


# Remedying Copyright for Indigenous Australians A Stolen Generations Perspective

Elizabeth Serventy and Nikos Koutras 

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Article abstract

This study presents a Judicial Intersectionality method that incorporates knowledge from arts, humanities, natural sciences, and social sciences. It aims to examine how historical legal, political, and social injustices against Indigenous Australians have persisted in various spheres. When considering the Stolen Generations period, attention is directed on addressing the existing insufficient copyright rights and enhancing future legal results for Indigenous artists. In order to achieve that objective, a unique and distinct copyright system is regarded as the most suitable resolution. Philosophically and pragmatically, this approach was aligned with the Australian Government's 2023 Referendum, which aimed to grant constitutional status to Indigenous individuals and establish a Voice to Parliament advisory council. Although the Referendum did not succeed, the implementation of the standalone sui generis copyright system is a crucial step in the Government's efforts to acknowledge, reconcile, and create a relationship with Indigenous Australians. The Judicial Intersectionality method acknowledges the importance of chance-related connections in unique situations that are uncertain and necessitate action. Given that these circumstances offer fresh starts and chances for transformation, it is now the appropriate moment to embark on this endeavour, to deliberate on the paths of legal modification, and to enact fair, sustainable, and revolutionary copyright reforms for Indigenous Australian artists.

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# Remedying Copyright for Indigenous Australians: A Stolen Generations Perspective

Elizabeth Serventy

*Edith Cowan University, Australia, ejservern@our.ecu.edu.au*

Nikos Koutras

*Curtin University, Australia, nikos.koutras@curtin.edu.au*

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## Abstract

This study presents a Judicial Intersectionality method that incorporates knowledge from arts, humanities, natural sciences, and social sciences. It aims to examine how historical legal, political, and social injustices against Indigenous Australians have persisted in various spheres. When considering the Stolen Generations period, attention is directed on addressing the existing insufficient copyright rights and enhancing future legal results for Indigenous artists. In order to achieve that objective, a unique and distinct copyright system is regarded as the most suitable resolution. Philosophically and pragmatically, this approach was aligned with the Australian Government's 2023 Referendum, which aimed to grant constitutional status to Indigenous individuals and establish a Voice to Parliament advisory council. Although the Referendum did not succeed, the implementation of the standalone sui generis copyright system is a crucial step in the Government's efforts to acknowledge, reconcile, and create a relationship with Indigenous Australians. The Judicial Intersectionality method acknowledges the importance of chance-related connections in unique situations that are uncertain and necessitate action. Given that these circumstances offer fresh starts and chances for transformation, it is now the appropriate moment to embark on this endeavour, to deliberate on the paths of legal modification, and to enact fair, sustainable, and revolutionary copyright reforms for Indigenous Australian artists.

## Keywords

Indigenous Australian intellectual property, copyright policy, stolen generations, legal policy and literary theory

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## Remediating Copyright for Indigenous Australians: A Stolen Generations Perspective

Questions regarding statutory interpretation turn on the relationships between courts and legislatures, and between governments and citizens. A fundamental question in this area is whether or not judicial decision-making should address the current interpretive gaps in legislation. In applying existing legal rules, a further question relates to the intentions of the rule-makers and the reasonable expectations of the public (Bix, 2015, p. 165). As Bix explains:

Common law reasoning involves the (1) incremental development of the law, (2) by judges, (3) through deciding particular cases, (4) with each decision being shown to be consistent with earlier decisions by a higher or co-equal court. To put the matter a different way, common law reasoning is the uneasy but productive mixture of moral intuition, hierarchical discipline, and principled consistency.

The notion of adherence to precedent, deciding in the same way as earlier cases, leads to one of the paradoxes of common law reasoning in that “precedent is only of crucial importance when the prior case was *wrongly decided* (or at least could have been decided in a different way with equal legitimacy)” (Bix, 2015, p. 158). As Bix discusses in terms of differences and drawbacks, Australia has a legal system that comprises common and statutory laws. This system is one of the legacies of its British colonial origins (Reynolds, 2021) and Federation in 1901 (Davis & Williams, 2021). Importantly, jurisprudence (Mann, 2018, Issue 333), “the study of law as an academic discipline” or legal theory (Crowe, 2023, p. 353), explores the philosophically-underpinned nature of legislative reasoning in order to obtain better understandings of its concepts and principles. These understandings involve examining judgements and inferences made by constructing and critiquing arguments, an approach that Crowe describes as “the everyday view of law that ordinary folk have, before legal theorists get hold of it” (Crowe, 2023). As the rule of law functions to ensure that citizens’ civil, political rights, and liberties are secure, meeting these responsibilities involves promoting and protecting unwritten social rules or normative standards; communicating and meeting contemporary community expectations and obligations; and achieving common good goals through codified legislation, public policies, and regulations. Collectively, these principled purposes are considered as being in the best legal and social interests of its citizens. In due course, academic and independent scholars, legal theorists, social commentators, writers, and others contribute to research conversations aimed at addressing jurisprudential challenges (Heinze, 2006). In using the recently-developed Judicial Intersectionality Theory, this paper addresses one such challenge, the inadequate copyright protections for Indigenous Australian artists. It does this by analyzing, evaluating, and contributing perspectives generated from “data” in arts, humanities, natural sciences, and social sciences literature.

With these research matters in mind, this paper discusses two major Indigenous Australian legal journeys (Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), n.d.). The first involves the Stolen Generations period from the early 1910s to the late 1970s (Read, 2014). This period is now synonymous with the forced removal, under State and Territory legal provisions, of Indigenous children from their families, communities, and traditional ways-of-life. These removals were presented by the settler state as being in the best interests of the children. This period is also synonymous with the highly-contested, contentious colonial-settler histories (Biggar, 2023); conflicting

worldview narratives (De Bono, 2018, pp. 2–3); and ongoing intergenerational impacts that include cultural, economic, racial and social discrimination, disadvantage, and dispossession. These impacts were comprehensively examined in the landmark *Bringing Them Home: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (i.e., final report published in 1997 from the Australian Human Rights and Equal Opportunity Commission).

In line with the paper's central research focus, the second legal journey, from the late 1960s onwards, examines copyright legislation and its limitations in terms of adequately protecting Indigenous artists' traditional knowledge and cultural expressions (Copyright Act 1968, 2019, Parts 1; 11; 111; IV and IVA). Copyright is one "form of intellectual property by which monopoly rights are granted (under the Copyright Act 1968 (Cth)) to the creators of literary and other works, and subject matter other than works." Australian copyright protection is automatic, requires no registration, and aims to safeguard creators' rights in relation to artistic, dramatic, literary, and musical works, adaptations, and published editions; films and sound recordings; and sound and television broadcasts (Fitzgerald & Eliades, 2015, pp. 4–8):

Intellectual property is concerned with recognising the creative, intellectual or administrative effort expended in developing new products, processes, designs and materials (although some, such as registered trademarks, are more closely related to the marketing and distribution of such goods and services). This is reflected in the legal definition of intellectual property, which focuses on the set (or bundle) of rights conferred on creators or inventors for the products of their creative or intellectual effort.

In this research conversation, restrictions apply in two areas. Firstly, delving-deeply into the historical development of Australian IP and copyright legislation is not included. Secondly, an overview of the paper's preferred copyright protection option for Indigenous artists is provided, rather than delivering a detailed analysis of its historical development, deliberation on its organizational components, and discussion on implementation strategies. This approach is considered reasonable given these areas have been comprehensively covered in existing research (Stewart et al., 2018).

Discussion is presented in seven sections. Following the Introduction, the second section reviews Crenshaw's Intersectionality Theory, the conceptual springboard for the Judicial Intersectionality Theory. In turn, the third section introduces this theoretical approach and discusses its interdisciplinary, literature-underpinned positioning, while the fourth section focuses on the nexus between all forms of literature in relation to legal and judicial practice and research. This section extends these Judicial Intersectionality interrelationships by considering connections with law school curricula. The fifth section discusses selected Indigenous Australians' justice-seeking journeys relating to the Stolen Generations period. In doing so, William Faulkner's contention that "[t]he past is never dead. It's not even past" is pertinent given the first journey legal failures serve as a precursor to those experienced in the second one (qtd in Inge, 1995). In turn, the sixth section provides an overview of Indigenous artists' inadequate copyright protections, along with an IP safeguarding option tailor-made to protect their traditional knowledge and cultural expressions. The Conclusion, the seventh section, delivers research reflections that underscore the enduring relevance of historical and contemporary interdisciplinary-literature generated perspectives. Accordingly, the following section discusses the Intersectionality

Theory that acknowledges and addresses the multiple levels of disadvantage and discrimination experienced by members of historically-oppressed and socially-marginalized communities.

