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RACIST IDEOLOGY AND HASHTAG ACTIVISM: THE COLLISION OF ART, BRAND, AND LAW IN PETER DREW'S AUSSIE FOLK HERO, MONGA KHAN

KATHY BOWREY*

Racist ideology is reproduced in daily communications and in art. Racism is also challenged. In this essay I explore the way ideology is present in Peter Drew's 'Monga Khan' posters — artwork designed to provoke critical reflection about representations of race and Australian identity. Part I discusses the ideological engagement Peter Drew anticipated arising from his art 'hactivism' and critical reception of the work. I compare Drew's oeuvre to 1970–80s protest posters, showing the effects of greater exposure to intellectual property constructs, marketing, and commercial branding on the ambition of art activism. Part II shows how attribution practices in the art world and media connect the politics of hactivist art with commodification. I discuss how 'Blackness', represented by Drew in the form of challenge to racialized ideas of Australian identity, functions as Drew's 'second skin', or brand identity. Subaltern voices also challenge the authority of white artists to speak for the 'Other', but due to the way today we attribute ownership to image and voice, these protests metamorphise into a passing parade of objectified cultural difference. Part III draws out the implications for law, addressing the socio-legal reproduction of ideology, outside of relations normally identified with the lived experience of law.

* With thanks to Peter Drew, Chips Mackinolty and Toni Robertson for their generosity in permitting use of their imagery, and to Lloyd Sharp, Toni Lester, Irene Watson, Marie Hadley, Hyo Yoon Kang, Hai-Yuean Tualima and the anonymous reviewers for their insights.

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I INTRODUCTION

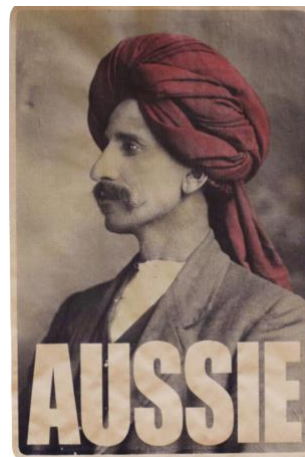


Figure 1 (left): *Monga Khan: Application for Certificate Exemption from Dictation Test*, Photograph, Unknown, 1916: NAA: MT19/4, 1916, Monga Khan.

Figure 2 (right): *Monga Khan: Series 2016*, Poster, Peter Drew 2016. Reproduced by permission of Peter Drew.

In 2015, Australian artist Peter Drew, a self-proclaimed ‘poster boy of hashtag activism’, selected an image from the National Archive of Australia, dating from the period of the White Australia Policy. The White Australia Policy (1901–1966) sought to protect ‘racial purity’ by subjecting ‘undesirable’ people to a dictation test. This test was not necessarily delivered in English; it could be in any prescribed language, thus magnifying the potential for racial discrimination. But it was also possible for persons of good character to apply for an exemption. Drew selected one of two headshots of a man whose application to be exempt from the test was successful.

Australian national identity has long been imagined and debated in terms of 'a triangulated relationship between white Australians, an internal Indigenous Other and an external non-white Other'.¹ Drew chose his image following nationwide 'Reclaim Australia' rallies, which called for further restrictions to Australia's refugee and migration policy and an end to non-white immigration. Rallies had Islamophobic overtones. He says:

The moment I found this photo I knew I had my hero image. He just looked so proud and stoic... We can only imagine what it was like to be the man in the image. But that's the difference between history and mythology. Mythology is where my curiosity catches fire....Through mythology he can become more than an identity, he can become a personality. He can embody a story that modern Australians cherish and desire to emulate. The man's name was Monga Khan.²

Drew was already a highly successful art activist and poster campaigner for social justice and human rights, with a mainstream media presence. He attracted crowd funding to support the reproduction of 1000 posters and to support travel associated with plastering them across major Australian cities.

In this essay, I analyse the production and circulation of the Monga Khan poster series exploring how the relationship between ideology, street art and political activism is impacted by our exposure to marketing and commercial branding. Ideology is discussed in terms of national and personal politics, and as encompassing artistic practices that seek to lay bare values, attitudes and subject positions present in the ideas we hold and observe around us. Drew describes his art practice as a form of propaganda. His art is not site specific. It is designed to be reproduced at large, disseminated far and wide, and recirculated in the form of digital copies made by those who stumble across it in the real world and online, aided by hashtag references ubiquitous to social media. Drew's incorporation of slogans and hashtags into his artistic practice connects his imagery to contemporary political issues. Adoption of the same slogans and hashtags also turns spectators into participants, as they are attracted and repelled by the cultural

¹ Catriona Elder, 'Invaders, Illegals and Aliens: Imagining Exclusion in a "White Australia"' (2003) 7 *Law Text Culture* 221, 223-4 (references omitted).

² Peter Drew, *Poster Boy. A Memoir of Art and Politics* (Black Inc, 2019) 98.

connotations suggested by #mongakhan; #peterdrewarts; #aussie; #realaussie; #realaustralians; and #auspol. These posters aim to provoke a conversation about Australian identity and an awareness of self that can be made visible through thinking about others' positive and negative responses.

