koch (2004), Barwick (2005), Hinkson (2002), Tafler (2000)

⁶ My fieldwork took place at various times during 1995-2001 all of 2002 and for short periods during 2003, 2004 and 2006. This research was assisted by grants from the University of California Pacific Rim

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⁷ I want to thank Cori Hayden for her probing question concerning this urge to compare by my interlocutors during our “Conversations with the Commons Panel” at the 2005 American Anthropological Association meetings.

⁸ Using the protocols generated by indigenous communities for digital content management is being addressed in Australia, see Nathan (2000), Barwick (2005), Christen (2005), Hunter (2005). For histories of new media and Aboriginal communities see: Michaels (1997) Tafler (2000), Hinkson (2002), and Ginsburg (2001, 2002).

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