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Indigenous Property Rights and Cultural Protocols

An envelope containing details of “secret women’s business” finds its way onto the desks of two politicians of opposing political persuasions. One decides to open the envelope, the other not. Each, as a result of his decision, has his political career destroyed.

This stage-play scenario is not all that different to what actually happened at the height of the Hindmarsh Island affair. Then Aboriginal Affairs minister Robert Tickner was reviled for his decision to issue a twenty-five year ban on the bridge without having read the secret envelopes. He left politics after Labor’s 1996 election defeat. Ian McLachlan, whose staff read and photocopied the material after it mistakenly arrived in his office, had to resign from the front bench after it became clear that the material had been labelled confidential. He spent time in the political wilderness, his career only resurrected after the 1996 election.

The ‘secret envelope’ is symbolic of the explosive power of Aboriginal myth in turn-of-the-century Australian politics. For conservatives it epitomises the so-called guilt industry, the gullibility of Europeans willing to accept Aboriginal claims without subjecting them to ‘normal’ processes of public cross-examination. Roger Sandall and others have argued that the affair marks the beginning of a new period of forelock-tugging, of deference to romantic myths about Aboriginal culture which in the end harms the very people it is supposed to serve.

Should Europeans respect Aboriginal secrets, or ride roughshod over them? Are calls for ‘cultural protocols’ an example of ‘political correctness’ gone wrong, a form of censorship which could see Aboriginal culture corralled and ghettoised, a sacred cow or perhaps buffalo of the Top End? To listen to conservative rhetoric, one would conclude this was a danger.

Recent controversy over Phillip Gwynne’s book *Deadly, Unna?* and the resulting film *Australian Rules* have led to calls for ‘cultural protocols’ for creators of books and films dealing with indigenous material. A number are already in existence or are being proposed. SBS Independent, one of the funding bodies for the film, has prepared an Indigenous Protocol for film-makers who wish to make films dealing with indigenous material.¹ The Australian Film Commission is preparing a National Protocol for film-makers working with Indigenous content. Projects with indigenous content that apply for AFC funding are forwarded to the AFC indigenous branch to

1. SBS protocols, described in “The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities”, researched and compiled by Lester Bostock. A Shorter Protocol Guide was written by Darlene Johnson for SBSi: see generally <http://www.sbs.com.au/sbsi>, and discussion below.

determine whether cultural protocols have been followed.² The Australian Society of Authors has compiled a Code of Ethics Checklist for writing about indigenous Australia, and their web-site contains a discussion paper on the issue.³ Indigenous intellectual property lawyer Terri Janke, with Doreen Mellor, has drafted a set of protocols for people working with the indigenous visual arts and craft sector. These protocols, entitled “Valuing Art, Respecting Culture”, were commissioned by the National Association for the Visual Arts, and are available on the NAVA web-site.⁴ Griffith University’s Key Centre for Cultural and Media Policy (CMP) has produced videos dealing with legal and cultural protocols in the indigenous arts and cultural industry.⁵

What do cultural protocols require of creators, particularly non-indigenous creators, who wish to deal with indigenous material? Do they set out minimum standards, with prescriptive force, or do they merely describe standards of behaviour to which creators should, in an ideal world, aspire? Are they legal in nature or merely ethical? What, if anything, are the penalties for breach?

From a lawyer’s perspective at least, the answers to these questions are not always clear. Arguably, cultural protocols are primarily ethical in nature. They describe levels of behaviour which indigenous people and communities expect of outsiders dealing with indigenous material. In one sense, therefore, as the author of the SBS Shorter Protocols Guide has commented, “they are about understanding, not control.”⁶

At the same time there is a strong element of the prescriptive in cultural protocols. They are expressed in mandatory language. They appear to reflect the requirements of indigenous laws and customs, even where such laws and customs are not recognised by the Australian legal system. Hence, they occupy an uneasy terrain. Regarded as law by many indigenous people, they are viewed with suspicion by some creators who (as we shall see later) consider them attempts to smuggle into the cultural pantheon an impostor whose true name is censorship, masquerading as law.

The protocols are not always entirely clear on such issues as who must be consulted, and whether consultation includes a right of veto or control over content. Under the SBS Shorter Protocols Guide, for example, film-makers dealing with Aboriginal communities are required to seek permission to travel and film on Aboriginal land. Film-makers must discuss with the “subject” (presumably, this includes all Aboriginal individuals or communities with an interest in the subject matter) the purpose of the interview, and fully inform the subject of their rights as storytellers. This includes the right to full consultation at all stages of the production process.

² National Protocol for film-makers working with Indigenous content in both drama and documentary, prepared by the Indigenous Unit of the Australian Film Commission (finalized by September 2002). See <http://www.sbs.com.au/sbsi>.

³ See Anita Heiss, “Writing about Indigenous Australia: some issues to consider and protocols to follow: a discussion paper”, available at <http://www.asauthors>.

⁴ See Doreen Mellor and Terri Janke, *Valuing Art, Respecting Culture: Protocols for working with the Australian Indigenous visual arts and craft sector* (2001), available at www.visualarts.net.au.

⁵ See <http://www.transworldeducation.com/articles/media.htm>.

⁶ Darlene Johnson, speaking at an Australian Film Television and Radio School ethics panel, quoted in “Message Stick”, film review of “Australian Rules”, October 3, 2002, at [wysiwyg://28http://www.abc.net.au/sage/blackarts/review/s655039.htm](http://www.abc.net.au/sage/blackarts/review/s655039.htm).

