Introduction

In 1983 Aboriginal artist Yanggarrny Wunungmurra and the Aboriginal Arts Agency commenced action for copyright infringement against a fabric designer/manufacturer and the proprietor of a retail shop. The argument was that the copyright in the bark painting ‘Long necked fresh water tortoises by the fish trap at Gaanan’ had been infringed when reproduced onto fabric without the artist’s consent. The case was settled with the first defendant, the designer, being ordered to pay damages and to supply a list of all persons to whom he had supplied fabric. The second defendant, the retailer, was ordered to deliver all the remaining material to the plaintiff. The case hardly made a ripple in the vast waters of increasing copyright litigation within Australia. In hindsight this is a surprise considering that, at the time, an emerging issue in the Australian political environment was a concern for the protection of ‘expressions of folklore’, namely Aboriginal art.

Eleven years later another copyright case unfolded in the Northern Territory Federal Court that generated significantly more attention. Milpurruru & Others v Indofurn Pty Ltd involved the unauthorised reproduction of Aboriginal art as the designs for a series of impressive carpets intended for the art market. The significance of the case lay in the perception that it presented a clear judicial affirmation that Aboriginal art could legitimately secure copyright protection, and the collective interests of Aboriginal owners could be somehow legally secured. While some commentators in the popular media hailed the case as the ‘Mabo of copyright’, others argued that the case demonstrated the inherent irreconcilability between intellectual property law and indigenous beliefs and knowledge structures.

Importantly this case drew attention to the profound problem of securing intellectual property protection for intangible indigenous subject matter and cultural expression. The case also demonstrated how the ‘uniqueness’ of Australian indigenous cultures, expressed through cultural products such as art, were increasingly marketable commodities. This, in turn, increased the potential for these objects to be considered as legitimate entities for the deployment of western legal frameworks that control and protect certain kinds of knowledge.

Notably, the presiding judge, Justice von Doussa found that a ‘cultural harm’ had been sustained against the Aboriginal artists and awarded
additional damages accordingly. The very idea and articulation that a ‘cultural harm’ had taken place, indicated how issues of ‘culture’ and cultural difference were being interpreted and translated into a legal framework. Moreover, the case validated a narrative of the law as adaptable and responsive to changing political environments and the needs of the new ‘indigenous’ stakeholders. Thus with the finding of copyright infringement and the award of significant damages, the carpets case made legal history.8

*  *  *

Indigenous interests and rights in intellectual property has become a very popular area of contemporary concern.9 Consideration is no longer confined to specialist legal interest or academic disciplines.10 Questions about rights in intellectual property are raised throughout local communities, indigenous organisations, centres for policy co-ordination, as well as national and international bureaucracies.11 Indeed the networks through which discussions of intellectual property flow have generated a wealth of material describing the ‘problems’ of intellectual property.12 These include the global challenge of adequately protecting specific ‘types’ of knowledge and a questioning of the utility of international legal instruments, as well as what they may or may not address. However, given how diverse the contexts are in which conversations about intellectual property and indigenous knowledge are occurring, it is surprising that there has been limited attention directed to the emergence of this field. That it is virtually impossible to consider expressions of indigenous interests in knowledge control and protection outside legal discourse raises fundamental questions about the constitution of this subject in law and policy, and in particular, the specific effects of its location within legal frameworks of meaning. Indeed the discourse is so large, with so many participants, at so many levels of political engagement and with varying levels of agency, that the subject itself has become its own referent. That is to say that discussions often oscillate around themselves as if contained by their own references, repetitions and points of identification.13

The focus of this book is on the emergence of claims about the protection of ‘indigenous knowledge’ within Australia and the effects of the placement of such claims within an intellectual property discourse. My point in looking to this appearance is to illuminate the range of networks and influences – political, cultural, economic, personal – that are always-already working to produce meaning about indigenous interests in IP. In particular the book pushes boundaries in terms of understanding how a range of individuals, agencies, governments, bureaucracies have
acted, and continue to act, on the problem of indigenous knowledge and intellectual property protection. Of significance here are the kinds of meanings about indigenous rights in intellectual property which are being constructed, articulated, mobilised and mediated, and how these effect the kinds of remedies and/or possibilities for action which are being made available.¹⁴

My interest in this issue began ten years ago. Concerned with the ways in which knowledge about Aboriginal and Torres Strait Islander people and epistemology was circulated and authorised in a neoliberal colonial settler state like Australia, I became engaged in locating the conditions for the emergence of the concept of intellectual property within an indigenous context.¹⁵ In other words, what was its point of departure as a subject of law; a topic of attention in bureaucracy; a concept creating new languages and expectations within Aboriginal communities and policy arenas; and something of discussion in the general media? What became clear, and even more so when I began working with colleagues in Aboriginal organisations, communities and policy arenas was that this emergence did not exist in isolation to any of the other political and social dynamics that were occurring in relation to Aboriginal rights in Australia. Indeed, the production of something named as ‘indigenous intellectual property’ was thoroughly imbued with, and hence also a product of, sophisticated discourses of national and international indigenous rights, specifically rights in land, rights of sovereignty and rights of citizenship.¹⁶