## 2. Intersectionality

In 1989, Crenshaw, a United States (US) lawyer, civil rights activist, and law academic, introduced Intersectionality Theory to shine a legal light on the inability of the country's judicial systems to deal with marginalized communities facing entrenched, systematic racism and discrimination (Crenshaw, 1998). Crenshaw, in a paper referring to *De Graffenreid vs. General Motors* highlights the gender, identity, and race-related discriminatory barriers confronting Black American women. In doing so, Intersectionality encompasses the meshing of multiple levels of disadvantage that tend to further marginalize vulnerable people. These legally-legitimized intersections of disadvantage involve institutional, governmental, and societal ones, in areas that include education and literacy given English may be an individual's second or third language; employment and housing; health and well-being; and exclusion from active participation in community and social systems (Fincher, 2020). Deepened by individuals' cultural and racial identities, these impacts tend to increase exponentially in interconnecting areas, a situation that is analogous to those experienced by many Indigenous Australians (Smith, 2016, p. 74).

Intersectionality aims to break down attitudinal, behavioral, legal, and societal barriers and generate progressive ways of thinking about identity and its relationship to powerful and privileged institutional structures. As Jackson and Witenstein contend, the *De Graffenreid vs. General Motors* legal action provides case law as well as demonstrating a national disregard for the welfare of economically, educationally, politically, and socially-marginalized Black women (Jackson & Witenstein, 2021). Rather than this case, along with *Moore vs. Hughes Helicopter Inc.* and *Payne vs. Travenol Laboratories Inc.* providing the impetus for Intersectionality-led change, a reticent US legal system resisted the call. In perpetuating the existing exclusive societal norms and power structures, racial disadvantage and discrimination continued. According to Crenshaw, these intersecting factors increase the likelihood of people becoming "invisible" within vulnerable groups, a situation considered likely to result in further, across-life system adversities for Black American women over subsequent generations (Crenshaw, 2015). This situation is comparable to those of many Indigenous Australian women (Upton, 1992).

### 2.1 Intersectionality and Its Evolutionary Road

Since its introduction, Intersectionality-related theoretical discussion on its appropriateness and relevance in non-legal realms has been extensive. While initially described as a "double bind" of gender and racial prejudice (Schmitt et al., 2023), it has been applied in academia as a theoretical tool (Al-Faham et al., 2019); in education as an "*intellectual dialog*" (emphasis in original); in health and policy areas (Gueta, 2021); in historical Indigenous Peoples' contexts such as colonialism (Rice et al., 2019); in across-discipline research promoting global community engagement (Carbado et al., 2013); in psychology (McAdams, 2001); and in complex and challenging social justice issues.

Expanding beyond the canons of class (i.e., socio-economic status); gender (e.g., binary and non-binary, female, LGBTIQ+, male, and transgender); identity (i.e. multiplicity of self, socially, and "other"-

constructed identities such as age, ethnicity, gender, religion, self-worth, sexual-orientation, socioeconomic status, spirituality, and value systems); and race (e.g., Black, Indigenous Peoples; Latino, and People of Color). Intersectionality has been described by legal scholars as an academic research tool; a conceptual framework or theory; a legislative lens; a method and a methodology; an orientation; and an identity-related paradigm or perspective. As a sub-category within Critical Legal Studies, Bix considers Intersectionality as part of Outsider Jurisprudence, Critical Race Theory, and Feminist Theory (Bix, 2015; Delgado, 1993); theories that collectively demonstrate a focus on power and difference, designed to deliver legislative equality, justice, and reform. In turn, Foster highlights Intersectionality's multi-disciplinary application given its emphasis on "the equal and fair distribution of wealth, rights, opportunities, and political power in a society," thereby providing a "form of justice [that] also focuses on the mutual relationship between structural advantages and disadvantages, such as when an individual's weakness turns into someone else's privilege" (Foster, 2022). Furthermore, Foster furnishes theoretical framing in that an individuals' personal and social intentions and life outcomes result in part, from discriminatory and inequitable societal practices that are institutionally, legally, politically, structurally, and systemically entrenched and supported. Given the next section introduces Judicial Intersectionality, Crenshaw's theoretical approach has come full circle, returning to its research roots in the legal domain.

### 3. Judicial Intersectionality

As an interdisciplinary social justice approach, the Judicial Intersectionality Theory was brought into being by this paper's lead author. With an academic background in the arts, humanities, and social sciences, along with doctoral studies in education, this theory evolved during subsequent law degree studies (Serventy, 2020; Serventy & Allen, 2022). The crucial developmental catalyst came when studying a Law and Literature unit at Western Sydney University. In accordance with the maxim that "chance favors the prepared mind" (Brogren, 2024, p. 9), Judicial Intersectionality was a seamless fit and a serendipitous research discovery (Wick, 2019). In valuing fairness, access, inclusion, and representation, and in highlighting inconvenient jurisprudential truths evident in Western nations, this research approach aims to enhance cultural, legal, and social literacy. Given its theoretical foundations were established during the researcher's past academic studies, this positioning informs current legal writings and strengthens those planned for the future. An overview of the Judicial Intersectionality Theory follows.

#### 3.1 Theoretical Development

Judicial Intersectionality is founded on gaining greater understandings on how the combination of vulnerable people's cultural and social canons of class, gender, identity, and race impact in legal and judicial decision-making processes. It achieves this by identifying the multiple, overlapping, and interconnecting impacts that ricochet and rebound in legislation which should safeguard its citizens, rather than expanding the levels of disadvantage and discrimination. In doing so, this positioning maximizes the research opportunities and possibilities associated with using arts, humanities, natural sciences, and social sciences literature as "data resources." In accessing and appraising these resources, research-relevant perspectives are generated. This knowledge collection, management, and dissemination approach aligns with the significance Strauss and Corbin (1994) place on using

professional and disciplinary literature when developing Grounded Theory (Strauss & Corbin, 1990). Divided into two categories, literature is termed technical (e.g., research studies, theories, and philosophical papers) and non-technical (e.g., biographies, diaries, personal stories). Similarly, Judicial Intersectionality is informed by accessing interdisciplinary data resources, in categories that include academic (e.g., book chapters, research papers, sociological theories, and theses); literary (e.g. the classics; legal, political, and social justice-themed commentaries, novels, and plays); and popular culture (e.g., crime genre novels, detective series, and political thrillers). As global contributors to these theoretically-significant data resources include activists, educators, lawyers, novelists, public intellectuals, researchers, and scholars, both academic and independent; literature plays a crucial role. This approach ensures that writers' messages reach wider audiences.

In valuing these data resources, the concept of *Bibliotherapy* is a key component. Predicated on the position that “stories affect human emotions and books can serve as models for development,” story-telling continues to wield power and hold sway throughout history (McNicol & Brewster, 2021). In further buttressing Judicial Intersectionality positioning, Anchin's systematic analysis of Henriques' (2008) Tree of Knowledge framework supports the capture of “knowledge generated by the natural sciences, social sciences, and the humanities” in ways that also demonstrate “its capacity to solve problems through integrative solutions and to advance interdisciplinary conjunctions” (Anchin, 2008; Henriques, 2008). In keeping with this paper's central research focus, this positioning acknowledges the significance of Indigenous Australians' traditional knowledge and cultural expression systems that find form in contemporary artworks, story-telling practices, and post-settlement narratives (Barney, 2010). It also recognises Aboriginal and Torres Strait Islander peoples' systems of law/government and ways of knowing that are articulated through contemporary art works, storying practices and post-colonial accounts. Storying, from Indigenous perspectives, is more than representational and poetic, it is jurisprudential and epistemological. Story as vehicle of law is shown in how Indigenous legal traditions are enacted through oral teachings and storytelling, ceremony, and responsible relationships, rather than juridical constructions of rules (Borrows, 2010). Yunkaporta (2019) articulates story as a codified system through which governance and knowledging occurs. Neale and Kelly (2020) explore songlines as a mnemonic device, a law that keeps culture present and living no matter where you are located. Indigenous Australian academics such as McKinnon (2016) and Nakata (2012) share their thoughts on how storying is central to identity and nationhood. In Indigenous contexts, storying functions as jurisprudence and mnemonic law rather than as “literature” in the Western aesthetic sense—a distinction foregrounded by Borrows (2010) and Yunkaporta (2019) and institutionally curated through projects such as *Songlines: The Power and Promise* (Neale & Kelly, 2020). In contributing to intercultural understandings, these Indigenous meaning-making practices also chronicle crucial identity-related factors and failures (Woody, 2003). In doing so, these collective understandings shed light on the relationships between Indigenous customary law and Western law; law and literature; and legal scholarship and story-telling (Meyer, 2014). In summary, all branches of Henriques' Tree of Knowledge contribute to human development.