In addition, according to the SBS Guide, the subject should be given copies of the interview in VHS format. Film-makers should seek comments during the editing stage. The filmmaker should explain to the subjects that if upon seeing the tape they do not want it or parts of it used, they must tell the filmmaker as soon as possible, and the issues should be discussed. The subjects should notify the filmmaker as soon as possible if they believe that the interview is not consistent with the story they told or does not truthfully represent their story. The film-maker...

“should respectfully consider the subjects opinions and discuss with them any suggestions they may have. The filmmaker should agree to consult with the subjects, and exclude from the final version anything in the filming of them that has not been agreed to. If filmmakers are not prepared to agree they should make this clear to both the subject and SBS before agreements are signed. Filmmakers should be sensitive to the differences between an Aboriginal and non-Aboriginal way of seeing and be aware that past bad practice has created considerable distrust.”⁷

This appears to be an each-way bet: an attempt to ensure that film-makers will abide by the wishes of indigenous communities, while recognising that there is currently no clear legal recourse against those who do not.

Similarly, the six governing principles set out in the longer SBS protocols make no mention of an indigenous right of veto.⁸ However later discussion in the same booklet suggests that a code of ethics “must recognize that those who have the information needed are the sole owners of that information, and that they have the right to dispose of that information as they see fit.” Later there is the suggestion that “every effort should be made to ensure that the planning and execution of any research or interviews undertaken are done so (sic) only with the full involvement of, and under direction of, the Aboriginal or Torres Strait Islander people involved.”⁹

The ASA Code of Ethics Checklist for Writing about Indigenous Australia is also unclear about the extent of writers’ obligations to indigenous sources. It suggests that writers should “[k]eep Aboriginal people informed and, where possible, provide regular updates. When the first draft has been completed, take it back to the community for their approval and to vet.”¹⁰ This right of a community to “vet” a first draft appears to be a right of veto over content. It applies only to “the community you are writing about”. Arguably it is inapplicable to heavily fictionalised or lightly based work. In addition, the checklist notes at the same time that “[t]here is no law against you writing about Indigenous issues.”

Arguably cultural protocols of this type are not susceptible to dissection using a lawyer’s traditional tools. It is neither possible nor desirable to specify in advance the nature and extent of creative control over indigenous material which indigenous people should be entitled to expect. In any case it would be futile to do so in the absence of laws enforcing the moral obligations imposed. If this is the case, then arguably cultural protocols are ethical and not prescriptive in nature. They set out a

⁷ SBS protocols, above, n 1.

⁸ SBS protocols, above n 1, at pp. 9-10.

⁹ SBS protocols, above n 1, at pp. 20, 30.

¹⁰ “Writing About Indigenous Australia: Code of Ethics Checklist”, at [wysiwyg://12/http://www.asauthors.com](http://www.asauthors.com).

marginalised indigenous view-point in an environment dominated by the strident voices of the creatively “free”.

On this view, the protocols have several modest goals. They are designed to encourage creators dealing with indigenous material to be as sensitive as possible to indigenous perspectives; to inform indigenous communities about their creative intentions beforehand; to consult with them as fully as possible during the creative process; and to adequately pay them for their contribution.¹¹ Their major force is ethical. They appeal to a creator’s desire to ‘do the right thing’ by indigenous people, although it is also true that a film-maker applying for SBS or AFC funding would need to claim, at least, that they intend to comply.

Needless to say, the notion that film-makers and others should have their creative freedom trammled in this way has created considerable disquiet. Paul Goldman, the director of *Australian Rules*, has claimed that “[u]ltimately, you’re talking about censorship. Cultural protocols would mean there would have been a good chance the film would not have been made.” Producer Mark Lazarus similarly rejected the idea of cultural protocols. In particular, the film-makers rejected the idea that the 1977 Port Victoria pub shooting, upon which a major scene in the film was based, should not have been re-created unless the parents of both dead boys agreed. As a result of the controversy, he has stated that he would not make a film involving indigenous communities again, stating that “[l]ife is too short to make Aboriginal films.” Phillip Gwynne himself stated that he would never write about Aboriginal people again: “It sounds a bit gutless, but I’ve been thinking a lot about it, and this consultation thing means books by committees.”¹²

There have been several arguments against cultural protocols. They may be briefly summarised as follows:

1.1 Arguments against cultural protocols: practical considerations.

The first argument is practical. According to this argument, compulsory cultural protocols would slow the creative process to the extent that creating books and films with indigenous content would become practically and commercially unviable. This would deter conscientious authors and film-makers from creating books and films with indigenous content. As a result, only the unscrupulous would portray indigenous communities at all. Books and films with indigenous content would become even more distorted and unrepresentative than they already are.

Books, it is said, go through a lengthy editing and proof-reading process. This is often on a tight time-frame. If adhering to cultural protocols required submitting a draft to a community, with possibly lengthy negotiation to follow, this would take the publishing date out of the publisher’s or author’s control. This could make the difference between a decision to publish or not.

Similarly, film-making is said to be a collaborative venture. Consequently it depends to an even greater extent than do books upon wheels turning smoothly.

¹¹ See, for example, SBS protocol, set out above n 1.

¹² Peter Ellingsen, “Australian rules”, *The Age*, August 12, 2002.