This is clearly going to be quite a particular perspective, and at all moments in this book I claim responsibility for how the issues are interpreted, the networks are understood and the links drawn. The discussion is theoretical and philosophical in scope but it derives not only from archival-theoretical engagement with scholarship about law and the conditions under which legal authority operates, but practical experiences working with Aboriginal artists, communities and indigenous bureaucracies predominately within Australia.¹⁷ Whilst my theoretical influences are a combination of legal, critical legal and postmodern insight, it is the practical work for the last five years at the Australian Institute of Aboriginal and Torres Strait Islander Studies, (currently the only federal indigenous-run organisation within Australia),¹⁸ that has provided fresh impetus towards making sense of the complexities and importantly, contradictions, that characterise this field and the possibilities for action and agency that now need to be developed and extended.

The book in no way seeks to posit a definitive truth about a matter as politically complicated as indigenous interests in intellectual property. Simply – there is no one truth here, no singular problem and conversely no singular solution. In that sense, I will not be using the book as a forum for
arguing about greater rights in intellectual property for indigenous people, nor for the inevitable failure of law to address indigenous interests on indigenous terms. Nor do I seek to present a position about the extent that these rights could and should be protected, if only they were articulated in more simple and streamlined ways that greater nation state governments and sweeping international bureaucracies could tolerate. Rather, the book argues that what is happening at the intersection of indigenous rights and intellectual property law is of critical importance for how we understand the social effects of law: indigenous expectations of intellectual property and the emerging relationships and decision-making frameworks being generated around the notion of knowledge as a naturally occurring type of property, both within communities and in political/policy arenas. Understanding these often competing and contradictory dynamics matters if the diverse range of indigenous interests in intellectual property are going to be supported and thoughtfully progressed at local, regional and international levels.

Intellectual property law came to the subject of indigenous knowledge with a self-conscious appraisal of its need to be more socially responsive in the construction of legal relations of culture. Intellectual property academics are now almost self-congratulatory in their attention to indigenous matters as a ‘special’ kind of concern. This is despite a disinclination to consider the history of intellectual property law and its function as an instrument fashioned through a particular kind of colonial politics that facilitated the historical exclusion of indigenous interests from broader policy developments in this field to start with. Understanding the history of intellectual property law reframes the current debates and helps us understand the extent that the relationship between intellectual property law and indigenous knowledge is regulatory. For law is critically involved in managing how ‘indigenous knowledge’ is conceptualised, constructed and typologised within legal, bureaucratic, policy and increasingly more localised contexts. This affects how the problem of indigenous rights in intellectual property is configured and understood, and what kinds of possibilities for protecting knowledge can be imagined. For legal paradigms of intellectual property law are functioning as fundamental mechanisms of governance, producing new ways of authorising knowledge, new frameworks for engaging with knowledge circulation, new kinds of knowledge authorities and new kinds of legal communities.

A key problem with this field is that while there has been considerable (anthropological) focus on the indigenous dimensions and interpretations of the ‘intangible’, debates around cultural heritage and indigenous knowledge protection tend to endorse the authorised master narrative of intellectual property law’s history. That is, that it is consistent,
Introduction

The messy, inconsistent and unstable nature of intellectual property law is herein exposed. This leads to an inevitable fracture in the dominant narrative of intellectual property and with it the assumptions about how law works, and how it responds to new kinds of cultural/political issues as they emerge.27

In order to develop new possibilities for the protection of indigenous knowledge and knowledge practices, there must be a reframing of what intellectual property does and how it functions to manage the always already complicated social relationships around knowledge use and access. My point of departure is that ‘indigenous intellectual property’ is not an ahistorical subject to which the law responds. Rather, it is a very specific category that has been made and remade through various social, cultural, political and economic interventions including the struggles that are internal to law.

THE PROBLEMS AND POLITICS OF TERMINOLOGY

For this work, engaging in discussions about the position of indigenous knowledge (and its analogues including traditional knowledge, traditional ecological knowledge, cultural knowledge and folklore) in intellectual property law requires an appreciation of how the term indigenous knowledge will be employed, as well as how other concepts of indigenous knowledge are currently circulated from indigenous, governmental and academic perspectives. In this work indigenous knowledge is the preferred term. This is owing to the circumstances within Australia where indigenous knowledge is predominately utilised in reference to intellectual property and indigenous interests. However, from the outset it is crucial that the very politics of the term ‘indigenous’ is recognised. For it is not only within intellectual property contexts that definitions of ‘indigenous’ present difficulties. There remain lively debates within Aboriginal, Torres
Introduction