Given complex national public policy issues are increasingly subject to global (Inayatullah, 2004), technology-driven societal and legislative impacts, Leavy, a US sociologist, novelist, and independent scholar, advocates the need for innovative research approaches (Leavy, 2020). These approaches require

the well-developed, interdisciplinary literature-underpinned critical thinking skills necessary to dodge “dinosaur thinking” (Leavy, 2019). In tandem, adopting a “today is always better than some day thinking” approach is fundamental (Inayatullah, 2004, pp. 86–87). It is these flexible cognitive approaches that demonstrate the value in researchers venturing outside of their respective comfort zones. Accordingly, the Judicial Intersectionality Theory enabled the paper’s authors to “let the mind wander and make free associations that are necessary for generating stimulating questions, and for coming up with the comparisons that led to discovery” (Strauss & Corbin, 1994). Motivating this is the central research question:

How can Indigenous Australian artists’ current inadequate copyright protections be improved in ways that recognise, preserve, protect, and promote their traditional knowledge and cultural expressions in the future?

In addressing this question, traditional knowledge refers to the “body of knowledge that is developed, sustained, and passed on from generation to generation, often forming part of the Indigenous community’s cultural or spiritual identity” (Fitzgerald & Eliades, 2015, p. 17). Symbolically and synergistically, cultural expressions acknowledge artists’ traditional knowledge systems, finding form and function in artworks, dance, designs, music, signs, and symbols. With these interconnections in mind, the next section leads with Leavy’s advice for researchers.

### 3.2 Adopting a Holistic Approach to Theoretical Development

Start with the [research] question itself. Observe carefully and systematically, questioning what you normally take for granted . . . Apply different perspectives, including a micro-level frame and a broad, macro-level frame. Remain flexible—you may need to adapt along the way. Challenge your assumptions. Value every discipline without privileging any. Value experiential or lay knowledge. Work collaboratively and respectfully. Bring in voices from the relevant literature, looking for synergies and dissonances, because the sum is bigger than the parts. Context matters: how pieces of information sit in relation to one another creates meaning. Reality can never be fully captured, but we can do our best to interpret and represent it (Leavy, 2019, p. 144).

Leavy’s wise counsel underpins Judicial Intersectionality Theory and its practice in the legal research space. In a nutshell, this “purposeful eclecticism” approach to knowledge collection provides researchers with the confidence to access arts, humanities, natural sciences, and social sciences literature. In capturing, cracking, and considering these kernels of knowledge, accessing this literature provides the “fuel” with which to feel and focus, to forge and fashion equitable legal positions, and to further the best interests of all citizens. In the context of this paper, and in understanding the breadth and depth of the intersectionality-highlighted difficulties that vulnerable people experience, viewing through multi-level, theoretical framing is fundamental. For example, accessing Maslow’s framework for personal development, psychological growth, and happiness would pose problems for many vulnerable people (Maslow, 1943, 1971). In ascending order, this framework of human needs comprises physiological, safety, belongingness and love, esteem, and self-actualisation. In line with Maslow, Bronfenbrenner’s *Ecological Systems Theory* involves interrelationships that range from the immediate surroundings (e.g., family, home, and employment situations) to broader societal structures (e.g., economic, legal, and

political) within and between the five levels of systemic influence: micro, meso, exo, macro, and chrono (Bronfenbrenner, 1979). Put simply, Bronfenbrenner's human development theory argues that an individual's social environment influences every aspect of their life (Fraser, 1998; Grant Jr., 2023). Similarly, Suneetha, Panjwani, and Parker identify the importance of microaggressions, those "brief verbal or behavioral derogatory everyday exchanges that are either intentional or unintentional from a person and/or an environment toward a minority individual" that impact on a person's developmental needs (Manyam et al., 2019). In generating a further obstacle for disadvantaged individuals attempting to scale Maslow's five rungs of human needs, Kolko-Rivera provides a sixth, aspirational one (Kolko-Rivera, 2006). Described as self-transcendence, it is a step beyond self-actualisation, one that far exceeds ordinary or conventional physical needs and expectations. In keeping with previous human development, health, and well-being theorists, Antonovsky's Salutogenesis conceptual framework is significant (Antonovsky, 1980; Bauer et al., 2020). As Idan, Eriksson, and Al-Yagon explain, the Salutogenic approach focuses on individuals' Generalised Resistance Resources (Idan et al., 2017). These resources, essential in managing personal and professional challenges, are also essential in maintaining physical and psychological health and well-being. In offering a comparable theoretical position, Idan, Eriksson, and Al-Yagon use the Salutogenic framework to emphasise the political and social encounters of Black Americans, discussing the structural disparities that can diminish people's resilience resources and coping capabilities. Similarly, many Indigenous Australians encounter structural inequalities such as the restricted availability of culturally-appropriate education; healthcare; and legal rights in multiple life system domains. In gaining deeper understandings of the ways in which collective influences can magnify and multiply disadvantage in marginalized communities, Mullainathan and Shafir's psychologically-based Scarcity construct is an essential Judicial Intersectionality tenet (Mullainathan, 2014). This construct explores how people's deficits, their lack of sufficient mental resources or "bandwidths," impact on their coping reserves and strategies. These cognitive, attentional, executive control, and working memory resources, when limited in range and capacity, tend to produce a range of poorly-considered, systematic, and counter-productive behavioural responses that affect people's decision-making, planning, and problem-solving abilities.

Purposeful eclecticism demonstrates the benefits of exploring interdisciplinary literature and discovering perspectives that inform theoretical development. In line with Martin Luther King Jr's assertion that "darkness cannot drive out darkness; only light can do that," the following section highlights law and literature-related connections (Hall, 2024). In doing so, an expanded law school curricula that may assist in bringing about attitudinal, behavioral, and procedural changes in the legal-learning and writing area is spotlighted (Edelman, 2002).

#### 4. Law and Literature

When asked to provide advice to law students, US Supreme Court Justice Ginsburg responded (Ginsburg, 2021):

People who are pre-law sometimes say, "well should I major in government?" And my answer is major in whatever you like: music, art. Become a well-educated person, someone who appreciates good literature, who knows a little about philosophy... the law is a learned profession

... You are being a counselor and to be a wise counselor you should be a well-educated, well-read person.

Having studied European literature with Vladimir Nabokov at Cornell University in the 1950s, it is noteworthy that Ginsburg would later acknowledge the influence his lectureship and writing approach would have on her judicial works (Ginsburg, 2021, p. 153). From these studies, Ginsburg recognized the need for the critical thinking skills necessary to question and analyze judicial briefs, and in turn, deliver well-considered affirming or dissenting opinions. Ginsburg also recognized that Nabokov was “in love with the sound of words” (Ginsburg, 2021, p. 152). In harnessing the power of words and language, along with conveying legal meaning with persistence and precision in eloquent, evocative, and erudite ways, Ginsburg understood that “the written work is what endures” (Ginsburg, 2021, p. 14). Accordingly, Nabokov’s position that being a good writer is grounded in first being a good reader is proven (Nabokov, 2002; Toker, 1989).

Judicial Intersectionality values all literature. For example, in popular literature, novels dominate in countries with strong domestic crime fiction traditions such as Australia, the UK, and the US. As such, fiction, along with film adaptations, plays, and television series, allows readers and viewers to confront issues that may have previously been unavailable to them or ignored in the past. Interestingly, the crime fiction genre is far from exhausted in its capacity to resonate with readers when exploring connections between criminal activities and legal decision-making processes. In terms of literary works with universal appeal, the US Pulitzer Prize-winning writer Barbara Kingsolver considers that as well as informing and educating her readers, her works provide a moral compass towards the concept of “living life deliberately” (Thoreau, 1888). Drawing attention to ethically, judicially, legally, morally, and socially-unfair issues that impact across and within people’s life domain systems. Kingsolver asserts that:

fiction cultivates empathy for a theoretical stranger by putting you inside his head, allowing you to experience life from his point of view. It can broaden your view of gender, ethnicity, place and time, power and vulnerability, things that influence social interaction’, adding that ‘what could be more political than that (Kingsolver, 2003)?