Funding may have been arranged, actors and others hired. Shooting within budget may require completion by a certain date.¹³ For both books and films, the most practical stage for consultation to occur is at the initial development of the draft or script. At this stage, particularly for people without sophisticated English literacy skills, it is arguably difficult to assess the protocols issue. Further assessment at a later stage may also be required, and is indeed contemplated in existing guidelines.¹⁴

1.2 Arguments against cultural protocols: rights to stories.

The second argument is at a more theoretical level, and concerns rights to stories. If indigenous people have rights over stories, the argument runs, why should non-indigenous people not also have rights? At what point does a story become 'owned'? Why should non-indigenous people not also 'own' rights to stories about contact between indigenous and non-indigenous societies, particularly where there is no traditional or secret element, and where non-indigenous personal histories are also involved?

A recent example in which this argument has been raised is *Australian Rules*. The major issue in the film was not a 'traditional' or secret/sacred indigenous story but a shooting during an attempted robbery in a pub. Phillip Gwynne told the *Sydney Morning Herald* that "[t]he book has not tried to appropriate Aboriginal culture. It's a white boy's story and you don't see Aboriginal culture unless you see them through his eyes."¹⁵ This is despite the fact that Gwynne, who based much of the book on his own teenage experiences, was not actually in Port Victoria at the time of the shooting, and other key details have been changed.¹⁶

More generally, non-indigenous writers have argued that stories about indigenous people, particularly about contact and conflict with Westerners, are also European stories. They are part of Australian history. If reconciliation, and recognition of land and other indigenous political rights, requires an understanding of history, then it is essential that such stories be written and made. Mark Mordue, for example, has argued that such stories are "part of a tougher, necessary reconciliation with Aboriginal Australia that a white audience can't live without."¹⁷

¹³ Sally Riley, the manager of the indigenous unit at the Australian Film Commission, stated of the *Australian Rules* script: "They consulted too little too late. By the time they talked to the community, the wheels were turning, actors were hired. They could've helped the community get over the pain and anger of the deaths. Something good could have come out of it, but they didn't." See Peter Ellingsen, *ibid.*

¹⁴ See SBS protocol, above n 1 at p.29: "Once the likely aims, procedures and consequences of any research, interview etc have been explained clearly, as pointed out above, the right of consent or refusal to be used or to participate in the research still remains with the subject(s) of the work, regardless of whether consent or refusal had been made before."

¹⁵ Quoted in Mark Mordue, "White Words, Black Spaces", *HQ Magazine*, June 2002.

¹⁶ The white boy Blacky's Aboriginal mate Dumby Red, who was shot dead in the film, is in fact still alive. The real victims were two other Aboriginal youths. The real shooter was a publican, Antonio Armiento; in the film it is Blacky's dad. After the real shootings, a coroner was told one of the youths had a .22 rifle; in the film the youths are not armed. Gwynne stated that "[w]hen the truth didn't serve my purpose, I made it up. I wanted to capture the essence of a town that was redneck and racist. I included the names and aspects of reality. But it was naïve of me not to disguise it enough." See Ellingsen, above n 12.

¹⁷ Mordue, above n 15. Note that Mordue refers to a white audience's need for such stories, without considering whether they also fulfil an indigenous need.

1.3 Arguments against cultural protocols: freedom of expression.

At bottom, however, the argument against cultural protocols is based on freedom of expression. The right to freedom of expression is central to the European Australian conception of the role of the artist. It is also central to Western liberal political theory, as reflected in international and domestic law.¹⁸ According to this argument, artistic freedom requires writers being able to write what they like, either as fact or fiction, providing they do not cross such well-recognised legal boundaries as defamation, obscenity and racial vilification.

It is true, the argument states, that the line between fact and fiction is blurred. Writers will always have to deal with the personal sensitivities of those whose stories they tell. *Australian Rules*, for example, pitted artistic freedom against Aboriginal grief.¹⁹ Ultimately, however, a model which regards stories as 'owned' can only restrict a fundamental liberal freedom.

According to this model, the creation of 'high art' requires free circulation of artistic works in a marketplace of ideas. Stories about indigenous people must compete with others in this marketplace. The process of critical judgment is complex, but ultimately the yardstick by which all stories are judged is artistic merit.

Part of artistic merit is the issue of 'authenticity'. This is the question of whether the author of the book or film has remained, in some sense, 'true to life'. This notion of artistic truth is, however, sometimes misunderstood. It does not necessarily require 'getting it right' in a documentary or factual sense, although adherence to artistic convention does require certain elements of factual 'truth'.²⁰ Nevertheless the dominant notion in the debate about authenticity is the notion of artistic, not factual, truth. Artistic authenticity, paradoxically, often requires distortion of real events. Admittedly such distortion may cause pain to individuals who recognise, in books or films, versions of events in their own lives. Whether this pain, which may be inflicted either through the distortion of real events or through their accurate representation, is justified depends on the artistic worth of the end product - an artistic version of the notion that the end justifies the means.

2. Philosophical issues.

The contrast between the idea of stories as owned and stories as freely circulating ideas seems so complete as to be philosophically irreconcilable, an attempt to find a fit between utterly alien ideas. From a legal perspective, it is reminiscent of the juridical attempt, in native title law, to recognise indigenous property rights whose nature and incidents are defined by indigenous law.²¹ The definition of 'native title'

¹⁸ See Article 19, *United Nations Declaration on Human Rights*, and Arts 19 and 20, *International Covenant on Civil and Political Rights*. In Australia, see *Davis v Commonwealth* (1988) 82 ALR 633, and B Gaze and M Jones, *Law, Liberty and Australian Democracy*, Law Book Company, 1990, p.286.