Strait Islander and indigenous contexts about the effects of classifying colonial systems, and the impact on group/community/self identification, as well as the implications of definitions arising from legislative contexts. In Australia for example, there is ongoing debate amongst indigenous people about the difficulties of the labels ‘Aboriginal’ and/or ‘Torres Strait Islander’ and/or ‘indigenous peoples’. These are extended to include debates about the constraints of the terminology, its vagaries, the dangers of papering over diversity and the inherent problem of minimising significant issues of identity and subjectivity. As Marcia Langton has explained,

Who is Aboriginal? What is Aboriginal? For Aboriginal people, resolving who is Aboriginal and who is not is an uneasy issue, located somewhere between the individual and the state. They find white representations of Aboriginality disturbing because of the history of forced removal of children, disenfranchisement from civil rights, and dispossession of land.

The label ‘Aboriginal’ has become one of the most disputed terms in the Australian language. There are High Court decisions and opinions on the ‘term’ and its meaning. Legal scholar John McCorquodale tells us that in Australian law there have been sixty-seven definitions of Aboriginal people, mostly related to their status as wards of the state and to criteria for incarceration in the institutional reserves. These definitions reflect not only the Anglo-Australian legal and administrative obsession, even fixation, with Aboriginal people, but also the uncertainty, confusion and constant search for the appropriate characterisation: ‘full blood’, ‘half caste’, ‘quadroon’, ‘octoroon’, ‘such and such a admixture of blood’, ‘a native of Australia’, ‘a native of an admixture of blood not less than half Aboriginal’, and so on. . . . The fixation on classification reflects the extraordinary intensification of colonial administration of Aboriginal affairs from 1788 to the present.

Owing to this history, the classification of Aboriginality is contested and this is precisely what will always make it a difficult category in law and politics. These key problems and politics have significant effects in how indigenous issues are even conceptualised, let alone played out, within law and policy.

In the context of this work, whilst I remain concerned about the use and deployment of terms, I will not be explicitly engaging in the debates about which terminology is better, and for whom. At a later point in the work and in light of the problems of marginalising issues of politics and subjectivity within broader intellectual property debates I will discuss the manner in which indigenous issues are classified within international and bureaucratic discussion papers.

For my purposes the concept of ‘indigenous knowledge’ requires a certain level of demystification. By demystification I mean exposing certain conditions that have enabled indigenous knowledge to be constructed as a coherent entity and, most importantly, significantly different from
‘western’ knowledge. Recognising that indigenous knowledge like all knowledge is changeable and permeable is often overlooked in discussions of this subject because it disrupts a dichotomy between indigenous and western knowledge which is dependent upon discourses of difference and exclusion.

If we are to understand the process of positioning indigenous knowledge in intellectual property law, it is at first instance integral to appreciate how the term ‘indigenous knowledge’ is itself a construct that limits what can be understood within the diverse range of indigenous experience, ontology and epistemology. My interest here is not what constitutes indigenous epistemology but more the use of terminology – specifically how the construct ‘indigenous knowledge’ circulates within intellectual property discussions. Intellectual property law seeks to produce indigenous knowledge (and the analogues of traditional knowledge, folklore etc) as coherent entities – that is, the same unto themselves, but different in relation to any other kind of knowledge practice, embodiment and transference. This affects how indigenous interests are understood, and significantly, how indigenous interests are classified as the ‘same’ in their identification as ‘indigenous’ despite vastly different social and cultural experiences, ontologies and epistemologies. The mystification of indigenous knowledge has led to mistaken conclusions about the dynamic intersections permeating indigenous ways of knowing. Implicitly and explicitly, a reflection on the instability of the category ‘indigenous knowledge’ will be at all stages of this work. Indeed it is this instability, which mirrors the instability of intellectual property law in general, that makes the category difficult to manage, and to develop appropriate solutions (that accord with problems experienced at more localised levels) for.

In 1995 Arun Agrawal challenged the way in which indigenous knowledge was discussed in contemporary anthropological and social theory research. The article traced the increased interest in indigenous knowledge from a variety of sectors, including international and national institutions, and for a variety of purposes including indigenous participation in development strategies, aid objectives and scientific research. Agrawal’s argument is that the making of indigenous knowledge as a specific ‘target’ within these discourses signaled a profound shift in appreciating the content (and hence value) of indigenous ways of knowing. Agrawal goes on to argue that consequently there is a tendency in such studies to construe indigenous knowledge as ‘somehow’ fundamentally different to other forms of knowledge. Here the questions are about the ‘validity and even the possibility of separating traditional or indigenous knowledge from western or rational/scientific knowledge.’ The point is twofold. Firstly, that the intersections of all knowledge are potentially permeable, whatever
the genesis; and secondly that the dichotomy generally assumed between indigenous knowledge and ‘western’ knowledge is produced through historically informed networks of power.  