The interest stimulated by Drew's rephotographing portraits found in government files, discussing the works in the media, reposting on social media and the creation of merchandise featuring the same imagery, allows us to glimpse the everyday process where ideology is made, remade and reinvented. I move well beyond the scope of the artist and critics' discussion about the ideological dimensions of Australian national identity challenged by and reproduced in the *Monga Khan* posters, to show how, alongside engaging in political discussion about Australian racism, ideologies of authorship, private property, and commercial branding are embedded in the same public discourse about the poster art.

The methodology adopted decentres legal taxonomy and moves beyond neat scholarly approaches to reading the *Monga Khan* posters with reference to pre-constituted themes such as commercialisation and branding, the racism of the immigration act, protest art shaping legal discourses, intellectual property issues in archival work, critical race intellectual property, and more. My investigation moves across and in-between these topics; rather than beginning by locating art within legal taxonomies then commentating on the race implications of these framings for society, my gaze is turned the other way. I want to highlight the social fabrication of legal thinking as expressed in everyday political commitments. I begin with the political ambition of art activists, and the place, role, and impact of law as they understand and engage it. I then trace the broader impact of socio-legal constructs on the production, circulation, and reception of their communications.

This framing does not privilege expert readings of law above those of non-experts. This displacement creates a space to consider how the production and reproduction of socio-legal constructs and ideology ground the authority of law. As we interact in the world, we all navigate a 'lawscape'. How we make sense of it has implications for political action.

The essay is in three parts. Part I discusses the social fabrication of legal thinking as expressed in everyday political commitments. I begin with the political ambition of art activists, and the place, role, and impact of law as they understand and engage it. I then trace the broader impact of socio-legal constructs on the production, circulation, and reception of their communications and engagement Peter Drew anticipated arising from his Monga Khan campaign, and critical reception of the work. Part II considers the same terrain, showing how attribution practices in the art world and media connect the politics of hactivist art with commodification. This part relies on Drew's own description so far as possible, so as not to distort his motivations.³ I discuss how a connection to commodification is enabled by intellectual property constructs that attach to any work of art such as authorship, privacy, public domain, and private property rights. Intellectual property constructs engage racialized optics, meaning the central tenet of the White Australia Policy using 'face value' as the criteria of inclusion, is reproduced in everyday engagement with Drew's artistic practice. What drives this engagement is Drew's branding strategy. A brand signifies a connection between the purveyor of a message, the content communicated and the informed reader who comes to identify hallmarks or features that allow for easy identification of the brand identity. I argue that, courtesy of the new reproductions of Monga Khan and the application of hashtags, #Aussie functions as Drew's second skin or brand. This involves the imposition of a mythologised racist representation of 'Blackness', in the space that is supposed to advance critical reflection about the man Monga Khan, Australian race politics, and national identity.

Part III draws out the implications for law, addressing the socio-legal reproduction of ideology, outside of relations normally identified with the lived experience of law. In comparing Drew's hactivist art with activist poster art of the 20th century, I explore the significance of a deeper penetration of intellectual property ideologies into everyday life. The communicative function of the political poster has changed. Our receptivity to branding in public space and in art has implications on the struggle to combat racism. 'Blackness' and other signifiers of cultural difference represented in street imagery designed to challenge racism become the brand of the activist artist, perpetuating the

³ Peter Drew had the opportunity to read the article prior to publication and did not object to the characterisation offered here. Of course, this does not mean he endorses this analysis in any way.

objectification of the 'Other'. This turns recognition of difference into a mechanism that facilitates commodification, reinscribing the cultural commons with racialised hierarchies of inclusion.

II ART ACTIVISM: MAKING MONGA KHAN FAMOUS

It is usually hard to identify the space where ideology lives and is reproduced as we go about in our days because perception, real and borrowed memories and positionality blur. Activist art, posters with slogans provocatively appropriating public space, can directly engage us in thinking about ideology through the immediate frame of reference, the site of display and through what is said and left unsaid. The Monga Khan poster is an intervention that shouts out to an undifferentiated and anonymous Australian public where those who look are assumed to already be familiar with contentious debates about Australian identity, Islamophobia, and race. For this audience, the poster suggests a juxtaposition between the man in the portrait and the 'Aussie' badge and, at one and the same time, questions the place of visual representation in history and in the present, by playing with black and white.

Drew's recontextualisation of the archival file image omits and adds information to provoke discussion of racism and oppression associated with ascriptions of Australian national identity and belonging. The Monga Khan image was one of six faces turned into posters, selected from a process described as 'strip-mining the archive'.⁴ A paradox sits at the heart of the artistic practice. In 'making Monga Khan famous' the subject was picked from obscurity and put on display where his known identity is hidden.⁵ The reason the man was a photographic subject, and the bureaucratic reasons for the image's production and retention on file, is not apparent, at least to those who came across the poster without already knowing about it from advance media coverage based upon an accompanying campaign video.⁶ Choosing to sepia tint the mass reproduction signals historic distance, whilst the slogan resonates in the present by inviting the viewer to accept or reject the

⁴ Peter Drew, 'Strip-Mining the Archive' in Drew (n 2) 93-99.

⁵ Ibid 115.