With this literary activism driver in mind, Kingsolver’s works are underpinned by “lyrical description, the arresting metaphor, the dialogue that falls so true on the ear it breaks your heart, [and includes weaving a] plot that winds up exactly where it should” (Kingsolver, 2003, p. 252). As an astute contemporary social commentary, Kingsolver’s *Demon Copperhead* concerns a US Appalachian man trying to overcome his opioid addiction, government apathy, and institutional failures; along with the moral collapse of his community (Kingsolver, 2022). These traditions underscore the limits of drawing unqualified parallels between Anglophone transatlantic literary forms and Indigenous narrative systems, while nevertheless affirming story’s shared role in shaping legal consciousness and moral reasoning. In being socially disadvantaged and marginalised, *Demon* must deal with relentless deprivation and destitution. This contemporary tale provides a re-interpretation of Charles Dickens’ 1850 novel *David Copperfield* which highlighted the systemic levels of abuse and exploitation of vulnerable and marginalized communities in the UK (Kuran et al., 2020). Unsurprisingly, and in keeping with the tenets of Judicial Intersectionality, *Demon*’s communities have correspondingly higher rates of criminal prosecution, imprisonment, and recidivism than other US regions. In strengthening a literature-

informed Judicial Intersectionality positioning, Vesselova acknowledges that while “every person has an array of views on essential problems concerning his or her understanding of the world at large and of particular topics, such as faith, language, existence, ethics, mind, and time” (Vesselova, 2014); unlike many people, “writers are privileged to have the ability of expressing these views on paper, in the form of fiction, drama or poetry.”

#### 4.1 Legal Writing Challenges: Balancing the Scales of Justice

Given Ginsburg’s advice that lawyers should be well-educated and well-read, recognizing and understanding the social justice perspectives in literature provides valuable research data. In keeping with the writing positions advocated by Kingsolver, Leavy, and Vesselova, and as Posner points out, law and literature interconnections “bring together two overlapping bodies of thought, the legal and the literary, that have much in common including an emphasis on rhetoric” (Posner, 1998). Rhetoric is generally considered as the “stylistic devices used to persuade readers or listeners to believe or to do something” (Shapiro, 2016, p. 331). As such, the law-literature nexus is crucial in expanding the writing skills that are invaluable for all legal community stakeholders. That said, using a literature-underpinned Judicial Intersectionality approach would result in law-makers; legal professionals (i.e. barristers, lawyers, and solicitors); the judiciary; legal and social commentators; and researchers’ recognizing, developing, and demonstrating these skills. In doing so, gaining interdisciplinary perspectives would assist in meaning-making, generating alternative ways of seeing, thinking, and writing (Frankl, 1984). In relation to Stolen Generations cases, it could be argued that legal professionals failed to formulate narratives that forcefully-framed their clients multiple, intersecting levels of disadvantage, discrimination, and dispossession; explore Indigenous traditional knowledge and cultural perspectives; and adequately bring-to life their seldom-heard ‘voices’. As Shurbutt, a US academic, activist, and social critic makes clear (Shurbutt, 2021):

Good writing then is no trivial endeavor—it can change our opinions, our minds, or our hearts; it can champion those whose voices are seldom heard; it can unhinge governments that need serious adjustment. It can challenge the status quo or embolden us to ‘live life deliberately,’ as Thoreau was wont to say.

In keeping with Dow, Kingsolver, and Shurbutt’s literary objectives provide a way in which to meet and mitigate the jurisprudential challenges in human rights and social justice arenas (Dow, 2014). Accordingly, trial lawyers are encouraged to develop and forcefully-execute ethically underpinned “fighting words” in their legal narrative (Needham, 2022; Posner, 1998). These syllogistically aligned narratives enable lawyers to detail the issues or legal problems to be resolved; state the applicable legal rules (Yin & Desierto, 2016); apply these rules to their clients’ factual accounts; and deliver well-grounded, convincing conclusions. Collectively, this narrative approach aims to deliver positive judicial decision-making processes and legal outcomes:

In Western legal systems, the nexus between law and the judiciary, and between literature and writing well, is a dynamic and future-framing one. By way of example, in preparing legal judgements and handing down precedent-setting decisions in common law cases, Ginsburg viewed her writing style as professionally satisfying, considering that “the law is something I think I deal with well . . . to help

perhaps make people's lives a little better." In turn, this writing style has been being widely-acclaimed (Ginsburg et al., 2016). However, as the practice of law may be considered an inexact science, preventing legal wrongs can be challenging.

#### 4.1.2 Balancing the Scales of Justice: Preventing Miscarriages of Justice

In a constantly changing geopolitical world characterized by increasing uncertainty and decreasing cultural, legal, political, and social cohesion, employing a Judicial Intersectionality theoretical approach is crucial. This approach, in conjunction with legal professionals demonstrating cognitive flexibility skills, provides ways in which to conduct equitable and fair criminal proceedings, as well as preparing ethically-robust legal narratives. In learning from perspectives gleaned from interdisciplinary literature, narrative elements involve: repositioning legal issues; rebalancing legal probabilities against public interests; reframing judicial decision-making processes; acknowledging the powerful national and global media influences implicit in hardcopy and online platforms (e.g. deep fakes, disinformation, and misinformation); and taking into account the highly-medialised, polarized, and politicized public conversations evident in contemporary legal matters (Joseph, 2015; Young, 2023).

By way of contrast, the 2003 *Folbigg* criminal case in New South Wales (NSW) involving the unexplained deaths of accused's four young children, provides an example of prosecutors' adherence to inflexible-thinking approaches. Had NSW prosecutors adopted a Judicial Intersectionality positioning, they may have been emboldened to move outside their legal comfort zones by considering possible linkages between the young children's deaths and research findings in the natural sciences, relating to genetics and heredity factors. Adopting this theoretical positioning may have also resulted in prosecutors looking beyond legal situations that place undue reliance on so-called "coincidence evidence." Crucially, Cunliffe points out that unexplained infant deaths had been problematical in Western criminal justice systems since the early 1990s (Cunliffe, 2011). Nevertheless, prosecutors contended that the deaths of the Folbigg children defied credibility and coincidence, instead placing emphasis on the accused's likely actions and state-of-mind. As such, prosecutors argued their case based principally on gendered thinking about mothers and motherhood; on the flawed use of available evidence (ie Folbigg's diary entries); and on underestimating the pervasive influence of powerful global and national online networks in shaping public opinion on the controversial societal matters implicit in this case. Regrettably, Folbigg's conviction ultimately resulted in a 20-year-long miscarriage of justice. Following the final, successful appeal in 2022, in conjunction with jurisprudential commentary, the NSW Government established a Criminal Cases Review Commission (Roberts & Weathered, 2009). Continuing world-wide incidences of miscarriages of justice such as the Folbigg case contribute to citizens' losing confidence in their nation's legal systems (Hoyle, 2020).

#### 4.1.3 Rebalancing the Scales of Justice: Law Schools' Roles and Responsibilities

**Broadening Students' Professional Skill Sets.** Consistent with the previous discussion on the Judicial Intersectionality philosophy, with Ginsburg's recommendations to students, and with the cognitive flexibility skillsets inherent in the reading-to-writing legal research relationships, Wesley questions the role and responsibilities of tertiary institutions (Wesley, 2023). There is an urgent need, Wesley argues, for courses that foster the intellectual curiosity and critical thinking skills that are crucial in students'

successfully navigating contemporary learning environments. In the legal domain, these skills include analyzing, reasoning, and writing with creativity and innovation; being knowledgeably aware of the world around them; and becoming independent researchers, critical thinkers, and constructive writers. Importantly, Kaag and van Belle discuss algorithms and artificial intelligence (AI) systems (2024). In terms of possible perils for academic students, these include: using generative AI tools such as chatbots that may “train” on less credible, non-peer reviewed “research” material with uncertain quality control standards; facilitating easier access to plagiarism; undermining ethical attitudes towards learning and assessment practices; and indirectly condoning IP infringements given AI tools may provide copyrighted material with neither payment nor acknowledgement to their original creators; and failing to fully appreciate the discriminatory practices inherent in using predictive AI technologies that inform decisioning-making processes in Western police and prison systems (Walsh, 2023).

**Social Justice Matters.** In keeping with Judicial Intersectionality and its interdisciplinary literature positioning, Kaag and van Belle consider this connectivity highlights the importance of narratives that contribute to maintaining always-speaking legal systems that are in the best legal and social interests of their citizens (Goldfarb, 2013; Kaag & Belle, 2024; Meagher, 2020). However, achieving this objective represents a substantial jurisprudential challenge that involves all legal community stakeholders. In meeting this challenge, intersectionality-positioned contributions, as Choo and Ferree explain, use three distinct theoretical and methodological ways in which examine exclusion and inequalities in relation to wider legal and societal impacts (Choo & Ferree, 2010). Similarly, Bix considers that intersectionality, while controversial, explores themes concerned with “different affiliations and different oppression” in social and legal situations that illustrate the “perspective of the poor and [the] marginalised,” typically historically oppressed, “voiceless” people.