The classification between ‘indigenous’ and ‘western’ knowledge, as bounded wholes can never be effectively established. This is because such classification ‘seeks to separate and fix in time and space (separate as independent, and fix as stationary and unchanging) systems that can never be thus separated or so fixed.’ Knowledge, and its expression and practice is more complicated than any form of binary allows and fundamental concerns about the intersections of relations of power in the production and circulation of knowledge are often understated or ignored. Labelling and classifying knowledge as ‘types’ ultimately produces organisational categories that bare little resemblance to practical utility and the interchangeability of experience.

Martin Nakata has extended these observations within an Australian indigenous context. Nakata explains contentions in the current debate about the utility of indigenous knowledge: primarily that the use of the term ‘indigenous knowledge’ seldom engages in any contextualisation of knowledge use and tends to indicate quite particular interests. As he remarks, ‘the Indigenous Knowledge enterprise seems to have everything and nothing to do with us’. Indigenous people function as the subjects from which the ‘indigenous knowledge enterprise’ develops. This is at the expense of continued appreciation of the changing uses of knowledge systems. It is this observation that holds particular resonance to what follows in this book. Nakata is certainly correct, discussions of indigenous knowledge seldom engage in contextual usage and this is clearly a problem for areas like intellectual property law. But if one looks more closely at the history of intellectual property, which is where Part One of this book begins, it is clear that intellectual property law isn’t interested in contextualising any kind of knowledge, indigenous or otherwise. This is because knowledge has always been difficult for law to name, identify, classify and then protect. After long contention around this very issue, intellectual property law sidestepped the problem by ultimately focusing the form of the protection on the product of the knowledge (that is, a book, artwork, database), rather than the knowledge itself. It is therefore somewhat ironic that it is the problem of decontextualising indigenous knowledge, and thus not being able to fully grasp either its metaphysical makeup or contextual utility in order to make clear frameworks for protection, that re–exposes contingencies that go to the very heart of our current intellectual property law frameworks.

Nakata makes the further observation that the increasing discussions of indigenous knowledge remake it as ‘a commodity, something of value,
Introduction

something that can be value added, something that can be exchanged, traded, appropriated, preserved, something that can be excavated and mined’.46 Becoming a term that can be used by a variety of groups to support partisan interests, it runs the risk of losing meaning and context. Following Nakata then, the position of indigenous knowledge in intellectual property law is significant because it indicates quite a particular interest. Intellectual property law has become a key site in constructing indigenous knowledge as a stable subject and further, in producing it as a ‘type’ of distinct knowledge to be documented and managed through networks of legal power.47 This is, however, at the expense of complicated contexts and contested politics which ultimately mean that indigenous knowledge will never be ‘securely’ or fully captured in registries, in legislation or in policy.

THE INSISTENCE ON INDIGENOUS KNOWLEDGE AS ‘TRADITIONAL’ KNOWLEDGE

Despite these obvious problems of history, politics and locating a stable indigenous subject, the ‘indigenous knowledge’ category in intellectual property law functions through several terms that are often used interchangeably. I highlight the usage of these additional terms, in particular ‘folklore’ and ‘traditional knowledge’, for two reasons. Firstly, I want to suggest that the ways by which indigenous knowledge is equated to ‘traditional knowledge’ is representative of the way that indigenous knowledge structures and thus indigenous people continue to occupy uneasy positions in relation to contemporary cultural practice. The problem is that the prevailing emphasis on the ‘traditional’ component of indigenous knowledge facilitates a perception of incompatible differences between indigenous and western knowledge.

Secondly, the emphasis on the traditional component of indigenous knowledge significantly affects how it can be understood and made intelligible before the law. This therefore also affects how realistic outcomes in intellectual property law are envisaged. The question that remains is this: can utilisation of the term ‘tradition’, as it is evoked in reference to indigenous people and knowledges, ever be really re-conceptualised outside the meaning making contexts that established the relationship between the ‘traditional’ and the ‘primitive’ and the ‘modern’ in the first place? At best, it would be naïve to think that in the context of intellectual property law a term like ‘tradition’ occupies a more neutral space, where history and politics informing the term remain in abeyance. Inevitably, through its utterance, repetition and circulation amongst legal academics, as well
as bureaucratic and centres for policy development, ‘tradition’ (and more latterly ‘culture’\textsuperscript{48}) functions as the key trope for the identification of the metaphysical dimensions of indigenous knowledge – such an identification being crucial for an intellectual property right to be justified.\textsuperscript{49} In an inspired yet unpredictable twist, with the repetition of tradition as the key element of indigenous differentiation and necessary inclusion, intellectual property law again must face itself and the difficulties of identifying the metaphysical dimensions of property.

