Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

Jane E. Anderson

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This book is dedicated to my sister and dear friends
Sophie, Steve, Kirstie, Craig and Carol.
Future leaders.

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Contents

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)

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,

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 pervading 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')[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.[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 *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*[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.[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.[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 overtime 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

sovereign claims, minority rights and the preservation 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 intangible 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.[66] Property relations are understood as an instance of governmental management however, in the context of indigenous intellectual property, the management and outcome is far from predictable.[67] 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 development 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.[68]

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

1. *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported. See: N. Stevenson, 'Case Note: Infringement in Copyright in Aboriginal Artworks', (1993) 17 *Aboriginal Law Bulletin* 5.
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.
3. *Milpurrurru & Others v Indofurn Pty Ltd* [1994] 30 IPR 209, 130 ALR 659 (hereafter the *carpets case*). Also see: T. Janke (1995) 'Copyright: The Carpets Case', (1995) 3 (72) *Aboriginal Law Bulletin/Alternative Law Journal* (Joint Issue) 36.
4. For instance: V. Trioli, 'Record Damages for Illegal Aboriginal Images', *The Age*, 14 December 1994. The perception of the *carpets case* as the *Mabo* of copyright was subsequently raised in academic circles. This followed literature examining how the *Mabo* decision provided possibilities for recognising 'common law native title intellectual property'. For example see: K. Puri, 'Copyright Protection for Australian Aborigines in the Light of Mabo' in Stephenson, M. A., and S. Ratnapala (eds), *Mabo: A Judicial Revolution*, The University of Queensland Press: Brisbane, 1993; K. Puri, 'Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action', (1995) 9 (3), *Intellectual Property Journal* 293; D. Ellinson, 'Unauthorised Reproduction of Traditional Aboriginal Art', (1994) 17 (2) *University of New South Wales Law Journal* 327; N. Lofgren, 'Common Law Aboriginal Knowledge', (1995) 3 (77) *Aboriginal Law Bulletin*, 10; M. Blakeney, '*Milpurrurru & Ors v Indofurn Pty Ltd & Others* – Protecting Expressions of Aboriginal Folklore Under Copyright Law', (1995) *elaw: Murdoch Electronic Law Journal* at www.murdoch.edu.au/elaw/issues/v2n1/blakeney.txt; D. Bennett, 'Native Title and Intellectual Property', (1996) 10 *Land, Rights, Laws: Issues of Native Title* 2; S. Gray, 'Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post Mabo', (1993) 3 (63) *Aboriginal Law Bulletin* 10; S. Gray, 'Squatting in

Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist', (1996) 14 (2) *Law in Context* 29.

5. See: T. Davies, 'Aboriginal Cultural Property?', (1996) 14 (2) *Law in Context* 1; M. Dodson (1996), 'Indigenous Peoples and Intellectual Property Rights', in *Ecopolitics IX – Conference Papers and Resolutions*, Northern Land Council: Casuarina 1996; M. Davis, 'Indigenous Peoples and Intellectual Property Rights', (1996) *Parliamentary Library Research Paper* 20; M. Blakeney, 'Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective', (1997) 6 *European Intellectual Property Review* 298; C. Eatock and K. Mordaunt, *Copyrites*, Australian Film Finance Corporation Limited, 1997; J. McKeough and A. Stewart 'Intellectual Property and the Dreaming', in E. Johnstone, M. Hinton, and D. Rigney (eds), *Indigenous Australians and the Law*, Cavendish Publishing: Sydney, 1997.
6. See the following reports in the media: 'Aboriginal Art Copyright Win', *The Advertiser*, 14 December 1994; 'Aboriginal Art on Carpets Costs Importer $188,000', *Townsville Bulletin*, 15 December 1994; M. Lang, 'Artists win copyright case', *West Australian*, 14 December 1994; R. Macklin, 'Court Moves to Stop Rip-off of Aboriginal Art', *The Canberra Times*, 17 December 1994; R. Hessey, 'Designs on the Future', *The Sydney Morning Herald*, 15 December 1994; C. Egan, 'Tickner to Protect Aboriginal Artists', *The Australian*, 15 December 1994.
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.
10. Initially it was indigenous spokespeople and the legal discipline that took a special interest in indigenous intellectual property issues. This was followed later by anthropology, postcolonial studies, history, sociology, political science, archaeology, development studies, linguistics, philosophy and more recently science studies. The literature on the subject currently exceeds expectations. For space constraints it cannot be fully documented here. For a selection of writings initially produced in Australia and then becoming more international in scope see: W. Marika, 'Copyright on Aboriginal Art', (1976) 3 (1) *Aboriginal News* 7; R. Bell, 'Protection of Aboriginal Folklore: or Do they Dust Reports?', (1983) 17 *Aboriginal Law Bulletin* 5; J. Weiner, 'Protection of Folklore: A Political and Legal Challenge', (1987) 18 (1) *International Review of Industrial Property and Copyright Law* 56; K. Maddock, 'Copyright and Traditional Designs: An Aboriginal Dilemma', (1988) 34 *Aboriginal Law Bulletin* 8; V. Johnson, 'A Whiter Shade of Paleolithic: Aboriginal Art and Appropriation', (1988) 34 *Aboriginal Law Bulletin* 11; C. Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun', (1989) 10 *European Intellectual Property Review* 346; C. Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights', (1992) 7 *European Intellectual Property Review* 227; S. Harrison, 'Ritual as Intellectual Property', (1992) 27 *Man* 225; B. Sherman, 'From the Non-original to the Ab-original' in B. Sherman, and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press: Oxford UK, 1992; R. Gana Oekediji, 'Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property', (1995) 24 (1) *Denver Journal of International Law and Policy* 109; C. Hawkins, 'Stopping the Rip-offs: Protecting Aboriginal and Torres Strait Islander Cultural Expression', (1995) 20 (1) *Alternative Law Bulletin* 7; C. Golvan, 'Court Provides Strong Protection for Aboriginal Artwork', (1995) 8 (1) *Australian Intellectual Property Law Bulletin* 6; H. Fourmile,

'Protecting Indigenous Intellectual Property Rights in Biodiversity', in *Ecopolitics IX – Conference Papers and Resolutions*, Northern Land Council: Casuarina, 1996; D. Posey, 'Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships' in *Ecopolitics IX – Conference Papers and Resolutions*, Northern Land Council: Casuarina, 1996; D. Posey and G. Dutfield, *Beyond Intellectual Property*, International Development Research Centre: Ottowa, 1996; K. Wells, 'The Cosmic Irony of Intellectual Property and Indigenous Authenticity', (1996) 7 (3) *Culture and Policy* 45; F. Dawson, 'The Importance of Property Rights for Biodiversity Conservation in the Northern Territory', (1996) 3 (2) *The Australian Journal of Natural Resources Law and Policy* 179; C. Golvan, 'Aboriginal Art and Copyright Infringement' in L. Taylor and J. Altman (eds), *Marketing Aboriginal Art in the 1990s*, Aboriginal Studies Press: Canberra, 1996; M. Strathern, 'Potential Property: Intellectual Rights and Property in Persons', (1996) 4 (1) *Social Anthropology* 17; S. Brush, 'Whose Knowledge, Whose Genes, Whose Rights?' in S. Brush and D. Stabinsky (eds), *Valuing Local Knowledge: Indigenous Peoples and Intellectual Property Rights*, Island Press: Washington DC, 1996; M. Mansell, 'Barricading Our Last Frontier – Aboriginal Cultural and Intellectual Property Rights' in *Land Rights: Past Present and Future – Conference Papers*, Northern and Central Land Councils: Canberra, 1997; M. McMahon, 'The Intellectual Property Regime and the Protection of Indigenous Cultures' in *Land Rights: Past Present and Future – Conference Papers*, Northern and Central Land Councils: Canberra, 1997; M. Blakeney, 'Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective', (1997) 19 (6) *European Intellectual Property Review* 298; S. Gray, 'Vampires around the Campfire', (1997) 22 (2) *Alternative Law Journal* 60; B. Ziff and P. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation*, Rutgers University Press: New Jersey, 1997; M. McMahon, 'Indigenous Cultures, Copyright and the Digital Age', (1997) 3 (90) *Aboriginal Law Bulletin* 14; A. Barron, 'No Other Law? Author-ity, Property and Aboriginal Art' in L. Bently, and S. Maniatis (eds), *Perspectives on Intellectual Property Volume 4: Intellectual Property and Ethics*, Sweet and Maxwell: London UK, 1998; D.E. Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective', (1998) 23 *North Carolina Journal of International Law and Competition Regulation,* 229; M. Brown, 'Can Culture be Copyrighted?', (1998) 39 (2) *Current Anthropology* 193; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press: Durham NC, 1998; K. Aoki, 'Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', (1998) 6 *Indiana Journal of Global Legal Studies* 11; M. Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things*, Athlone Press: London UK, 1999; M. Sunder, 'Intellectual Property and Identity Politics: Playing with Fire', (2000) 4 (1) *Journal of Gender, Race and Justice* 69; M. Blakeney, 'The Protection of Traditional Knowledge under Intellectual Property Law', (2000) 6 *European Intellectual Property Review* 251; S. Kirsch, 'Environmental Disaster, 'Culture Loss' and the Law', (2001) 42 (2) *Current Anthropology* 167; V. Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, Zed Books: India, 2001; J. Gibson, 'Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property', (2001) 6 (4) *Australian Indigenous Law Reporter*1; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development*, Palgrave Macmillan: Hampshire UK, 2002; F.W. Grosheide and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge*, Intersentia Publishers: Antwerp, Oxford, New York, 2002; S. Harrison, 'The Politics of Resemblance: Ethnicity, Trademarks: Head-Hunting', (2002) 8 *Journal of the Royal Anthropological Institute* 211; E. Hirsch, 'Malinowski's Intellectual Property', (2002) 18 (2) *Anthropology Today* 1; R. Sackville, 'Legal Protection of Indigenous Culture in Australia', (2003) 11 *Cardozo Journal of International and Comparative Law* 711; C. Hayden, *When Nature Goes Public: The Making and Unmaking of Bioprospecting in Mexico*, Princeton