⁶ The video poses the question, 'Did Australia inherit its identity from the people who created the White Australia policy, or does "Aussie" have more to do with the people who survived it?'. Ibid.

politics implicit in the association. The red colourisation of the turban is designed to help catch the eye and further highlight the dissonance between the subject in the image and stereotypic projections of white Australia, as well as connect with contemporary debates around signifiers of racial and religious difference and intolerance. It is interesting that Drew selected the shot where the man is looking away, not what would have been a more confrontational one, where Monga Khan holds the gaze of the viewer (Figure 1). While we now know that as an Australian resident Monga Khan was seeking an exemption from a racist dictation test, it is the poster artist who, in adding the slogan, brands this subject as 'Aussie'.

Drew says the intention of propaganda is to provoke, and the purpose of art is to create myths that are open to interpretation. The posters were not necessarily designed to jolt the viewer into scholarly reflection on Australian history, national identity, migration or even refugee policy. On a personal level, it was his way of 'getting his anger out'.⁷ In terms of political ambition, Drew is ambivalent about the political value of provoking empathy for the 'other'. Seeking to empower the subject and others that look like them is also not the point of activist poster art:

*In the game of image virality, the aim is to flatter or empower the viewer, compelling them to share your image with their social network – and they won't do that if they're crying. You want to keep your images fast, shallow, and ironic... Luckily for me, today's culture rewards the fast and shallow.*⁸

The poster provoked media and academic discussion of Australia's South Asian and Islamic history as well as connections with Aboriginal Australia.⁹ The fast and shallow engagement practice was also criticised, in particular by South Asian commentators. There is a web page that seeks to dispel Drew's myth making and tell the true story:

⁷ Drew (n 2)139.

⁸ Ibid 27.

⁹ See, e.g., Daniel Browning, 'Behind the portraits of the cult "Aussie" poster series', *The Art Show* Radio National, Australian Broadcasting Corporation 26 May 2021; David Hansen, 'Only connect: Chunder Loo, Monga Khan and Australia's fugitive South Asians' (2018) 61 *Griffith Review* 153.

Monga Khan was a Victorian hawker but not a cameleer. He was not an Afghan but is described as a British Moslem Indian from Punjab who came to Australia in 1895.¹⁰

The presumed inclusiveness of the address to the Australian public was deconstructed in an interesting insight by Reena Gupta:

The posters imbue the white Australian who consumes them with a different mode of inhabiting Australia compared to those who are accepted into it. They empower the former with the fantasy of authority to dictate the terms by which the latter may inhabit it.

The campaign's attempt to accept the non-white body as Aussie therefore doesn't subvert racist practices of exclusion but in fact, works to reproduce the assumption that 'real' Aussies are white. Paradoxically then, Drew's poster campaign celebrates a form of inclusiveness that reinforces a dichotomy between white Australians and their non-white counterparts. The poster campaign reproduces the racial divisions that it wants to transcend.¹¹

Such criticism can help progress an understanding of Australian history and the ongoing ideological foundations to racism. But while critics challenge Drew's right to claim Monga Khan's image and story, these critiques are blunted by the way they intersect with cultural and legal norms applied when we recognise a work of art. Peter Drew's artistic practice was not simply related to public exhibition of an image of a man. He has a sophisticated understanding of media practice and the communication practices of the art world:

Today we view history through the lens of the market. As a result, we see only a succession of novelties rather than a battle of ideas. Others have to mimic the academic jargon of the curatorial clergy who run the state-sponsored art institutions and offer refuge to artists who mutter the correct incantations.

¹⁰ 'The Legend of MONGA KHAN – No! the true story' (online, 19 March 2016) <<http://australianindianhistory.com/monga-khan/>>.

¹¹ Reena Gupta, 'Welcome! (Kind of.) The problem with being declared "Aussie"' (Overland, 23 March 2017) <<https://overland.org.au/2017/03/welcome-kind-of-the-problem-with-being-declared-aussie/>>.

*Increasingly those mutterings favour ideology over aesthetic or spiritual aspirations. My posters are a symptom of this trend.*¹²

His posters did not only appear on walls in public spaces— copies of posters entered public gallery collections.¹³ The artist talk associated with the ‘Ian Potter Centre: NGV Australia ‘We Change the World’’ exhibition did not include acerbic commentary about curators and their tastes. Rather, it traverses very conventional ground — the artist’s biography, art school connections, artistic intention, production process, street art, political art, emotional impact, and public reception of works.¹⁴ Drew also produced a range of merchandise;¹⁵ for example, posters, t-shirts, and a collection of commissioned short stories, poems, and illustrations by 36 artists and writers, inspired by the ‘Aussie’ recreation of Monga Khan, from excess money raised by crowd funding.¹⁶

Hashtag activism adopts a different form of public engagement to older, more radical forms of art activism personified in the liberated creativity of the ‘Situationists’ and their successors.¹⁷ For example, the Sydney’s Earthworks Poster Collective (Tin Sheds), produced political posters 1972-1980 in support of land rights, gay and lesbian rights, against racism, domestic violence and in support of the unemployed, workers, education, and nuclear disarmament. The posters communicate overt ideological positions using striking and provocative imagery to advertise events, concerts, and fundraisers.¹⁸ They did not invite introspection but direct action, generating ‘social capital’ linked to grassroots political campaigns. The design studio is described as a product of:

The anti-elitist decade of the 1970s which saw an ‘anti-commodity’ push in the wider art world, where artists produced work such as happenings, performance, installations, video, and silk-screened posters, that were ephemeral by nature. Poster artists also quoted or appropriated other art works in their posters as a

¹² Drew (n 2) 5.