The Report \textit{Intellectual Property Needs and Expectations of Traditional Knowledge Holders}\textsuperscript{50} emanating from the intellectual property standard setting organisation World Intellectual Property Organisation, aptly demonstrates the interchangeability of the terms used in reference to indigenous knowledge. The document starts in the following way;

Traditional knowledge is created, originated, developed and practiced by traditional knowledge holders. . . From WIPO’s perspective, expressions of folklore are a subset of and included within the notion of traditional knowledge. Traditional knowledge is in turn, a subset of the broader concept of heritage. Indigenous knowledge being the traditional knowledge of indigenous peoples, is also a subset of traditional knowledge. As some expressions of folklore are created by indigenous persons there is an overlap between expressions of folklore and indigenous knowledge, both of which are forms of traditional knowledge.\textsuperscript{51}

The struggle to adequately describe indigenous knowledge, as a singular and relatively bounded entity, is reflected in this quote. It is a problem I have sympathy with, if only because of its inevitability. The difficulty of finding terminology that can capture the myriad of experiences that draw on and utilise, often at the same time, all these ‘types’ of knowledges and more, will continue to exist. The challenge remains to recognise these as historically and politically derived difficulties, and then to reconsider how they might meaningfully be overcome.

The dilemma indicated through the WIPO Report, and others that draw on WIPO’s authority, in positioning indigenous knowledge within the sphere of intellectual property reflects both uncertainty and insecurity. Law manages indigenous categories because a cultural identity is recognised (with indigenous knowledge, an assumed difference means that the cultural identity is disclosed). Yet intellectual property is generally disinterested in the cultural identity of any of its categories. To this end, a ‘special’ position is established that allows space for a connection between knowledge and identity and is applied to denote unique properties and legal positioning. This specialness becomes identified as ‘cultural’ in nature.\textsuperscript{52} ‘Culture’, then, becomes the primary trope for identifying and
explaining the unique concerns that are brought to intellectual property law by indigenous people.53

Ivison, Patton and Sanders have emphasised the need for urgent reflection in the making of categories that depend upon abstract binaries. For ‘when we evoke a mysterious otherness or radical difference in referring to indigenous cultures we are in danger of replaying prejudices that assume the inherent inferiority of indigenous peoples and their practices’.54

The emphasis on the ‘traditional’ lifestyles and ‘traditional’ peoples misunderstands colonial realities and the commonality of indigenous engagement with information management and markets.55 The insistence on the ‘traditional’ as the key marker of difference obscures contemporary indigenous practice and the reality that indigenous knowledge also undergoes transformation over time in usage and circulation both within family or community contexts and/or between families, the community and external parties.56

The anxiety for intellectual property law in reconciling indigenous interests becomes heightened by a reliance upon an unreal indigenous subjectivity that is cloaked in a sense of antiquated tradition.57 For claims of cultural difference have to be balanced against the dynamic ways in which cultures borrow and import practices and the extent that cultural identities are constantly reforming and renegotiated.58 What is potentially destabilising for the position of indigenous knowledge within networks of intellectual property is a reliance on notions of a ‘traditional culture’ that evoke particular romanticised and singular perceptions of indigenous culture, experience and community.59 The phantoms of romanticism that underpin much of intellectual property law and its consequent development are never too far away.60 Appeals to a romantic past are repeated in new ways in the present.61 This inevitably affects how indigenous knowledge is produced, positioned and managed through an intellectual property regime and how indigenous people negotiate positions in relation to these laws. Thus my key interest is in how intellectual property law constructs the indigenous category, and how it seeks to manage indigenous interests and relationships to law. To this end, it is the partial successes, moderate failures and potential dangers within intellectual property law with respect to the challenge of indigenous knowledge that is the focus of the book.

*   *   *

In Australia, the copyright cases involving Aboriginal art that developed through the 1980s and 1990s, generated debate and discussion within political, academic and more localised contexts. These discussions extended
arguments that addressed legal inclusivity, the rights and legitimacy of indigenous voices before the law and the recognition of the aesthetic nuances of Aboriginal cultural products. The cases did signify a genuine attempt within legal liberalism to accommodate the claims of indigenous people. For the Aboriginal artists involved, the cases represented a consolidation of the view that their art could be protected through western intellectual property laws, specifically copyright and that this was interconnected with sovereign claims and land ownership.

The carpets case was significant as it explicitly included aspects characterised as ‘indigenous difference’ within the fabric of the law. Whilst this will be explained in more depth in Part Two through a close reading of the cases themselves, in the main, the previous copyright cases included indigenous issues on the same terms as the non-indigenous. However when debate relating to cultural differences arose it was positioned at the margins of the law and aroused a range of hitherto unexplored notions.62 Thus the carpets case is important because it spurred debate about the terms of inclusion and questioned how indigenous concerns about protecting intangible cultural heritage were to be addressed. Explicitly the authority of the law was engaged to address indigenous interests, thereby exposing the power of legal discourse to produce the category and inform how it could be managed successfully and adequately.