In turn, these jurisprudential contributions recall Alpert and his social justice argument that not everyone can benefit in today’s highly-competitive and powerful social order (Alpert, 2022). To counter mounting inequalities, Alpert contends that communities must work together in more collaborative ways to help ensure that what he termed “a good enough life” is achievable for all citizens. Failure to do so, Alpert argues, means that many individuals in their race-to-the-top endeavours may do so at the expense of exacerbating the social inequities and injustices existing in vulnerable communities in Western countries (Malik, 2023). This theoretical commentary aligns with Western Sydney University’s Law and Literature unit which engages students with legally-underpinned works ranging from the Viking sagas to contemporary novels by Indigenous Australian writer-activists. According to Kaag and van Belle (2024), books, as written conversations, “form the foundation of human knowledge-cooperative, forward-thinking, actionable, and revelatory.” Accordingly, it is argued that law school curricula would benefit from providing specific programs that assist students in identifying and understanding the contextual factors contributing to legal and social inequalities and injustices in increasingly uncertain and unstable Western societies.

In concluding this law and literature-related discussion, we draw attention to Posner’s emphasis on the crucial interconnections that include: (i) understanding how literary and popular works integrate the rules of law with public expectations in complex societal contexts (Purcell, 2017); (ii) developing textual, analytical skills; (iii) making connections between intersecting life system impacts (Daley,

2019); (iv) exploring synergies in criminal law and popular literature in activist literary works (Churchwell, 2023); and understanding the influences wielded by media systems (Pearson, 2023), films, investigative journalism, and television series. However, as US journalist and former White House Secretary Bill Moyers contends “[w]hen injustice becomes law, resistance becomes duty.” Equally, responding to this civic responsibility is a shared one, as Ginsburg (et al., 2016, p. 230) acknowledges:

It takes that combustion of ground moral power and political courage and wisdom, and the ability of the system, the courts and others, to move in sync... Well, I think the people start it. The court is a reactive institution, and it doesn't have a platform. Doesn't say, "This year we're gonna deal with this or that issue." It takes the complaints that are out there. So it has to start with the people, and if the people don't care, nothing is gonna happen.

Ginsburg's words are appropriate given the next section discusses the injustices associated with Indigenous Australians' Stolen Generations period (Booth, 2011; Burnside, 2007). While there was a clamour for change during these journeys, Australia's criminal justice system was unable or unwilling “to move in sync.”

### **5. The Stolen Generations Period and Judicial Intersectionality Positioning**

The collective, negative impacts associated with the Stolen Generations period have been well-documented in legal research (Martin, 2018). In particular, the previously-mentioned *Bringing Them Home Report* published in 1997 (Kremers, 2004; Productivity Commission, 2020, 2023), documented the decades of physical and psychological harm that many Indigenous Australian children experienced when forcibly removed from their families and placed in government care that included authorised homes, pastoral stations, and church-run institutions (Krieken, 1999). Importantly, this report also included written and verbal accounts provided by over five hundred Indigenous Australians. In devastating detail, these personal stories recounted addiction and substance abuse; widespread incidence of family violence and sexual abuse; increased levels of mental illness and self-harming behaviour; and intergenerational trauma. When viewed through a Judicial Intersectionality lens, these “legal” but discriminatory practices gave rise to intersecting levels of disadvantage, discrimination, and dispossession that included: (i) community and cultural deprivations; (ii) health and disability-related considerations (e.g. cognitive, intellectual, physical, and psychological); (iii) racial discrimination (e.g. disenfranchisement, dislocation, and disempowerment); (iv) geographic isolation from their families and communities which in turn undermined their social and spiritual well-being; (v) disconnection from traditional Indigenous knowledge and cultural expressions underpinned by customary laws; (vi) disproportionately high levels of socio-economic disparities between Indigenous and non-Indigenous Australians (e.g. rates of criminal convictions, imprisonment, and recidivism (adults and juveniles)); and (vii) subsequent dysfunctional and disruptive personal and local community relationships (e.g. domestic violence, family breakdowns, and sexual abuse).

In acknowledging the legal obstacles confronting Stolen Generations' claimants, the report made 54 recommendations. To date, few of these recommendations have been adopted (Gueta, 2021). As most Stolen Generations cases were unsuccessful, Indigenous Australians' confidence and trust (Citrin &

Stoker, 2018; Whiteley et al., 2016) in the nation's legal systems declined, with litigation being described "as a poor judge of history" (O'Connor, 2001).

### 5.1 An Overview of Stolen Generations Litigation

Under the broad terms of the *Aborigines Act 1905* (WA) enacted from circa 1918, the State of Western Australia assumed the legal authority to remove and detain Indigenous Australian children, referred to as half-castes, in institutional homes or in service till the age of sixteen (Blay, 2021). This authority also included guardianship and duty-of-care responsibilities that were intended to prevent civil wrongs happening to those in their care (Jones, 2020). Despite years of litigation, it was not until the *Trevorrow v South Australia* decision in 2007 that a measure of legal success was achieved (Cunneen & Grix, 2003). As Cunneen and Grix point out, litigation limitations such as the heavy evidentiary requirements and the burden of proof responsibilities facing Indigenous Australian plaintiffs were significant legal obstacles. In addition, plaintiffs had to deal with: (i) re-telling and re-living their past psychological traumas in Australian States and Territories' adversarial court systems; (ii) managing the financial costs; (iii) dealing with litigation within statutory time limitations; and (iv) providing satisfactory government and private written evidence, major cultural problem given Indigenous Australians' oral traditions essentially detail biographical events. Additionally, the court's failure to recognise cross-cultural differences during legal proceedings was problematical. Cultural differences include conceptions of rapport, lack of eye contact, preferred language use, personal space, periods of silence, shame, stigma, and touch (Queensland Government, 2015). Put simply, the clash between Indigenous customary laws, traditional knowledge, and spiritual belief systems and Western black letter law was, and continues to be, a complex, catch-22 quandary.

In relation to the *Cubillo* and *Williams* cases, Cornwall emphasises the negative emotional, physical health, and psychological impacts, along with managing the personal and social repercussions in terms of re-establishing their identities (Atkinson, 2005). In turn, these impacts were exacerbated by having their lives opened for scrutiny as part of a major public controversy, only to be disappointed by what the legal system could offer. Kune discusses the legal deterrents and impediments confronting plaintiffs, linking the Stolen Generations period in the context of wider social Indigenous injustices, that of colonisation and defending history (Kune, 2011). These injustices resulted in dispossession, disempowerment, and discrimination. As Kune notes, the:

Debate about the existence and extent of the Stolen Generations raises broader concerns about the potential lack of access to justice both for child victims of wrongful removal and for Aboriginal Australians generally. The debate also highlights the inability of the legal system to provide justice for Indigenous and non-Indigenous Australian children who have been the victims of systemic wrongdoing.

By way of example, in *Kruger v The Commonwealth* (*Kruger v The Commonwealth*, 1997), the litigants argued a cause of action based on the constitutional validity of legislation that legally justified the removal of Indigenous children from their extended families, community systems, and most importantly, as Indigenous artist and writer Ambelin Kwaymullina explained, from their Country concept connections that have been (Murphy, 2016):

altered due to colonialism: Aboriginal people of Australia call our homelands our Countries, and for us, Country is much more than a place. It is an ever moving, ever shifting, ever changing network of relationships; a pattern comprised of other patterns in which everything is interrelated and interdependent. Country is both alive and conscious and the source of all consciousness. It is the web of relationships that is our world.

However, while typifying the clash between Western law and Indigenous customary systems, this case was rejected by the High Court for two reasons. Firstly, that s 122 of the Australian Constitution accommodated this action. Secondly, that the breach of a constitutional right does not amount to a novel cause of action in relation to damages outside of contract or tort law. In *Cubillo v The Commonwealth*, it is noted that while many findings were favourable, most were reversed on appeal. However, the principal legal obstacle facing Stolen Generations' litigants involved overcoming the judicial view that the "standards of the time" (Inge, 1995) justified the forced removal practices carried out in "the best interests of the [Indigenous Australian] child."

In relation to dealing with long-winded, convoluted legislative processes, Kelly focuses on whether interpreting legislation necessarily says results in the same outcome each time "it speaks" in judicial decision-making deliberations (Kelly, 2021). In using the "always speaking" metaphor, Kelly asserts that more precise drafting of legislation is warranted. Accordingly, Kelly advocates for installing a traffic-lights system approach at key legislative junctions that signals the need to "slow down" decision-making process in order to reconsider and "speak" to the new facts and situations as they arise. Essentially, Kelly's slowed-down, traffic-lights system is similar to Judicial Intersectionality "pausing," a theoretical approach that generates cognitive space during the research process. This approach signals the need for greater appreciation of the complexities implicit in Indigenous Australians' life and legal journeys, along with providing greater flexibility in judicial decision-making processes. This approach also highlights the past interpretative problems, "particularly for old legislation where the meaning of words or phrases may have changed radically since the time of enactment." However, as "it's in vain to recall the past, unless it works some influence upon the present" the Australian Government, and in turn its citizens, must acknowledge and address the inconvenient historical, legal, political, and societal truths associated with the Stolen Generations period.