University Press: Princeton, 2003; S. Greene, 'Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bio-prospecting', (2004) 45 (2) *Cultural Anthropology* 211; M. Brown, *Who Owns Native Culture?*, Harvard University Press: Cambridge MA, 2004; G. Nicholas and K. Bannister, 'Copyrighting the Past?', (2004) 45 (4) *Cultural Anthropology* 327; M. Mundy and A. Pottage, *Law, Anthropology and the Social*, Cambridge University Press: Cambridge UK, 2004; H. Geismar (2005), 'Copyright in Context: Carvings, Carvers and Commodities in Vanuatu', (2005) 32 (3) *American Ethnologist* 437; E. Coleman, *Aboriginal Art, Identity and Appropriation*, Ashgate Publishing: Aldershot UK, 2005; S.W. Bunting, 'Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture', (2000) 18 *Context: Journal of Music Research* 15; M. Strathern, *Kinship, Law and the Unexpected: Relatives are Always a Surprise*, University of Cambridge Press: Cambridge UK, 2005; J. Gibson, *Community Resources: Intellectual Property, International Trade and the Protection of Traditional Knowledge*, Ashgate Publishing: Aldershot UK, 2005.

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.
12. In this area the work of Rosemary Coombe has been the most prolific and widely cited. In particular see: 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy', (1993) 6 (2) *Canadian Journal of Law and Jurisprudence* 249; 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity', (1998) 6 *Indiana Journal of Global Legal Studies* 59; 'The Recognition of Indigenous People's and Community Traditional Knowledge in International Law', (2001) 14 *St Thomas Law Review* 275; 'Fear, Hope and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property', (2003) 52 *De Paul Law Review* 1171.
13. G. Deleuze, *Difference and Repetition* (translated by P. Patton), Columbia University Press: New York, 1997.
14. These possibilities are usually articulated as policy and/or legislative reforms in national and international forums. For a discussion of the inter-penetration of strategies between the international and national see: J. Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill', (2004) 23 (4) *University of New South Wales Law Journal* 585; and J. Anderson, 'Chapter Nine – Globalising Indigenous Rights in Intellectual Property' in *The Production of Indigenous Knowledge in Intellectual Property Law*, PhD Dissertation, Law Faculty, University of New South Wales 2003.
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 incommensurability 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.
16. In particular, research that reflected upon postcolonial politics pointed to the significant relationships between power and legal authority within colonial states and hence problems of appropriation and the making of legal categories. For example see: N. Dirks, G. Eley and S. Ortner (eds), *Culture/Power/History: A Reader in Contemporary Social Theory*, Princeton University Press: New Jersey, 1994; B. Ziff, and P. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation*, Princeton University Press: New Jersey, 1997; R. Gana Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System', (2003) 7 *Singapore Journal of International & Comparative Law* 315.
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 predominately relates to presumptions of indigenous sameness and homogeneity, relationships to nature and communal existence.
20. There are very few histories that show the unique development of intellectual property law in colonial contexts. For an exception see L. Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia', (2004) 38 *Loyola Los Angeles Law Review* 71. For a discussion of this absence see: J. Anderson and K. Bowrey, 'The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas are Being Advanced?', Conference Paper, *Con/Texts of Invention Conference* Case Western Reserve University, 20–22 April 2006.
21. See: J. Anderson, *Intellectual Property and Indigenous Knowledge: Access, Ownership and Control of Cultural Materials – Final Report*, Australian Institute of Aboriginal and Torres Strait Islander Studies: Canberra, 2006.
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, Pasqualle Pasquino, Francois Ewald, Jacques Donzelot, Ian Hunter and Pat O'Malley.
23. Michael Brown's work is representative of this approach to intellectual property law. See M. Brown, *Who Owns Native Culture?*, Harvard University Press: Cambridge MA, 2004.
24. See K. Bowrey (1994), 'Don't Fence Me In: The Many Histories of Copyright', Doctor of Juridical Studies, University of Sydney, 1994 and K. Bowrey, 'Who's Writing Copyright's History?', (1996) 18 (6) *European Intellectual Property Review* 322; B. Sherman, and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911*, Cambridge University Press: Cambridge UK, 1999.
25. For a recent exploration of the dynamics of the eighteenth century copyright regime see R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)*, Hart Publishing: Oxford and Portland, 2004. For earlier influential discussions see: M. Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author', (1984) 17 *Eighteenth Century Studies* 425; M. Rose, 'The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship' in B. Sherman and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press: Oxford UK, 1994; M. Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press Cambridge MA, 1993.
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.

27. Following Sherwin, this would constitute a moment when law goes 'pop' – where we find new opportunities to expand the ways in which we think and talk about law. See R. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*, The University of Chicago Press: Chicago, 2000.
28. A. Agrawal, 'Indigenous Knowledge and the Politics of Classification', (2002) 54 (173) *International Social Science Journal* 287 at 293.
29. Native title is the most recent legislative reform that has placed demands on Aboriginal and Torres Strait Islander people in terms of conforming to relatively fixed self and group identification frameworks in Australia. See the *Native Title Act* 1993 (Cth), and the *Native Title Amendment Act* 1998 (Cth). For discussion of the effects and ongoing challenges of presuming stable categories as identity markers within law see: E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Duke University Press: Durham NC, 2002; G. Edmond, 'Thick Decisions: expertise, advocacy and reasonableness in the Federal Court of Australia', (2004) 74 (3) *Oceania* 190.
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.
31. M. Langton, 'Aboriginal Art and Film: The Politics of Representation', (2005) 6 *Rouge*.
32. See: A. Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000*, Fremantle Arts Centre Press: Fremantle, 2000 and N. Dirks, *Castes of Mind: Colonialism and the Making of Modern India*, Princeton University Press: New Jersey, 2001.
33. See: P. Nadasdy, *Hunters and Bureaucrats: Power, Knowledge and Aboriginal State Relations in the Southwest Yukon*, University of British Columbia Press: Vancouver, 2003.
34. A. Agrawal, 'Dismantling the Divide Between Indigenous and Scientific Knowledge', (1995) 26 *Development and Change* 413. For another version of this article see: 'Indigenous and Scientific Knowledge: Some Critical Comments', (1995) 3 (3) *Indigenous Knowledge and Development Monitor*, which generated varying and considered responses. For my purposes I will be referencing the initial citation above.
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.
37. See also: R. Drayton, *Nature's Government: Science, Imperial Britain and the Improvement of the World*, Yale University Press: New Haven, 2000; D.W. Chambers, and R. Gillespie, 'Locality in the History of Science: Colonial Science, Technoscience and Indigenous Knowledge', (2000) 15 *Osiris* 221; 'Focus: Colonial Science', (2005) 96 (1) *Isis*. As a key early text influencing these debates see: B. Cohn, *Colonialism and its Forms of Knowledge: The British in India*, Princeton University Press: New Jersey, 1996.
38. A. Agrawal, n.34, at 422.