¹³ *Monga Khan 1916, Series 2016*, Poster, Peter Drew, 1916. Art Gallery of South Australia, Accession Number 20167G103. National Gallery of Victoria, Accession Number 2020.185.

¹⁴ National Gallery of Victoria, ‘Peter Drew: In Conversation (with Katharina Prugger)’ 17 June 2021.

¹⁵ See Peter Drew, ‘Peter Drew Arts’ (online) <<https://www.peterdrewarts.com>>.

¹⁶ Drew (n 2) 117. The title is *The Legend of Monga Khan, An Aussie Folk Hero* (Ibid).

¹⁷ See Tom McDonough, *Guy Debord and the Situationist International: Texts and Documents* (MIT Press, 2002).

¹⁸ Olga Tsara, ‘The Art of Revolution. Political Posters in the Red Planet Archive’ (2005) 75 *Law Trobe Journal* 94, 95.

*strategy to undermine the art world's worship of originality. The aim was to produce works which were more interesting for their 'making' or effect, than for their collectability.*¹⁹

These posters were participatory in making and circulation. Works were unsigned, income generated was shared, and the attribution to a collective signified the posters as the creation of community-based art workers. They were designed to involve audiences in politics and cultural activity, alongside any effect they might have on private subjectivities. They were the people's art.

Some of the posters also ended up in gallery collections and featured in curated exhibitions, with artist names researched and credited.²⁰ But with these posters the artist's voice remains subjugated to that of the community connection signalled by the object of curation. They document past political agency, site specific cultural activity and unfinished business surrounding the ideologies promoted and contested by the groups and campaigns they were a product of.

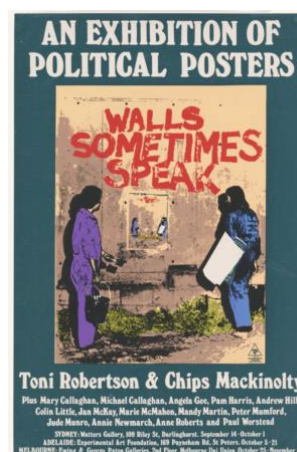


Figure 3 (left): *Land Rights Dance*, Poster, Chips Mackinolyt, 1977. Reproduced by permission of Chips Mackinolyt and Toni Robertson.

Figure 4 (right): *Walls Sometimes Speak: An Exhibition of Political Posters*, Poster, Chips Mackinolyt, 1977. Reproduced by permission of Chips Mackinolyt and Toni Robertson.

¹⁹ Ibid 94.

²⁰ Collection of posters produced by Earthworks Poster Collective and others, ca. 1978-1989; SLNSW: Record Identifier 9PQNK80n; Earthworks Poster Collective, History I - Writing on the fence is better than sitting on the fence, 1977, Museum of Contemporary Art Australia (MCA): Accession Number 2006.32.101.

Drew engages the public and the reproduction of ideology in a different way. Whereas the Earthworks posters point to externally organised political action and community agency, Drew describes his activism as ‘an imaginary battle against the city’.²¹ The action he seeks is a journey of self-knowledge, for artist and viewer. His book explains his art in the context of plotting a personal and family life story. He is also aware that most purchasers of the volume would be inclined to look to him for guidance on poster art activism. In this mode he presents like a streetwise impresario, promoting a brand of art advocacy that could lead to competition with the ‘Master’ for street real estate. This activity could build connections to other individuals and lead to a broader political embrace of historical outsiders to Australian national identity.

Drew’s outreach activity is best explained with reference to the commissioned book, which was an extension of the poster campaign attempting to stimulate further debate about race and, in particular, respond to allegations of cultural appropriation implicit in the Monga Khan myth making. In curating a collection of tributes, his idea was ‘to launch Monga Khan into collective ownership’.²² The language used signals letting go of this creation. The front matter of the book says:

The Publisher and the Authors acknowledge that the copyright of the fictional character name ‘Monga Khan’ hereafter belongs in the public domain, meaning that anyone can publish works of fiction featuring a character of that name.

This information sits in tension below a conventional copyright notice ‘© Peter Drew Arts 2016’. As the quote itself acknowledges, the name ‘Monga Khan’ was already public property or part of the commons. It is not possible to copyright a fictional two-word name.²³ And of course, this is not really a fictional name at all. The Monga Khan image is also in the public domain, as Drew had presumed when he selected the image.²⁴ A

²¹ Drew (n 2) 134.

²² Ibid 130.

²³ Real names and short phrases are too insubstantial to qualify as original literary works under the *Copyright Act 1968* (Cth) s 32. It is only possible to ‘own’ a name if it is registered as a trademark, that is, where the owner intends to use the sign in trade, and it can be very difficult to prove to the Registrar that a real personal name is distinctive enough to qualify as a trademark, *Trade Marks Act 1995* (Cth) ss 17, 41.