¹⁹ Ellingsen comments that even with cultural protocols, "*Australian Rules* could still have pitted grief, in this case Aboriginal grief, against artistic freedom." Above n 12.

²⁰ For example, historical dates and events. These conventions have recently been debated particularly in relation to biography, with the recent publication of works which clearly fictionalise certain events in the subject's life.

²¹ "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of

in s.223 *Native Title Act* 1993 (Cth) contains two contradictory and irreconcilable elements, that native title be determined by reference to indigenous laws and customs, and that it be recognised by the common law.²² This contradiction, which is superficially resolved by referring to native title as *sui generis*, has the odd result that in order to ‘exist’, indigenous land rights must be identified and named by Western law. However, the very act of identifying and naming destroys those interests by bringing them under the aegis of Western law.

To put this another way, it is easy to understand, up to a point, the pain of those who find personal incidents and details reproduced in books and film. What is not easy to understand is the peculiar pain suffered by indigenous people in this situation, a pain which - because of the differences in culture, history and relative power - is both ‘the same’ as, and different to, non-indigenous pain.

There are two approaches which may help in appreciating indigenous perspectives on this issue:

2.1 Historical considerations.

The first is historical. Since the early days of European contact, the process of expropriation and colonisation of indigenous land has been accompanied by a kind of intellectual colonisation: a monopolisation of the right to represent, an objectifying of indigenous culture and community, which is consequently only ‘real’ when seen through non-indigenous eyes. This has led to grossly distorted and caricatured portrayals of indigenous culture, frequently circulated by shysters and frauds, and pandering to non-indigenous desires for titillating and salacious detail of cannibal orgy, sexual abandon or outlandish custom.²³

These representations of indigenous culture, epitomised in the ‘noble savage’ stereotype, have remained remarkably consistent throughout time. At the end of the nineteenth century Louis de Rougemont told ripping yarns of cannibalism, corroboree and dusky maidens garnered during the thirty years he claimed to have spent amongst northern Aboriginal tribes after being shipwrecked off the Kimberley Coast.²⁴ His

native title must be ascertained as a matter of fact by reference to those laws and customs”: see *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, per Brennan J at p.58. See also s.223 *Native Title Act* 1993 (Cth).

²² S.223(1) states that “The expression ‘native title’ or ‘native title rights and interests’ means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (c) the rights and interests are recognised by the common law of Australia.

²³ “Common in various early Movietone newsreels and the like, Aboriginal people were once (and arguably still are) regarded in a curious light – a fading reminder of primitive man unique to Australia. These were then followed by white filmmakers... [who] saw Aborigines as mysterious residents of the desert, offering magical “Dreamtime” guidance to the weary traveler. Aah, the good old noble savage! These and other often-romanticised visions of Aboriginal people have had a serious impact on the greater Australian view of our community, and of Aboriginal people in film. In the past there was never an attempt to allow indigenous people to speak for themselves, instead choosing an ethnocentric slant on an Indigenous person or community and treating them as “object” rather than subject.” (review, 3 October 2002, in “Messagestick”, Aboriginal and Torres Strait Islander online).

²⁴ See Frank Clune, *The Greatest Liar on Earth*, Hawthorn Press, Melbourne, 1945, and Geoffrey Maslen, *The Most Amazing Story a man ever lived to tell*, Angus and Robertson, Sydney, 1977.

stories, which were serialised in *Wide World Magazine*, were later exposed as a fraud, and De Rougemont spent his last years begging in the streets of London before his death in the Kensington Workhouse in 1921.²⁵

At the end of the twentieth century, Marlo Morgan's stories of her three-month desert trek with the 'Real People' of central Australia were no less fantastic. She spoke of the supernatural powers taught to her by this lost tribe, powers which illuminated "the world beyond, the dimension from which we come, and the dimension where we shall return."²⁶ They apparently even included this central Australian desert people's ability to communicate telepathically with dolphins and whales.²⁷

Morgan, who came to Australia originally as a tea-tree oil sales agent, was also exposed as a fraud, although the foreword to her work, republished by Harper Collins as a novel, continues to maintain that it is fact.²⁸ Nevertheless the work has been a best-seller in the United States and Europe, where the work is studied at undergraduate level as a work of popular anthropology.

The only difference between the nineteenth- and twentieth- century representations of indigenous culture is that the earlier version tends to emphasis the 'savage' and the later the 'noble' side to the 'noble savage' stereotype. Both are equally distorted, equally driven by the mass non-indigenous market, and both steer perilously close to racial vilification, in De Rougemont's case arguably even crossing that line.

This modern process of intellectual colonization is reflected most clearly in the New Age movement. According to Grossman and Cuthbert, adherents of both the American and Australian New Age movements are primarily "economically comfortable white folks" whose ethical principles are "quite mainstream and middle class, permeating suburban life and corporate philosophy alike." Rather than relying explicitly on elimination of the native 'post-settler' narratives "seek to assimilate or reconcile Indigenous existence without significantly diminishing non-Indigenous entitlements. One notable feature of this shift has been the emergence of discourses about white Australian belonging that are no longer so much about belonging in the country... as they are about belonging to country, where country signifies a land-based spirituality." Non-indigenous New Age adherents, of whom Marlo Morgan is a prime example, speak about their connection to the land in terms identical to those used by indigenous people. This "purports to acknowledge Aboriginal claims to

²⁵ Clune, *ibid*, p.22.