39. For a good discussion regarding the problem of knowledge, culture and property from a Nietzschean perspective see T. Flessas, 'Aphorisms, Objects and Culture' in P. Goodrich and M. Valverde, *Nietzsche and Legal Theory: Half-Written Laws*, Routledge Press: New York, 2005.
40. See: J. Rappaport, *Intercultural Utopias: Public Intellectuals, Cultural Experimentation, and Ethnic Pluralism in Columbia*, Duke University Press: Durham NC, 2005.
41. M. Nakata, 'Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems', (2002) 28 *International Federation of Libraries Association Journal* 281.
42. 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.
43. Ibid., at 282.
44. A. Agrawal, n.34 at 292.
45. 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.
46. M. Nakata, n.41 at 283.
47. 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.
48. This will be explored in more depth in Part Three.
49. This will be expanded in Part One.
50. World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)*, Geneva, Switzerland, 2001.
51. Ibid., at 26.
52. 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.
53. The problem that this generates is the subject of Part Three.
54. D. Ivison, P. Patton and W. Sanders, 'Introduction' in D. Ivison, P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press: Cambridge, 2000 at 4.
55. Intellectual property law remains surprisingly impervious to the substantial critical literature on the invention of tradition. See: E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition*, Cambridge University Press: Cambridge, 1992.
56. 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.
57. 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

to secure particular ends. Brosius uses the example of conservation campaigns as a key site to understand how 'traditional' is re-appropriated by indigenous people. In this way, power and resistance are seen as mutually engaged. See: P. Brosius, 'Anthropological Engagements with Environmentalism', (1999) 40 (3) *Current Anthropology* 277; and, P. Brosius, 'Green Dots, Pink Hearts: Displacing Politics from the Malaysian Rain Forest', (1999) 101 (1) *American Anthropologist* 36. See also T. Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot', (2000) 42 (1) *Comparative Studies in Society and History* 149.

58. See J. Beckett (ed), *Past and Present: The Construction of Aboriginality*, Aboriginal Studies Press: Canberra, 1988. More recently see: M. Dodson, 'The end in the beginning: re(de)finding Aboriginality', (1994) 1 *Australian Aboriginal Studies* 2; M. Langton, *'Well I heard it on the radio and saw it on the television. . .': an essay for the Australian Film Commission on the politics and aesthetics of filmmaking by and about Aboriginal people and things*, The Australian Film Commission, 1993. See also: M. Barcham, '(De) Constructing the Politics of Indigeneity' in D. Ivison, P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* n.54.
59. This has been most explicitly played out in native title cases. In particular see the literature surrounding the emphasis on tradition in the Yorta Yorta case: *Members of the Yorta Yorta Community v State of Victoria* [1998] FCA 1606; *Members of the Yorta Yorta Community v State of Victoria* [2001] FCA 45 and *Members of the Yorta Yorta Community v State of Victoria* [2002] HCA 58. For example: V. Kerriush and C. Perrin, 'Awash in Colonialism', (1999) 24 (1) *Alternative Law Journal* 3; S. Young, 'The Trouble with 'Tradition': Native Title and the *Yorta Yorta* Decision', (2001) 30 (1) *The University of Western Australia Law Review* 28; J. Weiner, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta', (2002) 2 (18) *Land, Rights, Laws: Issues of Native Title* 1; L. Strelein, 'Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 – Comment', (2003) 2 (21) *Land, Rights, Laws: Issues of Native Title* 1; R. Bartlett, 'The Obsession with Traditional Laws and Customs Creates Difficulties Establishing Native Title Claims in the South', (2003) 31 (1) *The University of Western Australia Law Review* 35.
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.
62. For instance see: *Yumbulul v Reserve Bank of Australia & Others* (1991) 21 IPR 481; and, *Foster v Mountford & Rigby Ltd* (1977) 14 ALR 71.
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.
65. See: R. Coombe, 'The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination' in B. Ziff, and P.V. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation*, Rutgers University Press: New Jersey, 1997.
66. See also: P. Drahos, *A Philosophy of Intellectual Property*, Dartmouth Press: Sydney, 1996 and, B. Bryan, 'Property as Ontology: On Aboriginal English Understandings of Ownership', (2000) 13 *Canadian Journal of Law and Jurisprudence* 3.
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: Problematics of Government',

(1992) 43 (2) *British Journal of Sociology* 172; C. Gordon, 'Governmental Rationality: An Introduction' in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality*, The University of Chicago Press: Chicago, 1991; M. Dean, *Governmentality*: *Power and Rule in Modern Society*, Sage Publications: London, 1999; N. Rose, *Powers of Freedom: Reframing Political Thought*, Cambridge University Press: Cambrige, 1999.

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

PART I

Law

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.

NOTES

1. F. Munger, 'Mapping Law and Society' in *Crossing Boundaries: Traditions and Transformations in Law and Society Research*, in A. Sarat, M. Constable, D. Engel, V. Hans, S. Lawrence (eds), Northwestern University Press, 1998 at 43.
2. J. Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, University of Wisconsin Press: Wisconsin at x.

1. The cultural life of law

'Intellectual property' has become internationally recognised as a term covering a collection of intangible rights and causes of action developed by western nation states at various times to protect particular aspects of artistic and industrial output – copyright, designs, patents, trade secrets, passing off, aspects of competition law and trade marks. A description of, purpose for and scope of intellectual property law has been defined internationally through *The Convention Establishing the World Intellectual Property Organisation 1967* (WIPO).[1] In general, intellectual property laws seek to 'promote investment in, and access to, the results of creative effort, and extend to protecting the marketing of goods and services'.[2] As a signatory to the Convention, Australia promotes the protection of intellectual property in Australia and throughout the world through a variety of conventions and agreements. One reason for this is that intellectual property is increasingly an important mechanism of world trade.[3] Thus the regime of intellectual property law in Australia is in keeping with the definitions provided through the WIPO Convention and subsequent agreements made through this international body.[4]

With a direct relationship between intellectual property, economics and trade becoming more explicit critical evaluation of intellectual property and its history have emerged.[5] Critical interest has been facilitated in part by concern for new and emerging technologies and related practices, such as developments with digital technology and biotechnology.[6] Much of this commentary has involved an evaluation of the role of intellectual property laws in facilitating commodification and the development of new markets.[7] As part of the developing discourse, attention has also been directed to the implicit cultural elements (and hence cultural prejudices) of intellectual property law, wherein cultural products are increasingly circulating as commodities within networks of private property relations.[8]

Recently Peter Drahos (with Braithwaite) observed that, '[i]ntellectual property rights are, in essence, government tools for regulating markets in information'.[9] With the continuing global redefining of intellectual property standards and the animated trade bargaining pivoting around the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) a variety of publications by governments and non-government organisations (NGOs) echo concerns about the control over knowledge

markets facilitated through intellectual property laws.[10] For example, in many 'developing' countries intellectual property is increasingly considered as a mechanism providing new techniques of control, authority and knowledge management in the post-colonial era. We are now located at a specific point in time when the field of intellectual property law is undergoing transformation both in circulation and exposure.[11] 'Intellectual property rights have gone global.'[12]

LAW AND THE SOCIAL

That intellectual property law has become a subject of discussion within so many diverse forums and by so many people with different levels of access to law and legal agency tells us something broader about law itself: that it occupies a myriad of social spaces. It is not restricted to law books, courtrooms, institutions or bureaucracies. It is instead something that we negotiate everyday. For 'legal meaning is found and invented in the variety of locations and practices that comprise culture, and that those locations and practices are themselves encapsulated, though always incompletely, in legal forms, regulations and symbols'.[13] Law, in all its functions, is deeply imbued in a social nexus, and it is this nexus that provides the law with fluidity and changeability. For intellectual property this means that it is informed and influenced by changing social and political movements as much as by new court based judgments and determinations.

This way of understanding law really emerged in the latter part of the twentieth century. Critical attention to problems of jurisprudence grew from dissatisfaction with understanding law as a regime of abstract rules.[14] This was because legal power was a much more dynamic process than an argument relying on abstract rules could accommodate. For example, the way in which these rules were interpreted played a significant role in how legal power was exerted, and upon whom. Further, as a focus on the circulations of legal meaning increased, it was clear that such meaning was not communicated in a one-directional way: that the direction changed depending on who was communicating, interpreting, and in which kinds of contexts. Indeed, much critical attention continues to explore key assumptions underpinning the authority of the legal discipline. For instance:

> in what sense law is objective (determinate, impersonal) and autonomous rather than political and personal; the meaning of legal justice; the appropriate and actual role of the judge; the role of discretion in judging; the origins of the law; the place of social science and moral philosophy in law; the role of tradition in law; the possibility of making law a science; whether law progresses; and the problematics of interpreting legal texts.[15]

Certainly, it was consideration of the relations between law and politics that provided the initial frame for an analysis of the indeterminacy of legal thought and legal outcomes. In this way a fundamental critique of law was directed against legal formalism and objectivism.[16] Critical reflection upon differences between 'law making and law application' exposed the extent of thought where formalism and objectivism were assumed in each process. In this context, formalism should be understood as a 'commitment to, and therefore a belief in the possibility of, a method of legal justification that contrasts with open ended disputes about the basic terms of social life . . . [t]his formalism holds impersonal purposes, policies and principles to be indispensable components of legal reasoning'.[17] In other words, it is only through a rational, undemonstrative and apolitical framework of analysis that legal dogma is possible. Objectivism insists on the authority of legal material – cases, statutes and accepted legal rationale – as they display 'always imperfectly, an intelligible moral order'.[18] What characterises legal formalism and objectivism is the presumption that it is possible for law to function in an abstract space beyond people and politics.