However, the immediate challenge for intellectual property law in protecting indigenous knowledge resonates with tensions that characterise intellectual property law as a whole. As ‘new’ subject matter, indigenous knowledge requires an identification of the boundaries or marks that established its ‘property’ for protection.63 The greatest surprise is the familiarity of the task, for the central problematic of intellectual property law is the way in which it justifies a property right in any intangible subject matter.64 Yet the law generally fails to acknowledge that this is problematic in non–indigenous cases. Indigenous knowledge provides an example of how intellectual property law still grapples with determining the metaphysical dimensions of intellectual property subject matter.

The problem is that the unauthorised use of intangible indigenous subject matter involves an intersection of elements, not all of which can be remedied through the intellectual property framework. The danger in assuming intellectual property law has the capacity to provide just solutions to the appropriation of indigenous knowledge limits an understanding of the broader issues associated with the political and social impetus of naming and identifying instances of cultural appropriation. Intellectual property is evoked as the strategy for securing cultural integrity.65 However, claims for protecting cultural integrity and stopping cultural appropriation are highly political. This is the difficulty of reconciling
souvern claims, minority rights and the presentation of ‘culture’ within
the context of intellectual property law.

Consequent to the success of indigenous claims involving visual
artwork, certain critical legal and philosophical analyses from the debates
surrounding Aboriginal art are used as a point of departure for developing
the arguments in this book. As the Australian case law has grappled
with the inclusion of Aboriginal art as legitimate subject matter, and the
attention of the Australian Government has been focused on this area
in particular, copyright forms the key focus. However I will extrapolate
beyond the category of copyright in order to understand how intellectual
property law more generally constructs and subsequently treats intangi-
bible indigenous subject matter. To this end the book is occupied by the
following core questions:

● what are the cultural, political and legal shifts that have produced
the category of indigenous knowledge within the field of intellectual
property law?

● how does legal power produce a domain specifically occupied by a
concept of ‘indigenous knowledge’ and how does it seek to manage
such a domain?

The focus here is on the philosophical issues that surround the process
of imbuing an object with property rights, exploring how this process
replicates liberal possessive individualism in both indigenous and non-
indigenous cases and how this functions as a means to manage indigenous
difference. Property relations are understood as an instance of govern-
mental management however, in the context of indigenous intellectual
property, the management and outcome is far from predictable. This
is because how the law actually deals with any intangible subject matter
is not as consistent or stable as is generally believed. Indigenous claims
expose the contingency and instability of intellectual property law and this
is crucial for understanding law’s difficulties in managing the direction and
closure of the category.

As already stated, the book is divided into three parts. Each explores a
broad theme that is integral to the making of the indigenous category within
intellectual property. Part One begins with a consideration of the history of
intellectual property law. In particular it considers both the early develop-
ment of controls for managing relationships around knowledge use and
circulation in the United Kingdom, and the more ‘modern’ manifestation
that we have come to understand as a body of law named as ‘intellectual
property’. This first part will also explore the cultural functions of law,
that law does not function in isolation, but is always-already informed
by a range of political, social, economic and cultural relationships. A combination of these elements will always drive the ‘discovery’ of new areas of legal focus and categorisation.

Part Two takes the identification of a new ‘indigenous’ category within Australian intellectual property law as its point of departure. A close reading of the initial bureaucratic interventions leading to the actual cases and the subsequent bureaucratic, academic and indigenous responses, provides a structure for understanding how knowledge about indigenous interests in intellectual property emerged. This analysis makes the relationships between legal authority, bureaucratic intervention and the significance of individual action clearer. It establishes a framework for understanding the extent that intellectual property law functions as a regulatory mechanism for managing relationships between people and legal authority, and that this has effects upon how solutions to the problems of indigenous control of knowledge are phrased, and how they have become dependent upon further legal expertise and legal authority.

Part Three explores how ‘culture’ has been produced in intellectual property law as a singularised and reified trait possessed only by indigenous people. Through the prism of current policy and legislative initiatives within Australia, this section discusses what the limitations and future possibilities for this field might be. It argues that attention must be given to more localised strategies, emboldening already existing (and those in the process of being developed) community based approaches to knowledge management. Whilst this may appear to be in conflict with global intellectual property governing strategies, practical experience has shown how more local focused activities provide new possibilities in this area. This is because they enable space for diverse indigenous histories and experiences, as well as problems with sovereignty and legal autonomy to be engaged more meaningfully. Part Three directly addresses the tension between theory and policy development that haunts this field. It concludes with suggestions for how this tension may be overcome so that indigenous people and communities can mediate knowledge management contexts on their own terms.