²⁶ Marlo Morgan, *Mutant Message Down Under*, Harper Collins, 1994, p.45.

²⁷ Gareth Griffiths, "Mixed Up Messages Down Under: the Marlo Morgan 'Hoax': A Textual Travesty of Aboriginal Culture", in *Connections: Essays on Black Literatures*, Emmanuel S. Nelson (ed), Aboriginal Studies Press, Canberra 1988, p.76 at p.82. See also generally Larissa Behrendt, 'In Your Dreams: Cultural Appropriation, Popular Culture and Colonialism', *Law, Text, Culture*, special edition ('In the Wake of Terra Nullius'), Autumn 1998, Vol. 4, No. 1, p.256.

²⁸ "This was written after the fact and inspired by actual experience. As you will see, there wasn't a notebook handy. It is sold as a novel to protect the small tribe of Aborigines from legal involvement. I have deleted details to honor friends who do not wish to be identified and to secure the secret location of our sacred site." Morgan, *above n 26*, p.xiii.

country while simultaneously universalising those claims, asserting that Aboriginal people by no means enjoy an exclusive spiritual connection to land.”²⁹

In this process, “the spiritual connection of Aboriginal people to the land frequently slips into an idea of the spirituality of the land itself. Aboriginal people themselves are either erased or dismissed as subjects in relation to land, and their agency is effectively assigned to country instead.” By regarding indigenous spiritual connection to land as something all people share or can at least aspire to, the peculiar nature of indigenous entitlement, and therefore the basis for land rights, is dissolved. Thus, “New Age representations of Australian Aboriginality are complicit, rather than innocent, in the writing of ‘Aboriginality’ into and as a narrative of ‘spirit’ that produces a construct of the Aboriginal that can be written off in terms of political and cultural sovereignty.”³⁰

It is questionable whether all representations of Aboriginal communities, including that in *Deadly, unna?* and *Australian Rules*, fall into this category. Nevertheless, the author’s assertion of ownership over the story (“it’s a white boy’s story and you don’t see Aboriginal culture unless you see them through his eyes”³¹) suggests Aboriginal culture and experience being re-interpreted through a ‘white’ lens. The story does not have meaning until filtered and re-told by a European observer: Aboriginal culture does not exist independently, but only insofar as it is capable of being understood by the dominant outsider. This type of re-interpretation is inevitable, of course, so long as the story is told by a European. The only alternative would be for the European storyteller to attempt to tell the story from an Aboriginal point of view, a narrative method now thoroughly discredited.³² Given the history of these types of representations, and the political ramifications of these cultural stereotypes, it is no wonder Aboriginal people are suspicious.

2.2 Cultural protocols and the pornography debate.

Several features of the debate about cultural protocols are reminiscent of the so-called ‘pornography debate’: that is, the question of whether restrictions on pornography should be regarded as a balance between freedom of speech and censorship, or whether a right to equality is also part of the balance. Like the cultural protocols debate, the pornography debate pits assertions of artistic freedom against historical and current abuse. Secondly, just as non-indigenous authors and film-makers claim even distorted portrayals of indigenous people advance indigenous social and political rights, the makers of pornography claim their representations of women actually improve women’s social condition.³³ Thirdly, both the indigenous

²⁹ Michele Grossman and Denise Cuthbert, “Forgetting Aboriginality in the New Age”, *Meanjin*, 1998, Vol. 57 Issue 4, 770

³⁰ Grossman and Cuthbert, *ibid*.

³¹ Phillip Gwynne, quoted in n 12, above.

³² Tom Kenneally has said that he would not have written *The Chant of Jimmie Blacksmith* in today’s political climate. Note also the SBS cultural protocols, compiled by Lester Bostock, above n 1 at p.31: “All Aboriginal parts should be played by Aboriginal actors. There are no acceptable circumstances in today’s society which might justify using a non-Aboriginal actor to play a role in ‘black-face.’ To do so is not only seen as negative stereotyping, but is also degrading to indigenous people.”

³³ In the indigenous context, this claim is made of sympathetic portrayals; in the context of pornography, the claim is rather that unsympathetic and abusive portrayals act as an outlet or safety valve for the violent feelings of men.

and pornography debates involve a conflict between formal and substantial models of the notion of 'equality': that is, the extent to which the powerless position of women or indigenous people respectively needs to be taken into account in assessing the issue of 'rights'.