In particular, it was these two specific characteristics of law which came under increased scrutiny, for their inability to provide an accurate account of legal process and function.[19] The fuzzy boundaries between law, individuals and practice also heightened the necessity for reflection that made links between legal processes and their effects on social relationships. This critical work illustrated how law *never* functions above or beyond politics.[20] Both the 'law-in-context movement' and critical legal jurisprudence challenged the belief in the naturalness, efficiency and fairness of the structure of the legal profession. It revealed the hidden characteristics and political life of legal reasoning.

As well as arguing for a broader understanding of the contingency of law and highlighting the impossibility of objectivism, critical legal scholarship also questioned how it was then, that the legitimating and constitutive operation of law, on all levels of social and individual engagement, could be seen to be natural.[21] The progression of this line of inquiry revealed that underlying particular legal doctrines rested categories of legal analysis that distributed particular and subtle effects. In short, this meant that law, positioned within a political location, was partial, contingent and specific. Law responded to politics and politics enhanced the position of law, particularly in situated and localised centres of conflict. Critical legal theory unmasked the 'universalism' of traditional legal jurisprudence, rejecting the premise that law exists in a political and social vacuum.

However, this kind of legal thinking developed a critique of law that was difficult for mainstream jurisprudence and legal teaching to absorb.[22] Nonetheless, sympathetic to the broader general critique of law, dedicated

readings of feminism and law,[23] race and law,[24] and law and discourse[25] endured, drawing upon political theories of feminism, critical race theory and postmodernism.[26] This new interdisciplinary scholarship has revealed contingencies and limits within the law that were previously undisclosed and hidden. Rethinking the construction of categories of law with regard to differing subjectivities has produced new and diverse ways of thinking about law, legal process and legal power that reflect upon the complexity of legal engagement within any social context. Through this thinking indigenous claims to self-determination and human rights have taken on a new resonance, displacing the mythology of modern law as autonomous, distinct, unified and internally coherent.[27] Understanding the complex and intricate relationships between law, power and authority is urgently required. This necessitates an appreciation of the ways in which law shapes and influences how people think and act, and conversely how different kinds of actions can influence the direction that law takes on a particular issue.

LAW AND INDIGENOUS PEOPLE

Critical attention to the subject positions that indigenous people occupy within the law (and within society) has been crucial for locating and identifying modes of historical injustice. It has also provided a context for understanding the amalgam ways through which law treats difference.[28] Indeed it is impossible to consider the position of indigenous people in relation to western law without also recognising the historical circumstances of colonisation to which indigenous people have been subjected. This includes the way in which legal precedent has established Anglo-Australian jurisdiction over indigenous people.[29] While arguments by indigenous people fundamentally question the legitimacy of the jurisdiction of Australian courts, inevitably leading to opposing sovereignty claims, the continuing over-representation of indigenous people in the criminal justice system, for example, reflects the power of legal apparatus to continue to exert its effects upon indigenous people.[30]

In Australia, the 1967 referendum where 'full' citizenship rights were established for Aboriginal and Torres Strait Islander people implied the 'application of the principle of equality before the law'.[31] This included dismantling the discriminatory legislation and policies directed towards indigenous people during the prolonged period of colonisation.[32] However, as Irene Watson and Chris Cuneen, amongst others, have argued, the colonial optic for viewing and managing indigenous people through the legal system has not changed very substantially.[33] The significant *Royal*

Commission into Aboriginal Deaths in Custody[34] highlighted the severe failings of the Australian legal system to respond to cultural differences and recognise the effects of colonial power structures on colonised people.[35]

The way in which indigenous people have been constructed and produced before the Anglo-Australian legal system is a product of social and political influence in which the law has been integrally engaged.[36] This itself draws attention to the extent that politics is embedded within the law: that it does not function in an isolated sphere. The recent push to recognise the 'special' circumstances under which indigenous subjects enter the legal discourse has prompted consideration of the extent to which law can accommodate difference. For example, the recent exploration by the Western Australian government on potential ways of incorporating customary law is illustrative of the ways in which indigenous difference (as custom/culture) is treated.[37] Here indigenous culture is deployed in the law as a problematic – there is a real question about the accommodation of difference in law, for instance that indigenous people can make for differing legal subjectivities.

The tension for law is that indigenous people can also make for similar legal subjects owing to changing cultural experience, circumstance and relations. The problem is that indigenous differences in relation to certain kinds of law can be localised and particular – it is not always possible to generalise from local to broader national Aboriginal contexts. For example, with the overturning of the doctrine of *terra nullius* through the *Mabo* decision in 1992, new dilemmas in accommodating indigenous difference have arisen. Specifically these are in terms of recognising indigenous proprietary rights to land. As the Australian High Court found that such rights continued to exist after colonisation and British sovereignty,[38] questions of land ownership, native title and the presumption of generic land 'ownership' initially formed the frontier for illustrating how law treats difference presented through indigenous legal subjects.[39]

At this point it is useful to move to an examination of how individual and group claims to 'real' property have provided a platform that challenge (once revered) legal frameworks. Property provides a vantage point to consider a number of intersecting elements including the traditions of western philosophy of property and rights in property; legal frameworks through which social relations between people are engaged; and, how different indigenous perceptions of property disrupt traditional western jurisprudence.

The consideration of how such difference is treated in 'real' property terms is crucial to developing an appreciation of the implications in intellectual property. It is worth remembering that the ways in which 'real' property justifies a right in property differs considerably to that in

intellectual property.[40] However, a conception of property, here understood as a principle of social organisation, was intrinsic to some of the emergent arguments justifying intellectual property.[41] The real value in understanding the concept of property and its subsequent deployment is not only to demonstrate how law accommodates differing indigenous conceptualisations of property rights, but as will be the focus on the following chapter, how law works simultaneously to extend and enhance its own categories and boundaries of identification and classification.

WHY 'REAL' PROPERTY MATTERS

> Property is nothing but a basis of expectation: the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical, it is a mere conception of the mind.[42]

The language of property underpins the way that indigenous knowledge and expression have come to be positioned within the law. This is not only in regard to 'intellectual' property but follows a trajectory set first by land rights and subsequently followed by claims to the ownership material cultural products.[43] Discussions that pinpoint notions of cultural 'ownership' and 'theft' denote exclusive relations of private property. For my purposes here, it is certainly a significant moment when social issues are positioned for remedy through legal means, and raises questions about the influence of the law in managing particular sites of discontinuity, for instance indigenous property rights.[44] At the same time it also makes for challenging legal positions.

It could be argued that western law is preoccupied with property rights and their protection.[45] Importantly in Australia, *Mabo* (1992) addressed in part, the injustice of colonisation (expropriating property) and the historical legal denial of indigenous customary rights. It is significant that this political watershed was achieved through a case specifically centred on property. For the indigenous claimants, western property law, or 'real' property, provided a vehicle to argue for a set of rights, one of which could be understood because of the familiar phrasing of the claim through this legal jurisdiction – ownership of land.[46] Together, the politics of law and the justice claims made to the law, expressed in terms of expectation following Bentham, create a tension in dealing with indigenous property. For indigenous property is not confined to a claim restricted by real property law but incorporates other categories of law such as intellectual property.[47]

Both modern 'real' property law and intellectual property law developed significantly in the eighteenth and nineteenth centuries.[48] Yet, both bodies of law experienced profound difficulties in securing agreement on foundations and principles, despite various statutory reforms. Challenged in terms of addressing their own cultural specificity and history, it is unsurprising that both fields of law are stretched by indigenous 'real property' and 'intellectual property' claims. In both spheres, western notions of property have come under increased scrutiny. Property is 'an expression of social relationships because it organises people with respect to each other and their material environment'.[49]

The power of property is that it resides simultaneously within the law and outside it. It is both a legal and social trope. Where indigenous people have adopted the property discourse to challenge precepts of *terra nullius*, for example, property demarcates competing political interests: for example in the instance of the *Mabo* case between the Murray Islanders and the Australian Commonwealth Government. It also points to the ways in which, inescapably, property mediates the world in which people interact and the possible relationships between individuals and communities as well as legal and governmental institutions. Arguably, property is an essential organising principle around which liberal ideals of ownership and possession are circulated and authorised. Law is an important vehicle in distributing and circulating perceptions of property relations within social, political and economic networks, but as property theory illustrates, law remains unclear about what property is or means.

The concept of property has evolved over time. However the modern political conception of property owes a considerable debt to John Locke and it is therefore important to sketch briefly his approach to property.[50] Locke's thinking on property was instrumental in shaping how successors such as Blackstone,[51] Bentham,[52] Hohfeld[53] and Reich[54] reinterpreted and reinscribed concepts that have become central tenets in modern liberal political contexts.

