Introduction

Viewing law as the mutual interpenetration of the formal legal system and daily life invites us to consider the interaction of the legal and the non-legal as sources of both self-conscious and unself-conscious action.1

In all the writing that has been produced about indigenous interests in intellectual property law there is a notable absence. This absence is of a jurisprudential and critical reading of the history and development of intellectual property law as a specific cultural form, one integrally involved in managing relationships around knowledge use and circulation. This absence explains why intellectual property is repetitively understood and interpreted as a relatively naturally occurring and stable area of law. This, of course, is not so. Intellectual property is historical, political and contested, and this is ultimately what makes for its messiness in dealing with particular issues when they arise. This messiness within IP law is consistent regardless of whether the concern raised is one of regulating emerging digital technologies or protecting indigenous knowledge. Understanding the history fundamentally alters how we interpret what is going on when indigenous knowledge enters an intellectual property discourse. Thus, in responding to an urgent need for a little history work, this first part of the book will reflect on the making of intellectual property law.

When it comes to indigenous interests in intellectual property law, it is readily assumed that the problem is with the law. For example, that it doesn’t protect collective interests, doesn’t recognise the legitimacy of oral cultures, and can’t accommodate alternate views of property and ownership. These perspectives seek to locate the particular places where law fails and lets indigenous people down. I want to move beyond these particular readings of law’s inadequacies and instead explore them as necessary and inevitable instances that reveal the complex relationships and embedded networks functioning within law. In this sense, and following James Boyd White, law should be understood as a ‘social and cultural activity, as something we do with our minds, with language and with each other’.2 Law is not some abstract bounded entity. Rather, it is fluid and dynamic. When faced with new kinds of claims, like indigenous interests in intellectual property, critical legal scholars and cultural theorists are provided with an opportunity to understand the intricate operations of law. Importantly, in
these contested instances it is possible to uncover the extent that law has also been intrinsically involved in making, and effecting relations between, the very problems that are generating new claims to law and requiring legal attention and remedy.

This first part of the book ‘Law’ will be divided into three separate chapters. The first chapter sketches out a framework for understanding law – not as a body of rules but as a network of interpretation and operation that influences and conversely, is influenced by, individual, social, cultural, political and economic dimensions. Here the focus is on problems of jurisprudence and the contingency of law, where rather than a unitary phenomenon, law, legal institutions and legal power are shown as deeply imbued within, and dependent upon, networks of political and social influence. Thinking through law in relation to society and individuals focuses attention on how law is informed and constituted by cultural production, where law is simultaneously an object and subject of culture. The example that will be used to illustrate the cultural forms that law takes will be drawn from the socially and legally developed concepts and expectations of property. This is important for understanding the historical and philosophical relationships between ‘real’ property law and intellectual property law, and the way in which indigenous claims to intellectual property challenge legal categories of identification of property rights, and simultaneously endorse them.

After establishing that law is not above or beyond politics and social influence, the second chapter will move to an examination of a specific instance of law’s development: the making of modern intellectual property law. This section will consider the disparate and inconsistent history and philosophy of intellectual property. In particular it will highlight how what appears as a distinct field of law is actually a relatively recent phenomenon. In order to appreciate the general operation of intellectual property law on knowledge and knowledge ‘objects’, and more specifically, how this impacts upon how issues of indigenous knowledge are identified and treated, this history matters considerably. As will become clearer at later stages of the book, this kind of jurisprudential reading of intellectual property’s history opens the space of interpretation and reframes the struggles around indigenous knowledge protection as ones that are also internal to the development of intellectual property law as a whole.

Destabilising the narrative of intellectual property as a cohesive unit provides the context for the final chapter in this first part of the book. This chapter will constitute an examination of the creation of copyright as a sub-category of intellectual property law. As copyright is characterised by its influence from early enlightenment and romantic notions of possessive individualism, the chapter will explore the extent that these influences
continue to underpin the two categories that identify legitimate copyright subject matter: authorship and originality. These categories function to maintain the limits and boundaries of copyright and as such it is at these points that the dilemma of including indigenous knowledge within this framework is most starkly exposed. In concluding with a consideration of the subjectivity of copyright, prompted through postmodern critiques, what is developed is an appreciation that the intersection of indigenous knowledge in intellectual property law is defined, and in response to, the characteristics of intellectual property law that include its complex history, its categories of measurement and the inevitable influence of political and economic discourses.

Overall, Part One argues that the difficulties facing intellectual property law in securing indigenous knowledge as a category that it can recognise, rather than being ‘new’ are actually part of a continuum. In this sense, law should be understood as working through an ongoing series of problems that it has been addressing for years. The past histories of intellectual property inform the present. The dominant problem set for intellectual property law – and this affects the inclusion of indigenous knowledge – is how law grants property status to intangible knowledge and how it ‘identifies’ the ‘property’ and the ‘right’. In this sense it is argued that what many intellectual property laws share is this central problematic, manifested in various legal forms and practical negotiations of authorised identifications of property.

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