²⁴ Not all images held in the National Archive are in the public domain. When Drew first reproduced the poster in 2016, copyright duration was for seventy years after the death of the (unknown) author/taker of the photograph. It is not known if the image was still in copyright, although it was often wrongly presumed that copyright expired 50 years after it was first made. As an unpublished image it may have

presentation of ostensibly new ‘collective ownership’ of the fictional Monga Khan — indicated by an emphatic ‘hereafter’ — simply accords with what was always the legal status quo, where the private property rights of the author arise from labouring on knowledge or ideas that form the public domain or cultural commons. So why bother with it?

It is easy to dismiss Drew’s engagement with law here as a technical newbie mistake. However, this view presumes the authority of formal legal understandings of copyright law as the ‘correct’ way of engaging and ordering social and cultural life. Respecting law is somewhat irrelevant to Drew’s practice, as an artist where negotiating an ‘outsider’ relationship to law is integral to a practice of claiming the street as public space to debate ideology and its effects on Australian society. Further:

The role of intellectual property rights in controlling the boundary between private and public spaces has a political significance that tends to be obscured by their legal character as private property rights...the power of the intellectual property system has been harnessed not only to the economic interests of multinational corporate actors, but also to the interests of that community that imagines itself as the Western nation state.²⁵

Drew’s fictional legal notice reimagines the public function of Australian copyright. This novel assertion of collective legal entitlement to participate in the creation of Monga Khan mythology opens up discussion about the character of public dialogue.

One subtext of his legal notice is that the realm of creativity is under threat by historians and other truth pedallers who wish to speak for the ‘real’ Monga Khan, wanting to discourage racially motivated mythmaking by cultural outsiders. Drew explains it this

retained copyright, and most likely it was the estate of Monga Khan who owned the right to it, as a commissioned image. However, since Drew made the poster, the law has changed. 2019 reforms changed the status of copyright in unpublished photographs where the author is unknown. For these works copyright expires at the end of seventy years after it was first made. This means the copyright term for the Monga Khan photograph is $1916 + 70 = 1987$. Thus, the poster may have been an infringing work between 2016-2018 but due to law reform the photograph it was based upon entered the public domain in 1988, *Copyright Act 1968* (Cth) ss 33(2), 35(5).

²⁵ Fiona Macmillan, *Intellectual and Cultural Property. Between Market and Community* (Routledge, 2021) 33.

way. In emphasising collective ownership of the Monga Khan of fiction the book is designed to inspire other members of the public to invent their own Monga Khan stories. Nationalist expressions of belonging and solidarity with once alienated subjects can undermine attempts to renew the White Australia politics of history. Drew considers the volume itself was a creative success, but he was disappointed in terms of it serving as a wider political inspiration. On reflection he says, the problem was with the book format. Unlike a poster, the book wasn't 'getting into anyone's face', not 'ruffling enough feathers,' and as self-publisher he also had no major book distribution network to help it find a wider audience. He concludes that his concerns about cultural appropriation and the danger it posed to creativity were all in his head.²⁶

However, unauthorised creative re-imaginings of 'Aussie' did emerge. The most famous 'copycat' posters featured two famous Australian outlaws, Victorian ISIS recruit Jake Bilardi and ex pat sex offender and children's entertainer, Rolf Harris. The publicity they generated and uncertainty as to the motivations behind them presented further opportunities for Drew to engage the media and advocate for an inclusive vision for Australia. He described the copycat poster efforts disparagingly as undergraduate expressions of anti-nationalism:

The objective of my posters was to celebrate some Australians that historically had been forgotten and to celebrate the history of diversity in this country. [The new posters are] that silly point of view that if something is not 100 per cent good, that you can't enjoy it.²⁷

But there is a political strategy that sits behind the churlish dismissal of works that talk back to his theme. His statement needs to be read in line with his 'Ten Rules for Great Propaganda'. This includes the following advice:

Empathise with your enemy.

²⁶ Drew (n 2) 133.

²⁷ Lucy Battersby, 'Aussie poster campaign hijacked by disturbing images of Rolf Harris and 'Jihadi Jake'', *The Age* (online, 2 June 2016) <<https://www.theage.com.au/national/victoria/aussie-poster-campaign-hijacked-by-disturbing-images-of-rolf-harris-and-jihadi-jake-20160602-gp9w3b.html>>.

*Try to understand the people you oppose because they're not really your enemy. — they're actually you with a different worldview. What is it they are really trying to protect? Maybe you can show them another way to protect it.*²⁸

In his media appearances, Drew is very consistent in presenting an optimistic view of Australian identity, to engage a broad audience in discussion about local politics of cultural inclusion.

Drew's art activism seeks to raise questions about ideology in the everyday reproduction of national identity and the positive public function of poster art. But the mythmaking that revolves around Monga Khan also reproduces other power dynamics that stem from the attribution of authorship in a work of postmodern art. Alongside building an amorphous political connection with other Australians, Drew is building a brand identity. The section below explores the everyday reproduction of ideologies that support commodification of art and the brand identity of the artist. This amplifies the voice of the artist amongst others that challenge his right to speak for the 'other'.