## 5.2 Parliamentary Acknowledgement of Australia's Stolen Generations Past

While the Stolen Generations period and its legal, political, and social justice failings were well-known within the three arms of the Australian Government (Parliament, the Executive Government, and the Judiciary), it was not until 1992 that the then Treasurer, Paul Keating spoke publicly about the nation's colonial past. In his now famous *Redfern Address*, Keating spoke of "the abuses that have occurred since the time of colonisation to the Aboriginal and Torres Strait Islander peoples of Australia," citing a "failure of imagination on the part of settler colonial society to be able to imagine these things being "done to us" (National Film and Sound Archive of Australia, 1992). In turn, Keating conveys a message of "hope for significant change in Australian society," pointing out the "growing appreciation of the diversity and depth of cultures in Indigenous Australia, of the richness of our national life and identity with the participation of Indigenous people, their music, art and dance." However, it was not until 2008 that the then Prime Minister of Australia, Kevin Rudd, provided an apology in parliament (Rudd, 2008):

For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry. To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry. And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

Despite research advocating for legal change, with the passage of time and with legally enshrined roadblocks firmly in place, further successful litigation is unlikely (McIntyre, 2020). Nevertheless, in channelling the *I Have a Dream* speech by US activist and advocate for equality Martin Luther King Jnr, Justice Kirby outlines his Australian dream (Justice Kirby, 2004; St. Louis Public Radio, 2010):

I dream of a legal system that brings true justice to the indigenous people of Australia. Despite Mabo, and the efforts of many parliaments, governments and of the courts, the law of Australia has often failed the Aboriginal people ... I have a dream that the law is not barren. That it can sometimes still yield justice to indigenous Australians in their cases. Law can be a shelter and a support in the quest for true equality in our Commonwealth without which 'peace, order and good government' will sometimes seem an empty vessel.

With this judicial dreaming in mind, the next section discusses Indigenous artists' copyright journeys through the prism of Judicial Intersectionality.

## 6. Intellectual Property

As Indigenous Australians' Stolen Generations legal journeys were concluding, albeit unsatisfactorily, equally inadequate tortuous and tortious journeys in the copyright domain were beginning. While the IP area has evolved philosophically and pragmatically over time (Stewart et al., 2018, pp. 16–21), piecemeal copyright changes have paid insufficient attention to Indigenous Australian-related issues requiring substantial innovation (Fitzgerald & Eliades, 2015; Productivity Commission, 2015). Crucially, these issues revolve around marrying the apparent irreconcilable differences between two legal systems. The first is Indigenous Australians' traditional cultural knowledge and customary laws embedded in Dreamtime artifacts, artworks, song lines, and storytelling, while the second legal system is Australia's copyright "black letter law" (McCallum & Timmins, 2021). As such, any future IP protections must acknowledge and respect these differences, while developing a regime capable of meshing the strengths of each system in a supportive and sustainable manner. In failing to close the gaps in copyright legislation and rectify the "grey" areas in legal interpretation and judicial decision-making, associated inequalities and injustices continued, serving to magnify the multiple intersecting levels of social and economic disadvantage and discrimination within many already-marginalised Indigenous communities (Attorney-General's Department, 2022).<sup>1</sup> As such, the following discussion underscores the significance of the aphorism that "history will not give us the answers, but it will certainly help to focus our questions and our understanding of the forces at work in the world today" (Beevor, 2010). In addressing these questions, the "glue" that connects these discussions is Judicial Intersectionality, a theoretical approach

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<sup>1</sup> See <https://www.niaa.gov.au/news-centre/indigenous-affairs/commonwealth-closing-gap-annual-report-2022>, and William Van Caenegem. (2019). *Intellectual and industrial property law*. LexisNexis Butterworth Australia, pp. 421-461 for solutions to remedy gaps in IP law.

generating social justice understandings that are supported by interdisciplinary, literature-informed perspectives.

### 6.1 Protecting Indigenous Australians' Traditional Knowledge and Cultural Expressions

As Stewart et al explains, under Indigenous customary law, the right to create artworks depicting creation and dreaming stories, and to use pre-existing designs and totems of the clan, resides in the traditional owners as custodians of the images (Stewart et al., 2018, pp. 15–27). The traditional owners have the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and under what terms. Importantly, the extent to which an Indigenous artwork can be reproduced will depend on the subject matter of the work given (Janke, 1995):

Our [Indigenous] art is indeed an integral part of our life. It is not separate from the rest of our life; it is the expression of a total cultural consciousness and is interwoven into the texture of our everyday life. In song and dance, in rock engraving and bark painting, we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structure of our society (Leschziner & Brett, 2021).

As Dudgeon et al. make clear, Australia's Indigenous cultural traditions have a long and unrivalled historical and sociological global positioning, one that dates to between 50,000 and 65,000 years (Dudgeon et al., 2010). Importantly, the authors contend that rather than signalling the end of Indigenous traditions, new forms of creative expressions that reclaim and reconnect in bringing "vitality to older cultural themes and values" are necessary. As such, while Indigenous Australians occupy a unique and highly contested position in Australian history, Indigenous artists must deal with on-going IP and copyright limitations. Crucially, an early Government-commissioned *Report of the Contemporary Visual Arts and Craft Inquiry* (2002) emphasised the national importance of acknowledging the over 65,000 years of continuous existence and the cultural knowledge that finds expression in Indigenous Australians' artistic works (Parliament of Australia, 2002). These underpinnings, along with traditional belief and customary law systems, continue to inform and nurture their artistic endeavours (Langton & Corn, 2023). Taking many forms, these endeavours include cultural identity and spiritual elements; the use of Indigenous signs and symbols; designs, drawings, paintings, and sculptures; carvings and rock engravings; dance and ceremonial performances; music; and yarnning and story-telling that is based on Creation and Dreamtime beliefs developed through their oral tradition (Dreamtime Aboriginal Art Library, 2023). Section 10 (1) of the *Copyright Act* defines "artistic work" as including, among other things, paintings, sculptures, drawings, engravings, and photographs, regardless of artistic quality. This foundational definition sets the stage for understanding the scope and for protection of artistic works under Australian copyright law. Building on these protections, Stewart et al. emphasise how this definition has been interpreted and applied within the legal framework, exploring the nuances and implications of what constitutes an "artistic work" (Stewart et al., 2018, p. 167). In highlighting its significance in legal discourse, the authors further emphasise that in relation to Indigenous cultural expressions, this definition covers all works not specifically mentioned in the Act, that is, works irrespective of whether deemed to be of artistic quality or not; and works, regardless of their category as long as there is a degree of originality in craftsmanship and form.

Importantly, Fitzgerald and Eliades discuss Indigenous Australians' accompanying cultural and spiritual connections, past and present, that are implicit in the Country concept.

Ironically, despite an over five-decades-long discussion on IP's failure to recognise and protect Indigenous artists' traditional knowledge and cultural expressions (Stoianoff & Roy, 2015), government statements and corporate sponsorship initiatives lauded the increasing importance of their financial contributions to the Australian economy (Productivity Commission, 2022). In keeping with these views, discussion now focuses on selected, historical and emblematic examples of unauthorised cultural appropriation of Indigenous artworks. For example, the Hon John von Doussa QC drew attention to the Australian Government's introduction of its one dollar note in 1966. The reverse side of this note depicted designs originating from a bark painting by David Malangi, an Arnhem Land artist.

In terms of compensation, Dr Coombes personally paid Malangi AUD \$1,000 equivalent for his artwork; furnished him with fishing equipment; and presented him with a silver medallion. While these compensation measures smack of patronisation and tokenism when viewed through a post-colonial prism, the unauthorised use of Indigenous traditional knowledge and cultural practices was recognised. In 1966 the Reserve Bank's currency-producing processes were likely to have been in keeping with societal attitudes and standards of the time, those embedded in national, state and territory governments' laws, legislation, and enforcement practices in effect during the Stolen Generations period.

In reflecting on another Reserve Bank case, *Yumbulul v Reserve Bank of Australia Limited* (1991) FCA 332—aka the Yumbulul case—trading practice causes of actions included misleading or deceptive conduct; demonstrating unconscionable conduct; and determining whether the plaintiff was misled in the nature of licencing and sub-licencing matters and their intended uses. With the reproduction of the *Morning Star Pole* artwork that collectively belonged to the Galpu clan, the copyright issue related to whether, in the first instance, the plaintiff in the case was authorized to licence it under Indigenous customary laws. Subsequently licenced to a second party, the design was used in a controversial and culturally insensitive manner that drew attention to Australia's highly contested, settlement histories. In this contentious case, the designs were reproduced on the Bicentennial AUD \$10 note that celebrated European settlement on traditional Bidjegal and Gadigal Country on 27 January 1788. The court found for the defendant, determining that it was the Indigenous Australian plaintiff's responsibility to fully understand the licencing agreement he had signed. In terms of communal ownership of the artwork's designs, the court did not provide a determination. However, it did acknowledge the licencing complexities and the legal gap in terms of individual versus communal ownership and protections for Indigenous artworks. Implicit in this gap was the failure to integrate or legally mesh Indigenous customary laws with Western legal systems (Prazmowska, 2020), an on-going issue that Blakeney described as acknowledgment that Australian copyright law "does not provide adequate recognition of Aboriginal community claims that regulate the reproduction and use of works which are essentially communal in origin," adding that "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators" (Blakeney, 2015).