Increasingly indigenous knowledge is, for the purposes of governmental intervention, being generated and identified as a ‘type’ existing within a legal domain, produced through case law, governmental reports, academic interest and international concern. In reality, indigenous knowledge is not ahistorical and uniformly coherent. The objective of this book is to consider how this field of knowledge has been produced, including how other disciplines and forms of analysis have become subordinate to the legal questions that the intersection of indigenous knowledge and intellectual property generate.
The variety of demands made to include indigenous knowledge as an intellectual property category reflect the complex motivations, networks and interests of all stakeholders. It also highlights the positions that shape what can be known about the dimensions of indigenous knowledge, and the extent to which it can be recognised and incorporated within this legal framework. This book seeks to unpack fundamental problems in reconciling both intellectual property law and indigenous knowledge as categories of law and subjects of governance. Significantly it seeks to highlight a remarkable irony, that efforts to include indigenous knowledge in intellectual property in effect (re)expose contingencies in intellectual property law that are constant and have remained relatively undisclosed. In positioning indigenous knowledge within an intellectual property regime, the law produces a category that is difficult to manage, but it is this very difficulty that provides the possibility for more localised approaches to be justified and further developed.

NOTES


2. We can tell the case provoked little comment for several reasons. Firstly it was not reported in the intellectual property case reports and secondly, there is very little reflection on the case in the wealth of literature dealing with Aboriginal art and copyright. Vivien Johnson makes the note that ‘the case was not seen as important because the focus was on folklore not copyright.’ V. Johnson, Copyrites: Aboriginal Art in the Age of Reproductive Technologies, National Indigenous Arts Advocacy Association and Macquarie University: Sydney, 1996.


7. This is an example of what Stanley Fish calls the ‘amazing magic trick’ of law – ‘when a new movement in law or precedent is made but it is possible to claim that there is nothing innovative or new being done or said even while new departures are being taken.’ In A. Sarat and T. Kearns (eds), History, Memory and the Law, University of Michigan Press: Ann Arbor, 1999. In this context, Justice von Doussa made a significant intervention through introducing a new remedy in copyright law but claimed that it was only an elaboration of what already existed in precedent. This will be elaborated in Part Two.

8. The damages amounted to $188,000. At the time this was the largest sum ever awarded in an Australian copyright case.

9. How and why it is so popular remain as questions of ongoing interest.

Introduction

Introduction


11. For example, international lobby groups include the International Indian Treaty Council [www.treatycouncil.org]; Third World Network [www.twnside.org]; Intellectual Property Watch [www.ip-watch.org]; Africa Action [www.africaaction.org]. Also consider the increased funding by philanthropic organisations in the United States such as the Rockefeller Foundation and the Ford Foundation.


15. I was frustrated by the apparent simplicity and similarity of the debates in Australia in the 1980s and 1990s. My initial interest in the repetition of utterances about the incomensurability of the law in regard to indigenous interests moved me to a space where I began considering how they had become an issue ‘worthy’ of substantial debate and discussion in legal academic circles.


17. Over the last two years, I have been involved in a significant intellectual property project in Indonesia. The first part of the project in 2004 was conducted through the Social Science Research Council and the Ford Foundation. The second and third part of the
project was conducted between the Ford Foundation and American University. For an initial summary of the project see: www.ssrc.org. The final report, ‘Intellectual Property and Traditional Arts in Indonesia’ will be released in 2008.

18. On March 24 2005, the Aboriginal and Torres Strait Islander Commission (ATSIC) was abolished. The Aboriginal and Torres Strait Islander Commission Amendment Act 2005 was passed through the Australian parliament. ATSIC (1990–2005) was the elected indigenous body through which Aboriginal and Torres Strait Islander people were formally involved in the processes of government affecting their lives. See, ‘Extraordinary Forum: The Future of Australian Indigenous Governance’, (2004) 8 (4) Indigenous Law Reporter; L. Strelein, J. Anderson and S. Bradfield, Submission to the Senate Select Committee on the Administration of Indigenous Affairs by the Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004.

19. There are clear traces of romanticism in how legal academics have discussed indigenous people and culture in relation to intellectual property law. This predominantly relates to presumptions of indigenous sameness and homogeneity, relationships to nature and communal existence.


22. This argument will be extended throughout the book and is made in reference to insights on the workings of discourse, power, authority and governance provided by Michel Foucault in his work ‘On Governmentality’ in G. Burchell, C. Gordon and P. Miller (eds), The Foucault Effect: Studies in Governmentality, The University of Chicago Press: Chicago, 1991. While Foucault’s interlocutors are many, I restrict myself here to those who have been fundamental in setting possible trajectories for work on issues of governmental rationality. These include Colin Gordon, Nikolas Rose, Peter Millar, Barry Hindess, Mitchell Dean, Pasquale Pasquino, Francois Ewald, Jacques Donzelot, Ian Hunter and Pat O’Malley.


