Introduction

[t]o identify a problem as a legal need is to make a particular judgment about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution.¹

Law has established certain pre-eminent boundaries in addressing the problem of indigenous knowledge. This includes the way in which concepts of indigenous knowledge are positioned within the law and the extent that protecting a diversity of indigenous interests in controlling and disseminating knowledge systems is secured through an expectation of legal remedy. The challenge of how to stop the unauthorised use of indigenous knowledge is now firmly constituted as a problem to be solved by and managed in the legal domain.

The possibility for legal frameworks to deliver important entitlements and recognition that, whilst partial and incomplete, would nevertheless be difficult to gain elsewhere recognises that within law, certain politics of demand are at play which emanate from discursive positions not necessarily (at least initially) informed by law or bureaucracy. In this sense, while law may have a central role in making meaning about a particular subject, there is a range of other elements involved in bringing a particular issue to the attention of law. For instance, in Australia, changing political environments, the rise of an international Aboriginal art market and the advocacy of key individuals were all instrumental factors in alerting law to the problem of inappropriate use of Aboriginal artistic designs. Indeed, it is significant that the copying of Aboriginal artistic styles had been encouraged and endorsed for at least a century. This leads to the fundamental question: what was the shift that saw this copying as a legal problem, rather than a state and socially sanctioned process informing a nationalist aesthetic? The point to remember is that the making of this problem within a legal space was not necessarily predictable and thus suggests a range of changing circumstances that influenced how law came to identify the ‘problem’ of copying Aboriginal art.

The early reaction of the law was promising but uncertain.² There was hesitancy in regards to the ‘appropriateness’ of reconciling western legal principles to indigenous concepts of knowledge and ownership. However, the subsequent developments in the production of indigenous
knowledge within the law were not achieved through further litigation. It was governmental action. For law is not just court determined (directly applying the law). It is also managed through bureaucratic intervention, as law establishes and defines new spaces of intervention which may ultimately lead to legislative reform.

However, within legal bureaucracy the culturally specific nature of indigenous knowledge continues to present challenges regarding the position of ‘culture’. As I discussed in the last chapter, how the law treats difference is on its own terms, that is, what it can admit is mediated through its own modes of identification and categorisation, largely established through precedent. As indigenous intellectual property is not a ‘legal’ category in the sense that it is not derived from a specific piece of legislation in synthesis of common law, how did indigenous knowledge come to be firmly grounded in the legal sphere? Does the nature of its fabrication affect how the issue is talked about and constituted as a problem? To what extent do the discussions present the possibility of an outcome? What, if any, potential remedies exist beyond the law?

This second part of the book is divided into four chapters. The opening chapter picks up from the previous discussion on the making of intellectual property law and extends it into the context of identifying and classifying Aboriginal art. It begins with an appreciation of the importance of economic incentive and the commodity production of Aboriginal art in constituting indigenous knowledge as a distinct entity for law reform. Drawing upon insights provided by Bernard Edelman, my argument is that law takes on and forwards legal problems with significant economic implications. Paralleling the incorporation of photography and cinema as intellectual property subjects with Aboriginal art and hence indigenous knowledge provides a useful vantage point for understanding how law first identifies, and then classifies new kinds of cultural/economic products.

The second chapter is a site-specific study of the paradoxical enclosure and openness of the bureaucratic agenda targeting indigenous interests in intellectual property. To this end my argument will consider the two leading governmental reports dealing specifically with the protection of Aboriginal art and cultural expressions released within Australia: the 1981 Report of the Working Party on the Protection of Aboriginal Folklore; and the 1994 Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples. These two reports are significant precisely because they have been instrumental in directing the legal approach in Australia to protecting indigenous knowledge. However, the difficulty of negotiating an agreed purpose for the protection of indigenous knowledge undermines each report. This affects how indigenous knowledge is produced and made knowable as a legal subject. The importance of these
bureaucratic reports lies in the way they have functioned simultaneously to set the legal trajectory and affirm the authority of intellectual property. As such they have been instructive in the development of a specific kind of governable space, where debates concerning intellectual property and indigenous knowledge may be heard, phrased and understood.3

Following from this study, the third chapter will provide a close examination of how this ‘new’ issue of bureaucratic attention and management was dealt with in case law. The chapter will consider the two cases: Milpurrurr & Others v Indofurn Pty Ltd4 (hereafter the carpets case) and Bulun Bulun & Others v R & T Textiles Pty Ltd.5 While both these cases involve the unauthorised reproduction of Aboriginal art each is distinctive owing to the differing elements of copyright law that constitute their focus, and the extent to which the recognition of cultural differences is incorporated into the law through the decisions made. The carpets case (1994) sets the precedent that enables Bulun Bulun v R & T Textiles (1998) to push the limits of the law with regards to ‘difference’. Fundamentally exposed through this case law is how the function of the law is influenced by cultural expectations of how the law should react in specific circumstances, for instance those of misappropriation of Aboriginal cultural imagery and products. Nevertheless, the inability of intellectual property law to secure successfully the closure of ‘indigenous’ as a category, consequently reflects the power of certain kinds of knowledge to elude standardised systems of organisation and management. This also suggests that the possibilities for recognition and protection are not solely dependent upon legal processes of identification and classification.

The politics of law are revealed through instances of case law. Thus the final chapter illustrates how the category ‘indigenous intellectual property’ exposes the real difficulties for the law – precisely to what extent cultural difference can be accommodated and how the law treats indigenous difference. In particular it will consider how cultural difference is positioned, and how it is absorbed and treated within legal regimes. The terms of inclusion are rendered visible, even if they remain at the margins. Judicial decisions reveal gaps in the law that also constitute limits. However, the limits of the law are political in construct as they are dually informed and established by specific networks of power.6 In this way the law does not function in isolation but produces and is produced by cultural values and perspectives.7 Thus understanding copyright law requires an ‘interpretation of case law in view of many possible social and cultural influences and prejudices’.8

The corollary drawn between early literary property debates in the eighteenth century and the difficulties presented by indigenous knowledge highlight how the problems of identifying indigenous knowledge are part of a continuum; where intellectual property law must revisit earlier
difficulties concerning knowledge as property and the extent to which the right in intangible property can be determined. Indigenous knowledge surprises the law by how familiar these problems are. It does however present the law with difficult cultural contexts providing challenges that demand a new and timely response. In particular, this plays into the shift at a national and international level that has underpinned consideration of indigenous people as ‘special’ legal subjects. The complexity of legal subjectivity reveals that the law is not a coherent stable entity, but a product of social and political construction. It is precisely the messiness and complexity of the law that reveals the possibility for the law to respond to subject specific issues. What follows is a sustained examination of governmental process of engagement: recognising the multiple vectors that have effectively come to produce the category we now know as indigenous intellectual property.

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