Further examples of significant copyright infringement cases include *Milpurrurru, Marika* (1994) 54 FCR 240 - aka the Milpurrurra case - *Payunka & Public Trustee for the Northern Territory v Indofurn*

*Pty Ltd, Bethune, King & Rylands Pty Ltd*, and *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193—aka the *Bulun Bulun* case—both cases involving unauthorised cultural appropriation, with substantial sections of design elements being reproduced, without consent or licence, in overseas-produced carpets (Hardie, 1998). These businesses then imported the goods back into Australia for sale. These cases again drew attention to the clash between Indigenous customary laws that encompassed communal ownership rights of artworks and artists' implicit clan responsibilities, set against Western copyright laws. In the *Bulun Bulun* case, the court held that there was no legal recognition of communal rights, but held evidence related to Indigenous artists' customary rights, spiritual belief systems, and resultant obligations.

### 6.2.3 Western Australian Copyright Perspectives

This section highlights deliberate, well-planned instances of Indigenous Australian art frauds and cultural misappropriations. For instance, the following case attracted world-wide attention in 1997. Elizabeth Durack, a non-Indigenous Australian artist, produced an extended series of paintings under the name of Eddie Burrup, a fictitious Indigenous persona she created. Upon admitting the subterfuge, Durack was strongly criticised, but she never apologised, justifying her actions as having developed through her extensive contact with Indigenous people and their artworks (Casement, 2016).

A member of the prominent Western Australian colonising Durack family, and a younger sister of Dame Mary Durack (Durack, 2018), the art fraud by the lesser-known artist and writer Elizabeth created artistic divides that continue to this day (P. Jackson, 2020). In this unusual case, rather than appropriating the artworks or designs of an Indigenous Australian artist, Durack appropriated an Indigenous identity that included providing an historical account of Eddie Burrup's artistic and cultural background (O'Connell, 2001). While one art historian referred to Durack's cultural identity appropriation as an "homage" and as a "concrete exemplar for reconciliation between two cultures and two cultures," another considered the hoax provided a "timely opportunity to examine some of the ways in which colonial politics of dispossession, race, gender and an undoubted sympathy for Aboriginal people play out through the work and thought of an individual artist," Durack herself maintained that "Eddie Burrup" was an artistic "device" and a "nom de plume" in her paintings (Beare, 2017). However, given Durack's artworks were sold as, and submitted as genuine Indigenous works in a few art competitions, Indigenous artists' viewed things differently, protesting her arrogance and her assumed right to commit a fraud that involved artistic, cultural, and identity misappropriations. In addition, Durack's artistic endeavours constitute the tort of passing off, carrying out deliberate misappropriations that fit with Lord Diplock's definition in the landmark *Advocaat* criminal case (Stewart et al., 2018, pp. 567–654). According to Casement, Durack avoided criminal prosecution as there were limited financial impacts on the Indigenous art market and an absence of documented evidence or claims of financial loss.

Interestingly, in the early 1990s, the Kimberley region of Western Australia (WA) witnessed another case of Indigenous cultural and identity misappropriation, albeit in the literary domain. Similarly, this case that did not result in criminal prosecutions, despite the male, non-Indigenous writer deliberately passing himself off as a female Indigenous writer using the pseudonym of Wanda Koolmatrie (Koolmatrie, 2004). Well-planned and executed, the fraudulent writer "borrowed" from WA's Stolen Generations past, with a narrative claiming that Koolmatrie was removed from her family and placed in

foster care with a non-Indigenous family. However, the deception was discovered when the author failed to have a second literary work accepted for publication. Ironically, in arguing reverse discrimination, the author claimed that the fraud was initiated as part of exposing identity politics in Australian literature, founded on the belief that it would be easier to become a published author as an Indigenous rather than a non-Indigenous person. In a further variation on the literary misappropriation theme, another case involved a US writer's fictionalised account of her "adventures" when traveling with Indigenous Australians in remote country regions. Once again, no criminal prosecutions resulted despite Koolmatrie's admission that this fraudulent narrative was fabricated for an unquestioning US readership (Morgan, 2004). Collectively, this limited discussion highlights the need for holistic copyright protections that comprehensively protect Indigenous Australians' IP rights.

#### 6.2.4 A Holistic Intellectual Property Regime for Indigenous Australians

In accord with the Canadian and US post-colonial experiences, research indicates that many Western countries appear unable or unwilling to deal with post-settlement matters; to recognise and address an uncomfortable past; and to navigate the inherent difficulties in producing policies and regulations that drive positive legislative changes in legislative domains such as IP. For example, in the US context Kremers uses the Native North Americans idiomatic saying "speaking with a forked tongue," interpreted as meaning that governments say one thing but carry out another (Kremers, 2004). However, in considering the complex legal, political, and social issues implicit in IP legislation, the following Australian judicial view is significant:

Reiterating a famous Aristotelian phrase, the High Court has stated that equality before the law "requires, so far as the law permits, that like cases be treated alike ... [and], where the law permits, differential treatment of persons according to differences between them" ... In this sense, equal justice requires us to develop procedures and practices to accommodate cultural or linguistic differences that may hinder effective participation in the legal system (Bathurst, 2017).

In turn, Kremers asserts that leadership and political will is paramount in delivering holistic, Indigenous legislative reforms:

The United States, with its long tradition of ideological, religious, and racial diversity, should also take the lead in including indigenous representatives in all TKGRF [Traditional Knowledge, Genetic Resources, and Folklore] discussions ... adjustments in domestic law and policy would germinate a new fluidity of thinking among U.S. lawyers, judges, and scholars, not just in the TKGRF arena, but in many other areas of law as well ... [and] that more creative and expansive legal thinking is a necessary prerequisite to visionary problem-solving.

However, when reflecting on the national leadership failures between the 1960s and 1970s, public intellectual Donald Horne contends that "Australia is a lucky country run mainly by second rate people who share its luck" and that "most of its leaders (in all fields) so lack curiosity about the events that surround them that they are often taken by surprise" when having to deal with them (Horne, 2008). By way of example, the Government's lack of political ambition and integrity is illustrated by its avoidance of historical truth-telling in addressing the past:

A tragedy of the European colonisation of Australia that commenced with the arrival of The First Fleet from England in 1778 is that the new arrivals did not recognise that the Indigenous population of Australia lived in and under a complex matrix of well-established laws and practices based on a close spiritual relationship with the land; that their lives revolved around their communal clan ownership and connection with carefully defined land areas; and that sophisticated forms of "ceremony" or "folklore" encompassing creation stories, art, dance and song, were of central importance to their way of life (Sentina et al., 2017).

This paper considers that a bespoke, standalone *sui generis*-like regime to protect the entirety of Indigenous Australians' traditional knowledge and cultural expressions is warranted. *Sui generis* is a Latin term meaning "of one's own kind . . . unique, in a class of its own" used to describe a form of protection that exists outside of existing legal frameworks, international conventions, and treaties. However, it must be noted that global and national IP commentary on this regime ranges from positive to negative and somewhere in between. While *sui generis* is neither novel nor new, its adoption would effectively answer this paper's central research question by recognizing, preserving, protecting, and promoting Indigenous artists' traditional knowledge and cultural expressions. As such, protection would include their wide-ranging tangible (i.e., physical) and intangible (i.e., non-physical) cultural contributions in the IP domain. In doing so, there is ample legislative and social justice validation for extending this "legitimate differential treatment" to Indigenous Australians. Well-positioned within restorative justice systems, this legislative justification also acknowledges: the unresolved clashes between two cultures and their respective cultural, legal, judicial, and societal systems; the intersecting levels of racial discrimination and disadvantage in the arts and business domains; and the on-going, intergenerational repercussions in terms of cultural, legal, political, and socio-economic impacts. While resolving past IP inequalities and injustices and pre-empting future ones, implementing *sui generis* would require significant and comprehensive consultative processes. However, as Janke notes in one of many early IP reports (Janke, 1998):

A holistic, realistic and culturally appropriate approach should be taken to resolving the problem, an approach that allows Indigenous people the autonomy to develop—within the various local, regional and national power structures—mechanisms which maintain and strengthen their cultures and ensure that they have something to pass on to future generations for the benefit of all Australians.