John Locke's labour theory justified private property in a unique and somewhat oblique way which explains the subsequent contrary interpretations of his theory of natural rights.[55] Locke's concern with property is identified as existing in *Two Treatises of Government*.[56] The explanatory passage in 'Of Property' commonly cited to clearly locate this position is:

> Though the Earth, and all inferior Creatures be Common to all Men, yet every Man has a *Property* of his own *Person*. This nobody has any right to but himself. The *Labour* of his body and the *Work* of his hands, we may say are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own and thereby makes it his *Property*.[57]

Locke's justification of private property rests upon three key principles that can be elicited from this passage. Firstly, that 'every Man has a *Property* of his *Person*', and that '*Labour* of his body and *Work* of his hands' are therefore part of this property of the person. Secondly, mixing individual labour with the state of nature, produces something new which will be a person's property. Thirdly, it is labour that adds the value to land (the common state of nature), making it worth something, rather than nothing; as Locke asserts 'for it is labour indeed that puts the difference of value on everything'.[58] The key factor in this argument is that man's labour is an exertion of action exercised upon an object or thing previously inactive, for example while fruit grows it has to be picked and therefore labour exerted to become the property of the picker. Labour must be used to cultivate, extract and to make value out of something that would otherwise be worthless. Locke's natural rights theory assumes the inherent action of human endeavour which is juxtaposed to the contexts of the inactive state of nature: 'commons' provided by God for the use of 'Man'. Further, as property is thus imbued with the qualities of a natural right, it does not emanate from social relations but exists 'prior to the social order'.[59]

Notably, Locke's conception of natural rights requires a specific interpretation of 'labour' and the definition of the labourer entitled to property. There is an implicit hierarchy within Locke's natural rights theory – not only relating to who is a legitimate 'person' but also what the act of labour and cultivation entails. Cultivation is closely wedded to notions of civilisation, the presumption being that labour 'improves' the land and enables progress to be sustained. This presumption as well as those about the inferiority of certain kinds of people are demonstrated most aptly later in his account where Locke makes the distinction between labour and cultivation and the wastelands of America untilled (in the European sense) by the Indians: the logic extends via the implication that there is no property held by the Native Americans in America because there has been no labour exerted to cultivate and improve the land, especially given that: 'Nature [has] furnished as liberally as any other peoples with the material of plenty'.[60]

It can, however, be misleading only to consider this brief part of Locke's work to understand his natural rights theory of property.[61] For Locke's theory of property was also positioned within a larger discourse about government – in the justification of the English Revolution of 1688 and to invalidate the doctrine of absolute monarchy presented by Robert Filmer in *Patriarcha: or The Natural Order of Kings* (1680).[62] That such selective readings from Locke's work have been so influential is curious – even more so if we then consider how Locke's natural rights theory has also been used to authorise property in intellectual property, a connection that Locke

himself never made as he did not support a perpetual right of authors in a work.[63]

Whilst Lockean labour theory is discussed in some accounts of intellectual property law,[64] other prominent histories trace no such derivations.[65] The absence is interesting considering that a justification for modern intellectual property law, argued initially in the context of the English literary property debates of the eighteenth century, is that all authors have a natural pre-existing (and perpetual) private property right to the text because of the labour exerted. The position of 'labour' to justify property in abstract objects is significant but raises the question of boundaries, '[l]abour creates the property right, but what identifies the object of that property right?'.[66]

It was William Blackstone, an English common law theorist in the eighteenth century, that adapted and modified Locke's position on rights and labour in the particular context of the literary property debates of that same period. To this end, Blackstone pioneered a natural rights approach to ideas and knowledge, arguing the common law right to literary property arose through the natural labour exerted in the production of the expression. As Deazley notes, 'Blackstone was clearly influenced by Locke's second treatise on government, but had obviously failed to acquaint himself with Locke's personal views as to what property did exist in books'.[67] Whilst Locke did not support a perpetual common law right in an expression because of the unlikely 'essential representation of an identity in a work' nevertheless, in intellectual property circles Blackstone's interpretation has become synonymous with Locke's position and emphasises the rationality beginning to be utilised for the identification of property relationships.[68]

Nevertheless, by the end of the following century, Blackstone's conception of property originally equating to absolute dominion over things, was replaced by a newly defined form of property. The features that characterised this new form of property were that it had been dephysicalised, consisting not of rights over things but of any valuable right.[69] Value thus became the key to identifications of property, serving both the tangible realm of property and intangible property. Value, although relying on arbitrary judgement, linked formulations of property and secured judicial autonomy. Importantly measuring value was increasingly tied to the market and this meant that new forms of property could be constituted and protected.[70]

Whilst Blackstone embraced and reinterpreted Locke's account of natural rights theory and its justification for property, intermingling it with common law theories of entitlements, Jeremy Bentham, as Blackstone's predecessor, rejected natural law and natural rights. Subsequently Bentham's influence

in dismissing any claim to 'naturally' occurring rights in law, resonate from considerations of the relationship, generated by property, as being between persons, rather than between a person and a thing. However, whilst scorning natural rights and claiming to have replaced them with utility (or the greatest happiness of the greatest number), Bentham still rested the property right on labour. Bentham presents a case that relations of property are constitutive of social relations. Property then is not a pre-existing concept of law rather it is a socially constructed concept embodying questions of power and social relations. Thus property is not objectively definable or identifiable.[71]

Law provides the frameworks whereby an expectation of property is constructed and disseminated. In this sense, while property is a medium for social organisation, it is nevertheless regulated through legal parameters which govern that expectation. Bentham's position that 'property is nothing but an expectation' is significant precisely because expectation is fundamentally developed through human relations. It is not a pre-existing concept. What is integral to expectation is the extent to which such anticipation has been generated. The grounds for expectation need to be first established so that there is a sense of probability. This makes claims of entitlement possible. Expectation arises because of changing systems of value and the political circumstances for the voicing of rights claims. But expectation is also positioned within a field where it is legitimate to have expectation to begin with, that there is some form of precedent for such expectation to be recognised. If property is nothing more than expectation, then this is contingent upon the legal avenues that produce and uphold this 'expectation'. Expectation then can be shaped and sculpted so that what is expected is not beyond delivery.

Bentham's interpretation of property makes a different linkage between real property and intangible property possible to that assumed by Blackstone. Rather than treat the expression of ideas – the book (literary property) – as a kind of pre-occupied land, Bentham's approach obliterates the physicality of property altogether, relocating the gaze to the classificatory distinctions and boundaries produced by law itself. Law produces the legal subject/object. This is later understood by Charles Reich to also involve ceding an authority of the marketplace, to the extent that the law itself practically engages 'expectation'.[72]

The economic transformation of property is an equally important element of contemporary social relations especially in its capacity to generate new forms of expectation. Thus property relations become imbued with an intent to generate revenue, where governmental influences readily demarcate political domains of interaction. The economic utility of property generates new forms of expectation that law inevitably regulates.[73]

Changing interpretations of value inform property relations and influence how law identifies a distinction between exclusive possession and economic value.[74] Kevin Gray has argued that seeing property as generating a power relationship significantly increases the range of interests wherein property can be claimed.[75] As the limits on property are not fixed, judicial processes, for example through the courts and in the making of legislation, have the power to 'create property'.[76] The direct implication for intellectual property, at least, is that if there are no natural limits, and the politics of determining the boundaries of property are acknowledged, how can indigenous claims be denied?

Indigenous claims that directly target legal frameworks and institutions of law are made because an expectation has been developed that the law can recognise and respond to indigenous people's claims to property, both tangible and intangible.[77] Indigenous claims to cultural property evoke an expectation, not only in recognising a proprietary right, but also on the level of expecting justice. The politics of recognition here also illustrate how certain kinds of claims resonate within law itself, forcing law to respond in new ways. The example is in the resulting production of indigenous knowledge as a distinct category within law. Thus the nature of the expectation is marked by the boundaries of law that can respond and deliver a legally recognisable 'property' right.

Noel Pearson, Aboriginal spokesperson in Australia and Team Leader of Cape York Partnerships in northern Queensland, has recognised the utility and possibility for action wherein legal frameworks can be adopted for purposeful strategies of recognition.[78] As he states, indigenous people 'need to be realistic about the following: first about the content and the nature of the tools which are available to us; second about what these tools can positively achieve. They are limited tools and to optimise results we must use them wisely and skillfully'.[79] Pearson indicates the possibility of utilising law as a strategic vehicle, through which indigenous interests might be advanced. Certainly then, re–imagining a concept of property so that it can be adapted to differing conceptions of ownership, and relations between people, is a necessary element in voicing an expectation of law. In this context, the expectation is for a guarantee of justice through equitable treatment in recognising the legitimate rights and interests indigenous people have in controlling culturally specific knowledges and products. This strategy contests the language of the law and the power of property within it.

The legal claims for (indigenous) property rights become a powerful vehicle in advancing indigenous self-determination claims. Claims for property ownership in intangible material raise an agenda and present an expectation for legal action. Indeed, the increasing indigenous claims

to intellectual property frameworks within national and international contexts, speaks to the power of the broader intellectual property discourse. Intellectual property has provided a platform to which other indigenous issues can be attached and made more visible. In harnessing intellectual property as a powerful regime crucial to the function of liberalism, capital flow and modern trade relations, indigenous claims strategically demand legal attention and response.