Catharine MacKinnon has argued that to regard the pornography debate as a 'freedom of speech' issue ignores the powerlessness of the 'objects' of pornography, both the women abused in making the films and those who are abused as a result. The only laws traditionally available to scrutinise pornography were the obscenity laws. These laws required that the material tend to 'deprave and corrupt' the morals of the viewer. The test, therefore, focuses on the effect of the material on the mind of the male consumer, a test which according to MacKinnon misses the point:

"While one might well worry about what pornography does to those who use it, this test makes invisible those who are violated in making the materials, as well as those who are injured and subordinated by consumers acting on them. A substantive equality approach would make those harms visible."³⁴

Similarly, Susanne Kappeler has argued that 'freedom' is not a neutral concept in the context of the pornography debate:

"While it is true that censorship destroys freedom of expression, it is not true that the absence of censorship does anything like establish or guarantee freedom of expression. The absence of censorship, like the absence of a policy of protectionism, leaves 'expression' to the turmoil of market forces in a free market economy. The freedom our society protects is not the freedom of expression, but the freedom of the market."³⁵

This market freedom promotes the freedom of the powerful while subordinating and objectifying the powerless, that is who have no access to the media.³⁶ A freedom of speech position perpetuates the inequalities of the status quo,³⁷ and blinds the observer even to transgressions on freedom of speech where the freedom infringed is that of the powerless. An example of this is where "a New York Times reporter was told by a chief editor that *The New York Times* would no longer carry news stories about the feminist political opposition to pornography".³⁸ These types of decisions are accepted as carrying no 'free speech' implications, while

³⁴ Catharine A. MacKinnon, *Only Words*, Harper Collins, 1995, p.xii.

³⁵ Susanne Kappeler, "Pornography: the Representation of Power", in C. Itzin (ed), *Pornography: Women, Violence and Civil Liberties*, Oxford U.P. 1992, p.88.

³⁶ "Women, typically, have not been involved in the production of public ideas, just as black people and the poor have not. Pornography as the expression of a particular set of ideas and opinions centres on women, a class of people who have no access to the means of production of public ideas: they are the *objects* about whom those ideas are formed." See Kappeler, *ibid*, p.92.

³⁷ "Liberal protestations to the contrary, the 'no censorship' position does not mean a shift of responsibility from the state to the individual, but a shirking of all responsibility – in the name of the freedom of those individuals who stand to gain from it: pornographers and their clientele. It is freedom in the original sense of 'liberal': 'fit for a gentleman' (OED), and it is a liberty taken at the expense of women, the *objects* of pornography." (Kappeler, *ibid*, p.91).

³⁸ Diana E.H. Russell (ed), *Making Violence Sexy: Feminist Views on Pornography*, Teachers College Press, New York, 1993, p.10.

freedom of speech is loudly trumpeted when the question arises of suppressing the speech of the powerful. As MacKinnon points out:

*“publishing decisions, no matter how one-sided and cumulative and exclusionary, are regarded as the way the system of freedom of expression is supposed to work... Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true. Speech, hence the lines within which much of life can be lived, belongs to those who own it, mainly big corporations.”*³⁹

In 1983, at the request of the Minneapolis, Minnesota city council, Catharine MacKinnon and Andrea Dworkin proposed an anti-pornography law which would better reflect women’s rights to equality and freedom from discrimination. This proposal, known as the Minneapolis Ordinance, was passed by the city council but vetoed twice by the mayor. In 1985 similar legislation was passed by the Indianapolis City Council but struck down by a US Federal Court of Appeal on the basis that, although pornography was harmful to women, it was nonetheless protected speech.⁴⁰

The Dworkin and MacKinnon approach was to “define pornography as a practice of sex discrimination, a violation of women’s civil rights, the opposite of sexual equality. Its point is to hold accountable, to those who are injured, those who profit from and benefit from that injury.”⁴¹ Pornography is defined “as the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things or commodities” in various contexts, including rape, bestiality or torture.⁴² The use of men, children or transsexuals in place of women is also defined as pornography. According to MacKinnon, “[t]his law aspires to guarantee women’s rights consistent with the first amendment by making visible a conflict of rights between the equality guaranteed to all women and what, in some legal sense, is now the freedom of pornographers to make and sell... the materials this ordinance defines.”⁴³

How far can this approach to pornography be regarded as analogous to the representation of indigenous people in books and film? MacKinnon has argued that there are differences between the ideologies of racism and of sexism, at least in the US context of African slavery:

“I think it was never a central part of the ideology of racism that the system of chattel slavery of Africans really was designed for their enjoyment and benefit. The system *was* defended as an expression of their true nature and worth. They *were* told to be grateful for good treatment and kind masters. Their successful struggle to organize resistance and avoid complicity while still surviving is instructive to all of us... None the less, few people pretended that the entire system existed *because* of its basis in love and mutual respect and veneration, that white supremacy really treated

³⁹ Catharine MacKinnon, above n 34, p.56.

⁴⁰ Catherine Itzin, “Legislating against pornography without censorship”, in C. Itzin (ed), above n 35, 401 at pp. 416-418.

⁴¹ Catharine A. MacKinnon, “Pornography, civil rights and speech”, in C. Itzin (ed), *ibid*, 456 at p.465.

⁴² *Ibid*, at p.465.

⁴³ MacKinnon, *ibid*, at p.467.

blacks in many cases *better* than whites, and... few have pretended, much less authoritatively, that the social system, as it was, *was equality for them*.”⁴⁴

MacKinnon, here, is comparing a twentieth- and twenty-first century ideology of sexism with an ideology of racism that existed in the nineteenth century and before. The brief historical survey in the previous section has suggested that the nineteenth-century ideology of racism in Australia emphasised the ‘savage’ nature of the ‘noble savage’, at least in cultural expressions such as De Rougemont’s tales. Political expressions in frontier practice are even more clearly documented. In the twentieth century, however, the ideology of racism as expressed in Australian culture assumed a ‘softer’ and more subtle form, emphasising the ‘nobility’ of the noble savage.