26. It is worth considering the mirroring of problems that intellectual property law has with identifying the ‘property’ and managing relationships in the new digital communications and technology environment.
Introduction


30. Eric Michaels notes, ‘Colonial Australian administration has always refused to recognize that there is no-one Aboriginal culture but hundreds of them, as there are hundreds of distinct languages, all insistently autonomous. Local political systems promoted no ‘leader’ to be taken to, a problem that apparently stymied Captain Cook and has plagued 200 years of subsequent race relations. The overarching class ‘Aboriginal’ is a wholly European fantasy, a class that comes into existence as a consequence of colonial domination and not before (although Aborigines will make concessions to this fantasy seeing possibilities thereby for political and economic power).’ E. Michaels, *Bad Aboriginal Art: Tradition, Media and Technological Horizons*, Allen and Unwin: Sydney, 1994 at 150. For a further elaboration on the implications of these continuing constructions of Aboriginality and ‘tradition’ in the Access to Knowledge/Public Domain political legal movements see: J. Anderson and K. Bowrey, ‘The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas are Being Advanced?’, supra n.20 and A. Chander and M. Sunder, ‘The Romance of the Public Domain’, (2004) 92 *California Law Review* 1331.


35. The *Indigenous Knowledge and Development Monitor* provided a strategic place to voice Agrawal’s argument, as it also functions as a journal exploring the potential articulations of indigenous knowledge within a ‘development’ discourse.

36. A. Agrawal, ‘Dismantling the Divide Between Indigenous and Scientific Knowledge’ n.34 at 414.


38. A. Agrawal, n.34, at 422.


Nakata notes that these interests include ‘fields of ecology, soil science, veterinary medicine, forestry, human health, aquatic resource management, botany, zoology, agronomy, agricultural economics, rural sociology, mathematics, management science, agricultural education and extension, fisheries, range management, information science, wildlife management, and water resource management.’ Ibid., at 282.

A. Agrawal, n.34 at 292.

Understanding what knowledge is and how we recognise it and convey it has been a pre-occupation of western philosophy. See for instance the work of Scottish Enlightenment thinker David Hume.

M. Nakata, n.41 at 283.

In this context also consider the increased calls for new documentary practices such as inventories and lists of indigenous knowledge. Such documentary practices extend the field of intellectual property intervention, as they automatically engage with regimes of copyright and raise further questions of ownership, the extent of protection and access.

This will be explored in more depth in Part Three.

This will be expanded in Part One.


Shelley Wright has argued that part of the problem for the law in recognising indigenous demands can be understood by what is perceived to be the ‘untrustworthy’ nature of indigenous knowledge: ‘The real problem is that indigenous peoples are not seen to as trustworthy guardians of wisdom because they are so different in European eyes . . . it is illustrative of the relationship between European literate cultures and the oral cultures of colonised peoples. . . Speech is usually seen as less trustworthy than written evidence; experience to be valuable must be recorded; history does not become “history” until human narrative is transformed from oral mythology into written “fact” and lived experience is transformed into detached experience that can be objectively analysed.’ S. Wright, *Becoming Human: International Human Rights, Decolonisation and Globalisation*, Routledge: New York, 2001 at 106–107.

The problem that this generates is the subject of Part Three.


For a contemporary Australian example, consider the feature film *Ten Canoes* (2006) by Rolf de Heer and members of the Ramingining community in Northern Australia. In film also see *Atanarjuat (The Fast Runner)* (2001) by Iglook Isuma Productions – the first independent Inuit production company formed in 1990.

Peter Brosius has made the observation that the concept of ‘tradition’ and its emphatic equation with indigenous peoples is not exclusively the work of non-indigenous agencies and institutions. Indigenous people have also sought to use ‘traditional’ representations


60. J. Anderson and K. Bowrey, n.33.

61. ‘Paradoxically, however, the concepts of “traditional knowledge”, “the public domain” and “cultural environmentalism” are now proving to be obstacles to understanding poor people’s knowledge as intellectual property.’ M. Sunder, ‘The Invention of Traditional Knowledge’, University of California Davis Legal Studies Research Paper Series, Paper 75, 2006.


63. ‘Subject matter’ is utilised in this work in order to be consistent with standard legal referencing in intellectual property law, specifically within copyright. I am nevertheless mindful of the problems of subject/object descriptors more generally.

64. I will be examining this problematic in Part One.


67. Identifying the unpredictability of governing strategies is a feature of governmentality literature. In particular it refers to the inevitable failure of programmes of government. As Peter Miller and Nicholas Rose explain, ‘Programmes constitute a space within which the objectives of government are elaborated, and where plans to implement them are dreamed up. But the technologies which seek to operate on activities and processes produce their own difficulties, fail to function as intended.’ P. Miller, and N. Rose, ‘Governing Economic Life’, (1990) 19 (1) Economy and Society 1 at 14. See also N. Rose and P. Miller, ‘Political Power Beyond the State: Problems of Government’,

68. For instance, the requirements of originality and questions of authorship have pre-occupied many writers in this area.