Despite this optimism, there is a legitimate point to critical work that reveals how phrasing indigenous interests in knowledge protection and control within an intellectual property discourse necessarily reduces indigenous concepts of ownership and property to a western framework at the expense of a more nuanced understanding of historical and contemporary pressures and contexts. For example Michael Dodson has argued that;

> Certainly neither the Copyright Act, nor any other acts are able to provide for the complexities and subtleties of the ownership of indigenous art. The roles and obligations of our artists, the relationships between the artist as an individual and as a member of the society in which he or she works finds little accommodation within the existing legal framework.[80]

In a similar way, Michael Blakeney has argued that;

> Indeed a major problem, which has been identified in analysing traditional knowledge and cultural expression in conventional intellectual property terms is the observation that 'indigenous people do not view their heritage in terms of property at all. . .but in terms of community and individual responsibility'.[81]

Both Dodson and Blakeney emphasise how the existing legislative framework, in particular that of property, fails to take account of the diversity of positions held by indigenous people in relation to expressions of intangible cultural material.[82] Both suggest that a property discourse reduces indigenous concepts and community values. In reflecting upon these difficulties, Valerie Kerruish has observed that;

> Private property within a historical and cultural context that transforms such property, at the level of normative discourse into rights of persons (moral subjects, citizens) is a mode of social organisation which has exhausted its emancipatory potential.[83]

Kerruish's point is that it is capital that protects its power as property at all costs, therefore there can be no emancipatory power for the poor. But the conflict in the context of indigenous intellectual property is of a different nature. There is not a direct confrontation with capital versus labour. In fact it is the potential of indigenous cultural expressions as capital that

encourages the law to engage with the subject. This links back precisely to Pearson's point that there is emancipatory potential within the law, because there is nowhere else to go: the law can provide realistic expectations of what is possible, and not in a disciplinary arena of pre-ordained values imposed on indigenous people. The opportunity to expose the limits of the law comes from within law itself.

When indigenous people make the claim that intellectual property laws should protect their cultural integrity and cultural expressions, the challenge has been set for the law in a familiar framework. For law moderates difference when presented through the guise of its own categories and frameworks. Nevertheless, the irony remains that it is because indigenous interests were not seen as property proper, that this new appeal to property can be made. Other pressures, such as political influence and individual advocacy, also force changes in recognition and hence in the scope of the law. To change the terms of the debate necessitates initially beginning on these terms. The assumption that indigenous people are unable or unwilling to employ such strategic engagement misunderstands the ways by which multiple resistances to circulations of power can be or are imagined and enacted by individuals as well as generating new kinds of political impetus. As Michel de Certeau has argued, it is possible to subvert dominant representations and laws, 'not by rejecting or altering them, but by using them with respect to the ends and references foreign to the system. . .'.[84] de Certeau's point is that it is possible to deflect the power of the dominant social order, and I would add, that in this current context even the phrase, 'indigenous intellectual property', illustrates the particular kinds of deflection of property as power at play.

The primacy of law and legal frameworks in mediating certain kinds of political struggles is of fundamental interest here. In the context of property, law functions as a location where challenging positions are circulated. This is not only in regard to competing sovereignty claims but also contested value systems and intellectual traditions regarding knowledge use, management, access and circulation. It seems at least in intellectual property, incommensurable differences in knowledge production, ownership and protection are the familiar arguments that constitute the circularity of contemporary debate. However, if we keep in mind the complex relationship of dependency between knowledge and power, what is revealed is how the new subject of 'indigenous intellectual property', once created, starts to produce its own frameworks of understanding and regimes of truth. Further, these are not only the apparatus of the coloniser, but also tools adopted and modified by indigenous people and consequently a feature of indigenous governance. For whilst 'property' and 'ownership' might not fully encompass indigenous aspirations and perceptions, they do provide

an easily recognised and accepted terminology through which indigenous interests can be elevated.

So, whilst law reduces (cultural) differences so that they are barely noticeable, at the same time it also relies upon them to understand the differing demands brought for legal interpretation, mediation and importantly, remedy. This is part of the necessarily cultural functions of law. While law rejects difference presented to it in a radical way, it accommodates difference when it is presented through the guise of its own categories and terms of reference.[85] This is the reality of legal engagement with differentials, cultural or political, as law mediates a space that does not destablise its own narrative of internal cohesion. As Elizabeth Povinelli has explored in the context of land rights and native title in Australia, this can result in the construction of specific categories of cultural difference – where a criteria of *authenticity* is established that demands a specific 'performance' of legal subjectivity.[86] In this sense, law becomes intimately engaged in establishing how certain legal subjectivities are recognized – to the extent that this then effects how individuals behave within legal as well as other social contexts. At the same time however, this is never completely predictable, as individuals also use and modify law for their own strategic purposes.[87] This means that legal frameworks can also be adapted for purposeful strategies of recognition.[88]

Voicing a concern for indigenous property within a legal framework of intellectual property strategically works to alert the law to a concern to which it may have otherwise been blind. Because the challenge is set within the law's own terms of reference it must engage the challenge. Not to do so would undermine the legal narrative of 'universalism'. Thus a possibility for utilising law also depends upon recognising the emancipatory potential of property.[89] Indeed it is important to acknowledge that whilst indigenous advocates have been at the forefront of pointing to the limitations of western law, the very language of and expectations of intellectual property have not been abandoned as potentially useful political tools. In the communities, organisations and bureaucracies where I have worked, the current expressions and expectations around the protection of knowledge do not advocate an abandonment of 'property' *per se*.[90] Instead, the anticipation is of a reworked property regime that accommodates differing interests and expectation. Property, and hence legal networks remain the primary vehicles through which indigenous interests are being expressed.

It is because intellectual property is being evoked as the primary vehicle to secure indigenous interests in knowledge control and management that it is imperative that we look at the emergence of a body of law specifically engaged with managing expectations of property in intangible things like knowledge. The next section explores the foundational jurisprudential

contests that characterize intellectual property law. This is because these are almost always left out of the literature and debates on indigenous knowledge and intellectual property. Yet they are critical to understanding both the operation of legal authority and the function of law in fashioning new kinds of categories and interests. The absence of this jurisprudence limits what we can understand about the politics of this domain of law and the emergence of indigenous knowledge within it. What follows sets the frame for a more nuanced engagement of the extent that law constructs a space of interpretation for indigenous knowledge and indigenous culture(s). In more plain terms, what will become apparent is the manner in which intellectual property law actively makes an 'indigenous' category that it can identify, incorporate and respond to through new treaties, policies and legal reforms.[91]

NOTES

1. Prior to 1967, international standards for intellectual property protection were established through the *Paris Convention for the Protection of Industrial Property* (1884) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886).
2. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition), The Lawbook Company: Pyrmont, Sydney, 2002 at 3.
3. This has been made explicit through the 1994 *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs). As McKeough, Bowrey and Griffith note 'TRIPs is one of a system of agreements which make up the World Trade Organisation (WTO). TRIPs links intellectual property rights to GATT or WTO rights and obligations'. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials*, supra n.2 at 4. See also: M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, Sweet and Maxwell: London, 1996; P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*?, Earthscan Publications Ltd: London, 2002; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development*, Palgrave MacMillan: Hampshire and New York, 2002.
4. In particular see the *WIPO Performances and Phonograms Treaty* (1996) and the *WIPO Copyright Treaty* (1996).
5. See for example: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911*, Cambridge University Press: Cambridge, 1999; P. Drahos, *A Philosophy of Intellectual Property*, Dartmouth Press: Sydney, 1996; R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*, Hart Publishing: Oxford and Oregon, 2004.
6. See: P. Drahos, 'Capitalism, Efficiency and Self-Ownership', (2003) 28 *Australian Journal of Legal Philosophy* 215.
7. C. Lury, *Cultural Rights: Technology, Legality and Personality*, Routledge: London and New York, 1993; J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society*, Harvard University Press: Cambridge MA, 1996; L. Lessig, *The Future of Ideas: The Fate of the Commons in an Interconnected World*, Random House: New York, 2001; D.E. Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective', (1998) 23 *N.C.J. Int'l L.& Com.Reg.* 229; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual*

Property, Brookings Institution Press: Washington DC, 1998; S. Sell, 'Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS and Post-TRIPS Strategies', (2002) 10 *Cardozo Journal of International and Comparative Law* 79; C. May, *A Global Political Economy of Intellectual Property Rights: The New Enclosure?*, Routledge: London and New York, 2000; C. May and S. Sell, *Intellectual Property Rights: A Critical History*, Lynne Rienner Publishers: UK, 2005.