It is possible, although beyond the scope of this paper, that sexist ideology has similarly moved from a ‘hard’ nineteenth-century form, in which women were viewed as innately inferior and in need of legal restrictions, to a ‘soft’ twentieth century form in which the social system is conceived of as being for women’s enjoyment and benefit. Certainly MacKinnon’s sketch of twentieth-century sexism seems to have more in common with twentieth-century racism than with eighteenth-century chattel slavery. Indigenous people are told that the current system is working for their enjoyment and benefit, and that it is the best means of expressing their true nature and worth. They are expected to be grateful, and told that they are treated in many cases better than whites; and they are told, with more or less authority, that the current system is ‘equality for them’.

In other respects, as well, the language and arguments of the cultural protocols debate bear an almost uncanny resemblance to those used in relation to pornography. The traditional test for whether material is pornographic focussed on the effect of the material on the mind of the viewer. Similarly, the ethical issue in the cultural protocols debate is usually regarded as being whether the material enhances the non-indigenous viewer’s understanding of or respect for indigenous culture. The response of the indigenous ‘object’ of the book or film is considered of no more relevance than that of the female ‘object’ of pornography.

Secondly, the issue of market freedom and publishing decisions seems peculiarly apt in the context of media representations of indigenous people. A book or film from a non-indigenous perspective seems to have a better chance of being published and, more significantly, selling. Arguably, the public is more comfortable with a book or film that views another culture through the gaze of their own. While books and films by indigenous people are being made, published and winning prizes, it is possible that such creations must be re-shaped to fit non-indigenous expectations before they will achieve critical or commercial success. Kim Scott’s award-winning novel *Benang*, for example, is written in a ‘literary’ style about the ‘first white man born’; Scott has stated publicly that his Nyoongar friends and relatives found the book difficult if not impossible to read.⁴⁵

⁴⁴ *Ibid*, p.457.

⁴⁵ “Hey Kimmie, next time you write a novel, make it something we can read.” Kim Scott, unpublished paper, Victorian Association of Teachers of English conference, Melbourne, July 16-18, 2002.

The question of whether legal or ethical restrictions on abstract freedom are necessary in the interests of substantive equality also seems applicable to the cultural protocols debate. The Dworkin/MacKinnon approach to pornography would make illegal representations of women that depicted them as subordinate in graphic sexually explicit ways, or that dehumanised them as sexual objects, things or commodities. This approach, in the context of cultural protocols, would apply only to a relatively narrow class of representations of indigenous people, those which amounted to something like racial vilification.⁴⁶ Indeed, it appears that Dworkin and MacKinnon developed their approach to pornography by analogy with racist vilification and hate speech.⁴⁷

Racial hatred legislation is criminal, and therefore enforced by the police and the state. The Dworkin/MacKinnon pornography proposal “differed from other legislation in providing civil rather than criminal relief within a legal framework in which women themselves could take action against the publishers and distributors of pornography on the grounds of harm.”⁴⁸ To this extent the analogy between pornography and cultural protocols does not apply. Arguably cultural protocols, being merely ethical in nature, should apply to a broader range of conduct, including apparently ‘benign’ representations such as Marlo Morgan’s ‘Real People’.

3. Conclusion: negotiating the philosophical impasse?

As noted above, the contrast between indigenous and non-indigenous perspectives on the cultural protocols issue seems philosophically irreconcilable. Certainly, for at least the last twenty years, intellectual property law has shown itself unable to cross the divide and protect indigenous cultural material where it is not a tangible ‘expression of an idea.’

Recently, however, in *Western Australia v Ward and Others*,⁴⁹ Kirby J in dissent argued that “the right to protect cultural knowledge is, in my view, sufficiently connected to the area to be a right ‘in relation to’ land or waters for the purpose of s 223(1) of the NTA.”⁵⁰ His Honour accepted that the connection between a native title right and the land and waters the subject of the right need not be physical, and that cultural knowledge in a traditional context is inextricably linked to the land. While recognising that such a right would be “akin to a new species of intellectual property”, His Honour accepted “that the established laws of intellectual property are ill-equipped to provide full protection of the kind sought in this case”.⁵¹ He noted further that the burden of proving that the recognition of such a right would fracture a “skeletal principle” of Australian law lay upon the party seeking to deny its existence. He considered that no evidence had been shown on the facts that this would occur.

⁴⁶ This would appear to include De Rougemont’s account of cannibalism and barbaric practice, and possibly also Marlo Morgan’s depiction of ‘Real People’ untouched by civilisation.

⁴⁷ C. Itzin, “Legislating without censorship”, in C. Itzin, above n 40, pp. 416, 422. See also the following argument: “[p]rogressive people accept that racist, anti-Semitic, and homophobic propaganda promote racism, anti-Semitism and homophobia. Why then would sexualised bigotry be harmless, even cathartic?” Diana E.H Russell, “From Witches to Bitches: Sexual Terrorism Begets Thelma and Louise”, in Diana Russell (ed). *Making Violence Sexy*, above n ?, 254 at p.264.

⁴⁸ Itzin, *ibid*, p.417.

⁴⁹ *WA v Ward and Others* (2002) 191 ALR 1.

⁵⁰ *Ibid* per Kirby J at p. 162.

⁵¹ *Ibid* per Kirby J at 162-3.

