Introduction

Question: My name is Marie Samuel. I am with the NGO Yachy Wasi, based in Peru and New York. I am not indigenous but our constituency is. I am glad to see WIPO is there, but at the same time I have a question. As you know the Permanent Forum on Indigenous Issues has been adopted. I assume that one of the questions that they will deal with is traditional knowledge. Now I see that there is a panel of scholars, but you do not have an indigenous representative speaking from their point of view . . .

Professor Hugh Hansen: May I ask you a question? From which indigenous group should we have had a representative?

Questioner: It could have been any indigenous group.
Professor Hugh Hansen: What would they have said that was not said today or that you did not say?

Questioner: Well it is like speaking about a dead body or something. The person is not there to speak. Apparently none of you are indigenous. It would have been good to have an indigenous point of view. That is my point.

Professor Hugh Hansen: Okay. I might say we did put out a word to invite some NGOs to speak and, for whatever reason it never happened. But there was an invitation.¹

So far this book has focused on the social, economic, political and individual influences that have produced the category of indigenous knowledge in Australian intellectual property law. In particular it has considered the way in which national-specific governmental initiatives and case law progressed and developed the making of the category. However, the problem of protecting indigenous knowledge and the attention to intellectual property law for remedy whilst a relatively new issue, is not only confined to Australia. It is also a pressing international matter that peak global bodies, indigenous alliances and national governments are fervently discussing.²

This final part will illustrate how the issues already explored within a national context are re-inscribed and developed in parallel within the international domain. For the process of generating the category of indigenous knowledge within an intellectual property regime is also a product of multidimensional networks of power crossing transnational borders and incorporating varying levels of political interpretation, agency and imagination.

The first chapter of this final part begins with a consideration of the global politics of intellectual property. This is necessary for understanding the way in which indigenous knowledge is positioned as a particularly
pressing, yet differential ‘global issue’ of international legal concern. It will illustrate how many of the problems that are present in the national discourse on the protection of indigenous knowledge also thrive in and underpin international efforts and debate. However, these are moderated through differing political agendas engaged at the international level.

The point is to expose the ‘interpenetration’ of national and international objectives governing how the category of indigenous knowledge is created and managed. Thus, this chapter will highlight the overlapping strategies for identifying indigenous subject matter, and demonstrate the extent to which cultural difference and the problems of ‘culture’ and community are re-arranged in global initiatives. This is in order to illuminate the concomitant elements engaging with the intangible subject matter of indigenous knowledge and how a combination of these help construe the category as legally given and therefore open to techniques of legal ordering.

The second chapter will directly engage with the problem of ‘culture’ as it remains at the heart of both global and national discourses on indigenous intellectual property. My primary concern is how ‘culture’ has become positioned within the intellectual property discourse with a specific reference to indigenous interests. Part of the problem, and this affects legislative and policy developments nationally and internationally, is that in intellectual property law ‘culture’ has re-emerged as a generalised and essentialised concept, a peculiar indigenous trait and thus an explanatory tool for indigenous difference within law. Culture is read out of any other kind of intellectual property activity and read into indigenous issues exclusively. This helps reaffirm the indigenous claim as the problem, rather than it being one internal to law and its modern manifestation. The challenge for intellectual property law remains with the intangibility and invisibility of knowledge per se, not indigenous knowledge alone.

As a consequence of this dependence upon the ‘culture’ trope to understand indigenous needs, the strategies that are discussed and developed remain relatively limited. This is because they are unable to account for fluidity in indigenous experience and expectations of law, and importantly local demands in terms of action and remedy. Efforts at cultural inclusion within law need to be mindful of the extent of situations where indigenous needs overlap with those common to the aims of intellectual property law. These are most particularly felt in relation to the market, to the development of new kinds of audiences, to the recording and documentation of knowledge as well as controlling and protecting access to certain kinds of information.

The concluding chapter will take the deployment of ‘culture’ in intellectual property law as the point of departure for considering two recent Australian initiatives within this field: The Labels of Authenticity and
the draft Communal Moral Rights legislation. Whilst these developments seek to target directly indigenous differentiation, and importantly, to address specific concerns raised by indigenous people (namely the concern for communal over individual ownership rights), they nevertheless create new tensions in terms of understanding the complex negotiations between individuals, families and clans that are intrinsic to any notion of community. For law, the applicability of abstract categories (like ‘community’ for instance) to complicated social realities remains a significant challenge. Whilst these new initiatives are again specific to Australia, their guiding principles regarding the recognition of community ownership and the positioning of ‘culture’, are increasingly being found and incorporated into national jurisdictions beyond Australia. Given the interpenetration of strategies and Australia’s role in influencing and authorising the global construction of the indigenous knowledge category, the conclusions that will be drawn have implications beyond this context.

In general, this final part of the book will reflect upon and encourage further critique about how international and national discourses on intellectual property rights are formed, socialised and distributed. To this end, it is important to bring into question key assumptions upon which the current discourse rests. Such interrogation may make new interpretations possible and facilitate the development of clearer and less rhetorical perspectives on the dynamics that continue to marginalise indigenous interests by treating them as exceptional to the broader intellectual property dialectic. Before advocating for more intellectual property protectionism, there should be more reflection upon the effects of law, and indeed the new kinds of communities, authorities and cultures that new laws inevitably generate.

NOTES


2. See the World Intellectual Property Organisation – Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions www.wipo.org. The eleventh meeting was held in July 2007 and incorporated a range of statements produced from smaller regional meetings.