8. For example: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*?, supra n.3; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development*, supra n.3; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press: Durham and London, 1998; K. Aoki, 'Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', (1998) 6 *Ind. J. Global Leg. Stud.* 11; J. Gaines, *Contested Culture: The Image, the Voice and the Law*, The University of North Carolina Press: Chapel Hill, 1991; V. Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, Zed Books: India, 2001; D.E. Long, '"Globalization": A Future Trend or a Satisfying Mirage', (2001) 49 (1) *Journal of the Copyright Society of the USA* 313; R. Gana, 'Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property', (1995) 24 (1) *Denv. J. Int'l L. & Pol'y* 109; P.E. Geller, 'Copyright History and the Future: What's Culture Got to Do With It?', (2000) 48 (1) *Journal of the Copyright Society of the USA* 209; D.E. Long, '"Democratizing" Globalization: Practicing the Policies of Cultural Inclusion', (2002) 10 *Cardozo Journal of Interternational and Comparative Law* 217.
9. P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.3 at 3.
10. For example see the Canadian NGO, Rural Advancement Foundation International (RAFI) at [http://www.rafi.org.au]. See also the Third World Network, *The Need for Greater Regulation and Control of Genetic Engineering: A Statement by Scientists Concerned about Current Trends in the New Biotechnology*, Penang, Malaysia, 1995. Released articles include 'Feared reviewed science: contaminated corn and tainted tortillas – Genetic Pollution in Mexico's centre of maize diversity' (2002) 74 *RAFI Communique* at http://www.rafi.org/article.asp?newsid=287; 'GM Fallout from Mexico to Zambia: the great containment', RAFI press release, October 25, 2002 at http://www.rafi.org/article.asp?newsid=366; 'Sovereignty or Hegemony: Africa and security, Negotiating from reality' May 30 1997 at http://www.rafi.org/article.asp?newsid=192. For a discussion of implications for patents on plants like neem and tumeric see: Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, London, 2002; E. Martin, 'The Neem Tree Patent: International Conflict over the Commodification of Life', (1999) 22 *B.C. Int'l & Comp. L. Rev.* 279; V. Shiva, *Monocultures of the Mind: Perspective on Biodiversity and Biotechnology*, Zed Books: India, 1993.
11. Knowledge about intellectual property rights is always undergoing transformation, however in recent times the interpretation has shifted again owing to the increasing globalisation of such rights. See D.E. Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective', supra n.7.
12. P. Drahos 'Introduction' Drahos, P., and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development*, supra n.3 at 1. See also C. May, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?*, Routledge: London, New York, 2000.
13. A. Sarat and J. Simon, 'Beyond Legal Realism?: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship', (2001) 13 (35) *Yale Journal of Law and the Humanities* 1 at 21.
14. See for instance: J. Austin, *The Province of Jurisprudence Determined* and *Lectures on Jurisprudence* (3 vols) John Murray: London, 1861–3; H.L.A. Hart, *The Concept of Law*, Clarendon Press: Oxford, 1961; R. Dworkin, *Law's Empire*, Fontana Press: London, 1986.

15. R.A. Posner, *The Problems of Jurisprudence*, Harvard University Press: Cambridge MA, 1990.
16. R. Unger, *The Critical Legal Studies Movement*, Harvard University Press: Cambridge MA, 1986.
17. R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, Free Press: New York, 1976 at 1.
18. Ibid., at 2. See also the debate about the relationship between law and morals, in particular, M. Sandel (ed), *Liberalism and its Critics*, New York University Press: New York, 1984. Also see: A. Young and A. Sarat (eds), (1994) 3 (3) *Beyond Criticism: Law Power and Ethics*, *Social and Legal Studies* 1.
19. See the discussion in F. Munger, 'Mapping Law and Society' in Sarat, A., M. Constable, D. Engel, V. Hans and S. Lawrence (eds), *Crossing Boundaries: Traditions and Transformations in Law and Society Research*, Chicago: Northwestern University Press: 1998 at 43.
20. In other disciplines, such as anthropology, the social relationships generated through law were also of increasing interest. However, owing to alternate histories and philosophies underpinning each discipline the object of interest differed. For instance, anthropologists focused more on the social relationships generated through law and legalism often in non-western contexts, whereas legal scholars tended to focus more on internal legal questions and, increasingly how law functioned and was affected by political influences like feminism or socialism. For examples of the work of legal anthropologists emanating around the same time as the critical legal movements see the collection in L. Nader (ed), *Law in Culture and Society*, Aldine Publishing Company: Illinois, 1969.
21. M. Tushnet, 'Critical Legal Studies: A Political History', (1991) 100 (5) *The Yale Law Journal* 1515 at 1526. Also see: J. Derrida, 'Force of Law: The Mystical Foundation of Authority', (1990) 11 *Cardozo Law Review* 919.
22. The antagonism against critical legal scholars highlighted the threat that such ideas posed to the establishment. In Australia, the controversy was contextualised at the Law Faculty of Macquarie University. See *Report of the Committee to Review Australian Law Schools, A Discipline Assessment*. Commonwealth Tertiary Education Commission: Australian Government Publishing Service, 1987. In America, critical legal theorists were sacked and denied tenure. For an account of this see M. Tushnet, 'Critical Legal Studies', supra n.21 at 1530–1534.
23. For feminist critiques challenging traditional jurisprudence see: C. Smart, *Feminism and the Power of Law*, Routledge: London, 1989; C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press: Cambridge MA, 1987; T. S. Dahl, *Women's Law: An Introduction to Feminist Jurisprudence*, Oxford University Press: Oxford, 1987; M. Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press: London and Sydney, 1990.
24. For race and law see: P. Williams, *The Alchemy of Race and Rights*, Harvard University Press: Cambridge MA, 1991; C. Cunneen and T. Libesman, *Indigenous People and the Law in Australia*, Butterworths: Sydney, 1995; P. Fitzpatrick, 'Racism and the Innocence of Law' in Fitzpatrick, P. and A. Hunt (eds), *Critical Legal Studies*, Basil Blackwell: Oxford, 1991.
25. For law and discourse: R. Cotterrall, *Law's Community: Legal Theory in Sociological Perspective*, Clarendon Press: Oxford, 1995; H. Stacey, 'Legal Discourse and the Feminist Political Economy: Moving Beyond Sameness/Difference', (1996) 6 *The Australian Feminist Law Journal* 115.
26. See for example: P. Fitzpatrick, *The Mythology of Modern Law*, Routledge: London and New York, 1992.
27. Ibid., from 10.
28. For critical readings that examine the position of indigenous people within the law see generally: C. Cuneen, 'Judicial Racism', (1992) 2 (58) *Aboriginal Law Bulletin* 9; P. Dodson, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of the Inquiry into Underlying Issues in Western Australia*, Australian Government Printing Service: Canberra, 1991; P. Hanks and B. Keon-Cohen, *Aborigines and the*

Law, George Allen and Unwin: North Sydney, 1984; G. Bird, G. Martin and J. Nielson (eds), *Majah: Indigenous Peoples and the Law*, The Federation Press: Sydney, 1996; R.L. Barsh, 'Indigenous Peoples: An Emerging Object of International Law', (1986) 80 *The American Journal of International Law* 369; I. Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State', (1997) 8 *Australian Feminist Law Journal* 39; E. Johnson, M. Hinton and D. Rigney (eds), *Indigenous Australians and the Law*, Cavendish Publishing: Sydney, 1997; C. Cuneen and T. Libesman, *Indigenous People and the Law in Australia*, Butterworths: Australia, 1995.