III CREATIVE ATTRIBUTION AND BRAND DYNAMICS

Modern intellectual property law developed alongside a differentiation of works of mechanical labour from those of mental labour.²⁹ Well before there were laws protecting brands, there were authors.

In explaining the author function, Foucault suggests:

The coming into being of the notion of 'author' constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences ... an author's name is not simply an element in a discourse (capable of being either subject or object, of being replaced by a pronoun, and the like); it performs a certain role with regard to narrative discourse, assuring a classificatory function. Such a name permits one to group

²⁸ Drew (n 2) 243.

²⁹ Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999).

*together a certain number of texts, define them, differentiate them from and contrast them to others.*³⁰

Copyright laws afford a special status to original works attributed to an expressive individual. Original works are housed within a taxonomy that groups together literary, dramatic, musical, and artistic works. For reasons discussed below, expansion of the category of fine art to include photography was long and contested.³¹ Whilst the inclusion of photography is now accepted, there remains potential for significant confusion about attribution of ownership where a postmodern work includes a repurposed photograph. This is especially so where the reuse is of an historic image.

In the 19th century, the conditions of production of a photographic image challenged identification of an original artist or author. Analogue photography sits uneasily amongst other works of fine art because it is difficult to determine who is the producer of an original work, and who is responsible for the fixation of an original image required for copyright to subsist. The camera operator does not produce an image when they take the shot. An entirely different labourer might be responsible for directing the sitting, staging, and arranging the lighting. A different party again might produce the photograph plate or negative and print copies. These processes occur in the absence of a positive original, to which copyright might affix.³² The practice of commissioning a photographic portrait adds another layer of complication. The consumer contract between the photographer or studio might accommodate the interests of the commissioner, including the privacy of the sitter. In 1911, British law determined that the owner of the negative, normally the studio, was the first owner of copyright, but in the case of commissioned portraits, the commissioner — most normally the sitter — should own the copyright.³³ This principle was reflected in Australian law when Monga Khan arranged for his studio sitting.³⁴ But, so far as we know, Monga Khan never published the photograph, which, under the Act,

³⁰ Michel Foucault, 'What is an author?' in JV Harari (ed) *Textual Strategies: Perspectives in Poststructuralist Criticism* (Cornell University Press, 1979) 141.

³¹ Elena Cooper, *Art and Modern Copyright. The Contested Image* (Cambridge University Press, 2018), 20 ff.

³² Kathy Bowrey, 'Copyright, Photography and Computer Works - the fiction of an original expression' (1995) 18(2) *University of New South Wales Law Journal* 278.

³³ *Copyright Act 1911* (UK) ss 5, 21. See also Cooper (n 31) 49-106.

³⁴ *Copyright Act 1911* (UK) ss 5, 21 was in force under *Copyright Act 1912* (Cth) s 8.

required commercial printing, not simply exhibition. Historically, copyright law allowed the owner of an unpublished image to choose if or when to publish it.³⁵ The copyright term reflected this, beginning from first publication.

With respect to the Monga Khan archival image, to some degree, the sitter's privacy was already invaded by the requirement to deliver his photographic portrait to the police or a customs officer as part of his application in order to claim an exemption under the White Australia Policy. While this legal requirement led to retention of the photograph in official records, this does not transfer any copyright in the image.³⁶ However, the archival obligations of the state to release most records after twenty or thirty years³⁷ ultimately makes unpublished images public and free for others to use without permission. Due to Drew's interest in the Monga Khan photograph, the original file was digitised and is now free for anyone to download.³⁸

The white colonial governance project that determined fitness for inclusion as Australian citizens and residents has created a national archive of photographs and related records that disproportionally document black, brown, and Asian peoples. Those passing as white Australians were not only exempt from the historical project, the same racialized 'optics' that led to the inclusion of particular images in the archives in the first place carries forward into the 21st century, with the opening up of the archival record and the delivery of its contents as copyright-free or part of the cultural commons or public domain. Here, the photographic subjects become fodder for reuse, in line with a different governmental project related to the politics of an open archive.³⁹ Copyright law erases any potential claim by the successors in title to reclaim the original unpublished works. It tributes the photographic subjects to the public domain we all share, where the photographic subjects are once again observed and judged by strangers, including myself. While no longer

³⁵ *Copyright Act 1911* (UK) s 1. See also, EJ MacGillivray, *The Copyright Act 1911 (Annotated)* (Stevens & Sons, 1912), 7–10.

³⁶ This was in accordance with the *Immigration Restriction Act 1901–12* (Cth) and Regulations s 4B.

³⁷ *Archives Act 1983* (Cth) ss 3(7) & 31.

³⁸ Application for Certificate Exemption from Dictation Test. NAA: MT19/4, 1916, Monga Khan.

³⁹ There are (of course) a raft of other historical and ongoing governance projects using the face value of banks of photographs to predict criminality and receptivity to commercial overtures. The use of data mining and algorithms stimulates legal critique that routinely fails to consider the low-tech history of similar racialized targeting in public and private domains.

scrutinised in terms of official discourses of racial identity, racist ideologies are reproduced in the process that open the images for further objectification, and not just in the terms Gupta observed where the imaginary white viewer gets to decide who is, and is not, an Aussie.

