Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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Acknowledgements

This book was written in order to demystify key elements of legal discourse, and to illustrate the inner mechanics of an increasingly powerful body of law. Importantly this is not a book about defining indigenous knowledge, rather it is about the capacity of western law to make and remake that very category. The politics of the book is simple – unmasking the history, function and operation of intellectual property law actually provides the possibility for re-imagining how it could be used to advance indigenous interests in knowledge control, access and use. Given the complexity of colonial relationships within Australia as elsewhere, I firmly believe that finding a productive way forward in law and politics is not a task for indigenous people alone. It is the responsibility of us all.

This book initially developed out of my PhD thesis completed in the Faculty of Law at the University of New South Wales. Since then it has been reworked and informed by all my experiences working with indigenous people, families and communities in Australia, the United States and Indonesia.

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Cases

BRITISH CASES

AUSTRALIAN CASES

We decided to go and look at the site that was the subject of the painting. These were the waterhole paintings, right, and I thought that this waterhole was like, down the street, and it turned out it was in the most remote place. . .the waterhole that he [John Bulun Bulun] depicts, and has depicted throughout his whole artistic career. . .and others have depicted too was in fact a site he had never been to. . .it had never dawned on me before that for some of the artists, the first time that they saw the waterhole that they were depicting was with me from an aeroplane when we finally found it, using maps to locate it. We never landed, couldn't land there, it was in the most remote place. . .and I only realised then that what they were depicting was from their own sense of, you know, their own imagery. . .they had incorporated it into their own sense of the present and the real, something that they didn't know at all. . .it was amazing, that aspect of the Bulun Bulun case was amazing. I only realised that day that he had not actually been to the waterhole.

Colin Golvan (2002)

But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the Author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.

Justice Yates, *Millar v Taylor* (1769) 98 ER 233

To know the cause of a phenomenon is already a step taken in the direction of controlling it.

Ranajit Guha (1988)

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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.[1] 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.[2]

Eleven years later another copyright case unfolded in the Northern Territory Federal Court that generated significantly more attention.[3] *Milpurrurru & 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'[4], others argued that the case demonstrated the inherent irreconcilability between intellectual property law and indigenous beliefs and knowledge structures.[5]

Importantly this case drew attention to the profound problem of securing intellectual property protection for intangible indigenous subject matter and cultural expression.[6] 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.[7] 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.[19] 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.[20] 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.[21] 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.[22]

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.[23] That is, that it is consistent,

*a*historical, *a*political, *a*cultural and unchanging. To properly understand why indigenous ownership claims challenge the congruency of law it is important to consider the literary property debates of the eighteenth and nineteenth centuries and the development of 'design' as part of the intellectual property network.[24] It is here that the disputes about intangible property, the problem of identifying the 'property' and justifying the 'right' first really emerge and are fleshed out in courts and through broader social networks.[25] Following this history one finds that ownership and 'property' in something that is intangible has never been clear for intellectual property law. Indeed law still struggles with exactly the same problems today: determining the metaphysical dimensions of the 'property' and justifying the 'right'.[26] 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)[28] 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

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.[29] 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.[30] 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.[31]

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.[32] 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.[33]

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.[34] 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.[35] 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.'[36] 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.[37]

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.'[38] 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.[39] Labelling and classifying knowledge as 'types' ultimately produces organisational categories that bare little resemblance to practical utility and the interchangeability of experience.[40]

Martin Nakata has extended these observations within an Australian indigenous context.[41] 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.[42] As he remarks, 'the Indigenous Knowledge enterprise seems to have everything and nothing to do with us'.[43] 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.[44] 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.[45] 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,