Finally, he noted the possible availability of “a constitutional argument for the protection of the right to cultural knowledge” based upon the prohibition on laws affecting the free exercise of religion in s 116 of the Constitution.⁵²

If accepted by a future High Court, these views have the potential to transform the current approach of the judicial system towards indigenous intellectual property. This would be the case at least in a ‘traditional’ context where native title to land could also be shown. It is unlikely, however, that even Kirby J would accept that native title to cultural knowledge could exist where native title to the land or waters with which the cultural knowledge was connected had been extinguished. In any case, native title is unlikely to help indigenous people whose culture or lives have been portrayed in an insensitive or hurtful manner, unless the material so used can be characterised as ‘traditional’. It is difficult to see, for example, how the shooting of Dumby Red could be regarded as traditional cultural knowledge of the kind recognised by Kirby J in *Ward* as an incident of native title.

In any case, with the exception of Kirby J, the High Court in *Ward* was unable to recognise indigenous cultural expressions as a ‘nature or incident’ of native title. This was despite the statement in *Mabo* itself and in s.223 *Native Title Act* that such incidents were to be determined with reference to indigenous law and customs. This philosophical intransigence is reflected in the statements of authors and film-makers whose rights to freedom of expression is challenged after the event.

What may be needed is a new ethical approach to the question of intellectual property ownership. Such an approach might recognise the historical contingency of the dichotomy between expression and ideas which currently operates to exclude from protection much of what indigenous people regard as traditionally and culturally theirs. The pornography analogy is a reminder that the notion of freedom of expression is not neutral in the context of non-indigenous representations of indigenous people and culture. If equality as well as freedom is to be recognised as a legal and ethical aspiration, then both law and non-indigenous culture need to take greater account of indigenous perspectives on the issue of cultural protocols.

According to Grossman, the ‘author’ in Western copyright law “is primarily the offspring of the *menage a trois* between the Enlightenment ideology of the individual, Romantic aestheticism and the consolidation of industrial capitalism in the 18th century”.⁵³ The ‘author’ in the modern sense of the creator of a work was a “highly marginalised, virtually irrelevant figure in the great copyright wars that marked the emergence of book culture and the expansion of printing industries in the 16th and 17th centuries.”⁵⁴ With the emergence of Romanticism in the latter part of the eighteenth century “the artist is no longer (as within the Classical tradition) a ‘seer’, acting through art as a channel for a divine message: now he or she is a ‘genius’ equipped with an exceptional intellectual and spiritual endowment, which manifests

⁵² Ibid at p. 163.

⁵³ Michele Grossman, “The Sovereign Text? Copyright and intellectual property issues for Indigenous authors”, paper delivered at *The Other Frontier: Negotiating Treaties and Agreements Seminar Series*, Institute for Postcolonial Studies, Melbourne, 23 May 2002, p.3.

⁵⁴ Grossman, *ibid*, pp. 3-4.

itself in breaking rules, departing from traditions, effecting breakthroughs, that is in originality.”⁵⁵

The notions of art as a manifestation of originality and art as a manifestation of tradition stand in a postmodern relationship of *differance*: that is, neither of these apparently contradictory notions has meaning or existence without the other, and each bears ‘traces’ of the other. In the Western European “ethics of aesthetics”, the notion of originality is privileged over tradition: in indigenous cultures, the position is arguably reversed, but traditional indigenous cultures recognise the importance of the individual artist, just as Western European culture recognises the importance of tradition. The privileging of originality in European culture has, however, “functioned to marginalise or deny the work of many creative people: women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative projects, to name but a few.”⁵⁶

To regard negotiation with indigenous people over the content of a book or film as a form of censorship rests upon a privileging of ‘originality’ over tradition. The book or film could not exist without the pre-existing tradition. This may be true in all contexts, whether involving indigenous people or not: but what makes the circumstances different where indigenous material is involved is the historical inequality and powerlessness of indigenous people whose cultures are represented by others. This arguably justifies reversing the privileging of originality over tradition, at least temporarily, in order to attain the overriding right of ‘equal concern and respect.’⁵⁷ In the legal sphere this would require a reversal of the idea-expression dichotomy in intellectual property law, temporarily and for the purpose of overcoming the existing legal discrimination. Such an approach would require statutory amendment in order to protect traditional cultural expressions, at least if Kirby J’s interpretation of the concept of native title is not ultimately accepted by the High Court.⁵⁸ Where cultural protocols are concerned, however, the path to acceptance of indigenous perspectives is easier. The argument based on privileging provides an intellectual justification for the cultural protocols already in existence, and a relatively powerful response to the frequent protests from non-indigenous creators that such protocols amount to censorship.

⁵⁵ Anne Barron, “No Other Law? Author-ity, Property and Aboriginal Art”, in “Intellectual Property and Ethics”, Vol. 4 *Perspectives on Intellectual Property*, Lionel Bently and Spyros Maniatis (eds), Sweet and Maxwell, 1998, 39 at p.73.

⁵⁶ P. Jaszi and M. Woodmansee, “The Ethical Reaches of Authorship” (1996) 95:4 *South Atlantic Quarterly* 947 to 977 at 948, quoted in Anne Barron, *ibid*, at p.39.

⁵⁷ A right regarded even by the liberal legal philosopher Dworkin as of primary importance in the liberal scheme of rights: see, for example, discussion in H Davies and D Holdcroft, *Jurisprudence: Texts and Commentary*, Butterworths, 1991, pp. 313-4.

⁵⁸ See *Ward*, above n 49.