Objectification of the subject to support the process of commodification precedes any decision to reproduce the image on a poster, t-shirt, or other merchandise. It occurs in advance of the distribution of the repurposed image. The Monga Khan image was selected for reasons beyond the aesthetic criteria that potentially marked it as a suitable foundation for a new poster to stimulate public debate about national identity. The potency of the 'hero' image of a 'proud and stoic' Muslim man, its capacity to do the political work required to reach out to Drew's ideal audience — those likely confused or disconcerted by the juxtaposition of an 'Aussie' flag — draws from an existing cultural economy that revolves around 'face value'. Here, 'blackness continues to give appearance and visibility to commodity status'.⁴⁰ The capacity of the image to reach out to white audiences involves detaching the 'blackness' of Monga Khan from his body or skin, so that it can be observed, contemplated, and reinscribed with reference to the additional signifier, 'Aussie':

*The fact that blackness can be made "detachable" from black bodies — where it was made to adhere by what had been constructed as its natural, ontological, visibility — can be regarded as an indication of a new phase of development of the commodity form, what I described as blackness as phantasmagoria; that is, the stage in which an increasingly simulacral status of the visual develops its own, independent, social materiality.*⁴¹

The apparent legal and semiotic openness of the image of the blackness, also inscribed as foreignness with Islamic overtones, affects a corresponding closure to whatever meaning Monga Khan, or his family might ascribe to his representation. This might, as Drew suggests, deliver the racialised image to an unbounded collective ownership. Foucault suggests:

⁴⁰ Alessandra Raengo, *On the Sleeve of the Visual. Race as Face Value* (Dartmouth College Press, 2013) 90.

⁴¹ *Ibid* 128.

*An anonymous text posted on a wall probably has a writer — but not an author. The author-function is therefore characteristic of the mode of existence, circulation, and functioning of certain discourses within a society.*⁴²

Anonymity attached to the street exhibition of the Monga Khan image potentially also permits reclaiming of him by family and subaltern peoples. However, the new inclusion of a slogan, in conjunction with the media campaign and promotion by hashtag, affects how we read street art.

The unsigned poster glued to a wall on the street, sitting alongside graffiti and other outsider art and advertising, is not really one more anonymous work amongst others when the image is plastered across the country with a mainstream media and a social media campaign designed around it. The poster may not have an author, but the inclusion of the 'Aussie' banner, as designed to challenge the viewer, has a branding function. In the age of the hashtag, it serves as an aid to build a following and to reconnect image and source, art, and artist. In the gallery space, and on the artist webpage, there is no ambiguity at all about Drew's attribution as artist and owner of the image, regardless of the anaemic copyright status of the poster, based as it largely is, on a photograph in the public domain.

Art activism is linked with propaganda techniques, communication logics and eye-catching presentation styles developed by advertising agencies. Propaganda and advertising share an interest in building a following, or a brand identity. A brand is a socio-legal form of intellectual property. It operates at a much higher level of recognition and abstraction to any private property right associated with a registered trademark or copyright ownership.

Throughout the 20th century, brand identities started to be produced in advance of, and sometimes in defiance of, legal determinations about the legal right of the corporation to own a trademark or dress.⁴³ Brand value is not produced by the designer of the

⁴² Foucault (n 30) 148.

⁴³ See for example, Disney's agency practices that developed in the absence of strong legal rights, in Jose Bellido & Kathy Bowrey, *Adventures in Childhood. Intellectual Property, Imagination and the Business of Play* (Cambridge University Press, 2022) 135–139.

trademark or sign. It is the product of the affective relationships generated from connecting the signifier of the brand to an audience. Through marketing, consumers are educated to understand connotations in a particular way. Brands and marketing are not necessarily limited to the commercial activity of corporations. Today, trademark registrations by political parties, civil society actors and non-government organisations are also commonly used to help raise one's voice amongst the throng.

As a branding device, 'Aussie' signifies a connection between the ostensibly anonymous artist and members of the public interested in the political dynamics of inclusion/exclusion in association with Australian national identity. The slogan appeared in the same manner on the other images of Asiatic Australian faces in the same series. However, when deployed as a hashtag, 'Aussie' produces a brand association that helps us find and assign a value to the work of activism art and identify the ostensibly anonymous artist. Drew's faux anonymity creates a puzzle for the interested viewer to follow. Entering into this game dissipates any lingering ambiguity about the right of Drew to re-present the 'fictional' identity, Monga Khan. This brand is a 'second skin':

The brand functions instead as a center of corporeal density, a site of stabilization of the frenzy of circulation, but also a form of embodiment that competes with the embodiment of race. As Rosemary Coombe states, the brand is a 'second skin' that products develop in order to interface their consumers. She notes how with the rise of mass consumption, trademarks and logos offered a promise of bodily contact for the unmarked and disembodied bourgeois subject that sought to experience corporeality through consumption. Through its own prosthetic body, the brand could safely offer a little taste of the Other.⁴⁴

The political poster no longer functions, as it did in the time of Earthworks, to recruit the masses to participate and build community or collective action. A connection with merchandising and fandom is also not incidental to the ambition of raising one's voice about a political issue or cause. This activity signifies more than simply fund raising to make more art. It is a symptom of the penetration of intellectual property dynamics into the everyday, where public and private communicative acts interact to produce the

⁴⁴ Raengo (n 39) 119-20 (notes omitted).

celebrity artist. The public domain is overlaid with privileged attribution of expressions to recognised personalities. Intellectual property norms help amplify the voice of the artist amongst challenges to representations of Blackness and difference. Subaltern voices also circulate in a racialised public sphere, but expressions of resistance to racism circulated across media and through social media platforms often metamorphise into a passing parade of objectified cultural difference.