Australia's 2023 Referendum, as outlined in the next section, aligns with Janke's legislative recommendations.

### **6.2.5 Australia's 2023 Referendum: A Unique Opportunity to Improve Intellectual Property Protection for Indigenous Artists**

Advocating for a *sui generis*-like regime aligned pragmatically and philosophically with the Australian Government's 14 October 2023 Referendum calling for Constitutional recognition of Indigenous Australians (ABC Radio, 2022). Demonstrating leadership and national political will, this Referendum responded to decades-long calls to rectify social justices and inequalities, disadvantages and dispossession, by establishing an Indigenous-led Voice to Parliament advisory committee. In contrast

with previous law and literature observations, the nation's legal, political, and societal stars were seemingly in alignment and striving to work in sync. This Referendum symbolised the Government's commitment to journeys with Indigenous citizens' that incorporated the Uluru Statement from the Heart (First Nations National Constitutional Convention, 2017) ; amendments that would constitutionally-enshrine the Voice to Parliament advisory committee to inform on all Indigenous Australian matters; with subsequent journey stages that included a Makarrata or Treaty together with Truth-Telling processes relating to White Australia's black history.

By incorporating a *sui generis*-like IP system, these changes would signal the starting point in Australia's recognition, reconciliation, and relationship-building journeys with its Indigenous citizens.<sup>2</sup> In doing so, Australia's famous and highly-successful "It's Time" political rallying call of 1972<sup>3</sup> is recalled and in the context of this paper, Referendum success would represent a once-in-a-generation opportunity to usher in another significant period of social justice change (Australian Screen 1972). However, it is noteworthy that few Australian referenda have been successful.<sup>4</sup> In repeating history, the 2023 Referendum was resoundingly rejected, with Australian National University's survey data finding that nearly 40 per cent of legal votes rejected change for two major reasons. Firstly, there was significant reluctance to provide special rights to Indigenous Australians that were unavailable to other citizens. Secondly, while acknowledging Indigenous Australians' long-standing cultural, economic, and social disadvantages, a majority of voters considered that having a Voice to Parliament enshrined in the Constitution was an inappropriate model to bring about change. Accordingly, all States and the Northern Territory voted "No," with only the Australian Capital Territory voting "Yes" to Constitutional change.

Given the unsuccessful Referendum outcome, implementing a traditional *sui generis* copyright regime is best-placed to preserve, protect, promote, support, and sustain Indigenous artists' tangible artworks and cultural expressions that give form to their centuries-old intangible traditional knowledge and belief systems as significant subjects that matter. As such, this pragmatic and culturally-specific legislative solution would deliver an always speaking, best legal and social interest approach. It would also be underpinned by *UNDRIP*, article 31, with copyright protections that include legally guaranteed rights such maintaining, controlling, protecting, and developing their traditional knowledge systems and

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<sup>2</sup> See also Hossien Esmaeili, Gus Worby, & Simone Ulalka Tur. (2016), *Indigenous Australians, social justice and legal reform: Honouring Elliott Johnston*, Federation Press; Bruce Pascoe & David Horton. (2018). *The little red yellow black book: An introduction to Indigenous Australia* (Australian Institute of Aboriginal and Torres Strait Islander Studies).

<sup>3</sup> The film clip is described as selected arts and entertainment-world celebrities, led by Alison McCallum, singing the Australian Labor Party's "It's Time" song during the 1972 Federal Government election campaign.

<sup>4</sup> See Bain Attwood and Andrew Markus. (2007). *The 1967 referendum: Race, power and the Australian Constitution*, Aboriginal Studies Press. See also Geoffrey Sawer, *The Australian Constitution*. (1972). (ustralian Government Publishing Service. For a discussion on the fact that while Australia has held 18 referenda that included 42 separate proposals for change, given the difficulties implicit in s 128 of the Constitution, only five referenda have been successful, see Electoral Commission of Australia, "Referendum Dates and Results," *Referendums* (Web Page, 19 June 2023), [https://www.aec.gov.au/elections/referendums/referendum\\_dates\\_and\\_results.htm](https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm)

<sup>5</sup> See Greg Dyett, "The Voice Referendum Dominated Australian Politics in 2023." (30 December 2023). *SBS News* where the Australian Prime Minister urged Australians to come together after the Referendum failure, considering that the result "doesn't define us" and respecting "the decision of the Australian people and the democratic process that has delivered it." <https://www.sbs.com.au/news/podcast-episode/the-voice-referendum-dominated-australian-politics-in-2023/mgfe07rjj>

cultural expressions. Also included are human and genetic resources, traditional medicines, and Indigenous people's extensive knowledge of fauna and flora. Importantly, verbal and non-verbal communication, cultural practices, designs, performing arts, and storytelling are paramount in these protections.

### Conclusion

This paper's introductory discussion highlighted the Australian rule of law, and the interpretive powers of legislative wording designed to be "always speaking," always being in the best legal and social interests of all its citizens. Paradoxically, the codified legislative language and wording, its public policies, and its regulations have often presented barriers to achieving this legal system imperative. In relation to the research focus in this paper, Indigenous artists' jurisprudential copyright challenges included dealing with legislative "grey" areas that exacerbated judicial tensions when interpreting statutory legislation. In addition, legal wording typically supported Western notions of IP creativity and originality, while the communal ownership and iterative nature of Indigenous artists' cultural expressions were overlooked (McGrath et al., 2023). However, Judicial Intersectionality provided a guiding light, a way to navigate the research terrain and address this jurisprudential challenge. Underpinned by harnessing the power of words and language in arts, humanities, natural sciences, and social sciences data resources, the historical and contemporary perspectives generated contributed to this paper's research conversation. As Posner points out in terms of law and literature interrelationships, all narratives matter because they contribute to the rule of law that functions to ensure that civil rights and liberties are embedded in democratic conversations and legal commitments (Berger, 2008). In line with points-in-time research referred to as backdating or using an historical approach to legislation, the Australian Government's failed 2023 Referendum provided a textbook example. This call-to-action was in keeping with maximising common good jurisprudential goals by way of constitutional amendments and subsequent legal system changes. While a constitutionally enshrined Voice to Parliament may have righted the wrongs of past, failed legal journeys, that pathway no longer exists.

With this paper's IP legal dreaming in mind, future-focused, bespoke *sui generis* legislation warrants implementation. However, it is acknowledged that the politically and socially divisive *Referendum* discussion raised issues relating to equal citizenship principles and rights before the law. It also intensified and magnified identity politics matters, along with triggering social cohesion fault lines in relation to diversity, equity, and inclusion. Nevertheless, only Indigenous Australians can historically and legally lay claim to having truly unique cultural, moral, political, and spiritual connections with the land now referred to as Australia. Accordingly, there can be no legitimate or reasonable argument that adopting a *sui generis* IP framework protecting Indigenous traditional knowledge and cultural expressions would impact adversely on non-Indigenous Australians. Aligning with the view that "seeing comes before words," this framework will help ensure that Indigenous artists' protections in Australian cultural landscapes, and in global arts' systems, will be securely established and systematically strengthened.

While the 2023 Referendum vision has been vanquished, this paper connects Kirby's Legal Dream with Joseph Conrad's perspectives on "the power of the written word, to make you [the reader] hear, to make you feel . . . before all, to make you see . . . that glimpse of truth for which you have forgotten to

ask” (Conrad, 2008). Importantly these views align with the Judicial Intersectionality Theory, with positioning that demonstrates imaginative, innovative, and intuitive ways of seeing, understanding, and meeting legal system and jurisprudential challenges.

In concluding this research conversation, Robert Frost’s poem *The Road Not Taken* and its parallels with the Referendum result invites reflection (Frost & Untermeyer, 1946). Overwhelmingly, voters chose to travel Frost’s typically taken, status quo road by rejecting Constitutional change for Indigenous Australians and rebuffing the Voice to Parliament model for delivering social justice change. Conversely, this paper chose to travel Frost’s alternative, obstacle-strewn road to improving IP protections for Indigenous artists. In doing so, this paper considers that ultimately, all Australian citizens will benefit along the way. As Frost wrote:

I shall be telling this with a sigh  
Somewhere ages and ages hence:  
Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.

The Uluru Statement from the Heart (First Nations National Constitutional Convention, 2017) teaches us that nothing can be achieved without truth-telling, structural recognition, and walking together. Story and law are not binary modes of meaning-making, they are dialogical pathways through which dignity, recognition, and responsibility flow. Indigenous Australian copyright can use Judicial Intersectionality so we can listen differently. A jurisprudence that centres Indigenous systems can provide the space to acknowledge history, create principled legal reform, and tell a different story—one that is restorative.

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