IV LAW AS LIVED EXPERIENCE

Intellectual property laws are frequently deconstructed to expose the ideological dimensions of underlying principles that combine to define the distinctive technicalities of the different rights — copyright, design, patent, and trademark. This can include readings that locate racialised tropes and norms in society and in intellectual property case law that impacts on questions of culture, inclusion, national identity, and citizenship.⁴⁵ However, intellectual property concepts and practices associated with the attribution of ownership of ideas are woven into the social fabric of all cultural communication, not just those linked to the assertions of rights to intangible properties.⁴⁶ This affects the way the world is perceived, including the significance of personal and inter-personal connections and experiences within it. In other words, what might be described as our everyday lived experience includes the reproduction of legal ideas that support new processes of commodification in ways that cannot be easily observed or closely mapped by taxonomic readings of law or litigation. Street art has emerged as a significant site where this occurs. The panorama of public space supports destination branding, cultural tourism, and new kinds of art curatorship and attempts at legal

⁴⁵ See, e.g., Toni Lester, 'Blurred Lines - Where Copyright Ends and Cultural Appropriation Begins — The Case of Robin Thicke versus Bridgeport Music and the Estate of Marvin Gaye' (2014) 36 *Hastings Communications and Entertainment Law Journal* 217; Anjali Vats, *The Colour of Creatorship* (Stanford University Press, 2020).

⁴⁶ Ethnographic studies of community and everyday IP are increasingly common, see Rosemary Coombe and Susannah Chapman, 'Ethnographic Explorations of Intellectual Property', in *Oxford Research Encyclopedia of Anthropology*, (Oxford University Press, 2020) <<https://doi.org/10.1093/acrefore/9780190854584.013.115>>; Cathay YB Smith, 'Street Art: An Analysis Under US Intellectual Property Law and Intellectual Property's "Negative Space" Theory' (2014) 24 *DePaul Journal of Art, Technology & Intellectual Property Law* 259.

protection.⁴⁷ Ephemeral works such as politically inspired posters are given over to the public on qualified terms that carry along commercial branding dynamics. This has implications for the public communicative function of the poster as a call to political action.

The Monga Khan poster was successful in opening discussions about Australian national identity and race, using a slogan that engaged racial hierarchies to question who is and is not Australian. It also reproduced ideologies of 'Blackness' and cultural difference. For this to happen first, Monga Khan's identity was 'fictionalised', expressed as a disembodied concept and surface aesthetic, separated from the historical figure. Second, in applying the 'Aussie' tag to the fictional personality of Monga Khan, the aesthetic becomes a brand — Drew's 'second skin', part of his artistic identity and the oeuvre by which he is best known to the public. Intellectual property logics are implicated at both points; in opening the image of Monga Khan to the public domain in the first place, freeing his skin to be mythologised by strangers and in reassigning ownership of the racialised imaginary to the artist who claimed it. Ideologies of race are reproduced in both these moments.

V THE COLLISION OF ART, BRAND, AND LAW

This essay is not really about Peter Drew and his personal politics or the value of his art. It is also not intended as writing in solidarity with those who have criticised the poster which would involve a ventriloquist act, another illusory voicing of Monga Khan. Rather, what I am trying to draw attention to and create more discussion about, is the socio-legal construction of art, in the form of a poster that circulates on social media intended to create a controversy. An engagement with Australian race politics can be deliberately provoked by works that invite judgement of the face value of the imagery. But usually without even knowing about the law or thinking about it, as we navigate public streets, laneways, advertising, and social media, we also draw upon intellectual property constructs and branding dynamics to make sense of the artistic expressions we

⁴⁷ See Christie's, 'A guide to collecting Banksy' (online, 6 September 2021), <<https://www.christies.com/features/Collecting-Guide-Banksy-street-artist-10016-1.aspx>>; Kathy Bowrey 'Why Margaret Atwood, Radiohead and Banksy are not anti-copyright' in Kathy Bowrey, *Copyright, Creativity, Big Media and Cultural Value* (Routledge, 2021) 188–211; Fiona MacMillan, 'Living between Market and Community' in Macmillan (n 25) 177.

encounter. The ability to communicate ideas about race and see a different way of being is impacted by the socio-legal frameworks that connect minds, eyes, and hearts. Australian law penetrates the field of perception and because intellectual property constructs underlay evaluation and reception of these artworks, this forecloses different ways of understanding race and place within the nation.

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