29. C. Cuneen, *Conflicts, Politics and Crime*, Allen and Unwin: Sydney, 2001 at 5. Cunneen has more recently extended his argument about the limits of litigation in the case of the Stolen Generations. See C. Cuneen and J. Grix, 'The Limitations of Litigation in Stolen Generation Cases' *AIATSIS Research Discussion Paper* No. 15 2004.
30. In Australia many indigenous people are in custody for minor offences. See: J. Walker and D. McDonald, *The Over Representation of Indigenous Peoples in Custody in Australia*, Australian Institute of Criminology – Issues Paper 47, August 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner *Fifth Report*, HREOC, 1997; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, J.S. McMillan Publishing: Sydney 2001; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, J.S. McMillan Publishing: Sydney, 2002.
31. C. Cuneen, supra n.29 at 7.
32. For two important narratives see: S. Kinnane, *Shadow Lines,* Fremantle Press: Fremantle, 2004; and A. Haebich, *Broken Circle: Fragmenting Indigenous Families 1800–2000*, Fremantle Arts Centre Press: Fremantle W.A., 2000.
33. This is neo-colonialism. I. Watson, 'There is No Possibility of Rights Without Law: So Until Then Don't Thumb Print or Sign Anything!', (2000) 5 *Indigenous Law Bulletin* 4; I. Watson, 'Buried Alive', (2002) 13 (3) *Law and Critique* 253; C. Cuneen, supra n.29 at 10. See also: G. Bird, '*The Civilising Mission': Race and the Construction of Crime*, Contemporary Legal Issues No.4, Monash University, 1987; J. Purdy, 'British Common Law and Colonised Peoples: Studies in Trinidad and Western Australia' in Bird, G., G. Martin and J. Nielson (eds), *Majah: Indigenous Peoples and the Law*, The Federation Press: Sydney, 1996; J. Purdy, 'Postcolonialism: The Emperor's New Clothes?' in Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial*, The University of Michigan Press: Michigan, 1999.
34. *Royal Commission into Aboriginal Deaths in Custody – National Report*, AGPS: Canberra, 1991. Also see: *Royal Commission into Aboriginal Deaths in Custody – Interim Report*, AGPS: Canberra, 1988.
35. See: P. Dodson, *The Wentworth Lecture 2000 – Beyond the Mourning Gate: Dealing with Unfinished Business*, AIATSIS: Canberra, 2000; M. Langton, *Too Much Sorry Business: The Report of the Aboriginal Issues Unit of the Northern Territory*, AGPS: Canberra, 1991; H. Wootten, 'Deaths in Custody', Paper delivered at the Coronial Inquest Seminar, Sydney University Law School, 1992; T. Rowse, 'The Royal Commission, ATSIC and Self-Determination: A Review of the Royal Commission into Aboriginal Deaths in Custody', (1992) 27 (3) *Australian Journal of Social Issues* 153; M. Langton, 'Dumb politics wins the day', (2000) *Land Rights Queensland* 11.
36. See for example: J. Clarke, 'Law and Race: The position of Indigenous people', Bottomley, S., and S. Parker (eds), *Law and Context* (second edition), Federation Press: Annandale, 1997.
37. *Aboriginal Customary Laws: Final Report*, Western Australia Law Reform Commission, 2006.
38. *Mabo v Queensland* [No.2] (1992) 175 CLR 1.
39. P. Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence. . .', (2000) 6 (1) *parallax* 25.
40. How intellectual property law justifies a right in property will be examined in the following chapter.
41. These formed part of the literary property debates.

42. J. Bentham, 'Chapter VIII – Of Property', reprinted in Macpherson, C.B (ed), *Property: Mainstream and Critical Positions*, University of Toronto Press: Toronto, 1978 at 51.
43. Debates about material cultural objects (for instance what is now commonly referred to as cultural property) has informed intellectual property discussions in Australia.
44. P. O'Malley, 'Indigenous Governance' in Hindess, B. and M. Dean (eds), *Governing Australia: Studies in Contemporary Rationalities of Government*, Cambridge University Press: Australia, 1998; P. O'Malley, *Law Capitalism and Democracy*, Allen and Unwin: Sydney, 1983.
45. See: K. Bowrey 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture', (2001) 12 *Law and Critique* 75; P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.3.
46. See: N. Loos and K. Mabo, *Edward Koiki Mabo: His Life and Struggle for Land Rights*, Queensland University Press: St Lucia, 1996.
47. See: K. Howden, 'Indigenous Traditional Knowledge and Native Title', (2001) 24 (1) *UNSW Law Journal* 60;
48. See: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911*, supra n.5; D. Leiberman, *The Province of Legislature Determined: Legal Theory in Eighteenth Century Britain*, Cambridge University Press: Cambridge, 2002; P. Drahos, *A Philosophy of Intellectual Property*, supra n.5; J. Litman, 'The Public Domain', (1990) 39 (4) *Emory Law Journal* 965 at 970–972.
49. B. Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership', (2000) 13 *Can. J. L. & Juris.* 3.
50. For more detailed approaches see: R. Ashcraft, *John Locke: Critical Assessments*, Routledge: London, 1991; C. Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth Century Britain*, University of California Press: Berkeley, 1988; J. Dunn, *The Political Thought of John Locke*, Cambridge University Press: Cambridge, 1969.
51. W. Blackstone, *Commentaries on the Laws of England*, Facsimile of the First Edition (1765–1769) Chicago University Press: Chicago, 1979.
52. J. Bentham, *The Theory of Legislation* in Ogden, C.K. (ed), Keagan Paul Publishers: London, 1931. This text draws from Bentham's *Principles of the Civil Code* which was first published in French in 1802 and in English in 1830.
53. W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Juridical Reasoning', (1913) 23 *Yale Law Journal* 16. See also: J.E. Penner, 'The Bundle of Rights Picture of Property', (1996) 43 *UCLA Law Review* 711.
54. C. Reich, 'The New Property', (1964) 73 *Yale Law Journal* 733. Reich's work focused on the function of property and the changing social relations effecting the construction of property.
55. I will consider this shortly, however for interests sake compare J. Tully, *A Discourse on Property: John Locke and his Adversaries*, Cambridge University Press: Cambridge, 1980, and C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Clarendon Press: Oxford, 1962. Also see: P. Drahos, *A Philosophy of Intellectual Property*, supra n.5 for a discussion of these dissenting views.
56. *Two Treatises of Government* was first published in 1689. J. Locke, *Two Treatises of Government* (reprint) J.M. Dent & Sons Ltd: London, 1990.
57. Ibid., at 136.
58. Ibid., at 136.
59. M. Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press: Cambridge MA, 1993 at 6.
60. J. Locke, *Two Treatises of Government*, supra n.56 at 136.
61. K. Bowrey, *Don't Fence Me In: The Many Histories of Copyright*, Doctor of Juridical Studies, University of Sydney, 1994 (unpublished). Peter Drahos also notes that it is too simple a view of the natural law tradition in which Locke worked to depict him as a 'labour theorist of property'. P. Drahos, *A Philosophy of Intellectual Property* supra n.5 at 48. James Tully argues that Locke's philosophy is deeply embedded within a religious

context that is impossible to ignore in understanding Locke's conception of nature, law and the commons. See J. Tully, *A Discourse on Property: John Locke and his Adversaries*, supra n.55.

62. Whilst published after Filmer's death, it was the most complete expression of his ideas.
63. Ronan Deazley also traces this history in *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)*, Hart Publishing: Oxford and Portland, 2004.
64. See for instance: P. Drahos, *A Philosophy of Intellectual Property*, supra n.5; J. Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *The Georgetown Law Journal* 287; M. Rose, *Authors and Owners*, supra n.59; D. Saunders, *Authorship and Copyright*, Routledge: London, 1992; B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.5; E. Hettinger, 'Justifying Intellectual Property', (1989) 18 (1) *Philosophy and Public Affairs* 31.
65. See for instance: B. Kaplan, *An Unhurried View of Copyright*, Columbia University Press: New York, 1967; R. Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press: Nashville, 1968; V. Bonham-Carter, *Authors By Profession*, *Volume One and Two*, The Society of Authors: London, 1978; J. Feather, *The Provincial Book Trade in Eighteenth Century England*, Cambridge University Press: Cambridge, 1985.
66. P. Drahos, supra n.5 at 51.
67. R. Deazley, supra n.5 at 42.
68. M. Rose, supra n.59 at 5.
69. K. Vandervelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 *Buffalo Law Review* 325.
70. This will be elaborated in the context of the changing value of Aboriginal art in Part Two of this book.
71. See: C. Reich 'The New Property' (1964) 73 *Yale Law Journal* 733. Reich's argument focuses on the function of property and the changing social relations effecting the construction of property.
72. Thus overcoming the dead hand of legal 'tradition'. (This was understood as Bentham's critique of Blackstone.)
73. T. Mitchell, 'The Properties of Markets: Informal Housing and Capitalisms Mystery', Cultural Political Economy Working Paper Series, Institute for Advanced Studies in Social and Management Sciences, University of Lancaster, 2004; J. Elyachar, *Markets of Dispossession: NGOs, Economic Development and the State in Cairo*, Duke University Press: Durham, 2005.
74. D. Graeber, *Toward an Anthropological Theory of Value: The False Coin of Our Own Dreams*, Palgrave Press: New York, 2001.
75. K. Gray, 'Property in Thin Air', (1991) 50 *Cambridge Law Journal* 252 at 307. See also: M. Radin, *Reinterpreting Property*, University of Chicago Press: Chicago, 1993; C. Harris, 'Whiteness as Property', (1993) 106 (8) *Harvard Law Review* 1709 at 1730.
76. K. Gray, 'Property in Thin Air', Ibid. at 307.
77. The cultural property movement illustrates this nicely.
78. See also: C. O'Faircheallaigh, *Negotiating Major Agreements: The 'Cape York Model'*, Discussion Research Paper No. 11, AIATSIS: Canberra, 2000.
79. N. Pearson, 'Aboriginal law and Colonial Law since Mabo' in Fletcher, C. (ed), *Aboriginal Self-determination in Australia*, Aboriginal Studies Press: Canberra, 1994, at 158.
80. M. Dodson, 'Indigenous Peoples and Intellectual Property Rights' *Ecopolitics IX – Conference Papers and Resolutions*, Northern Land Council: Sydney, 1995 at 31.
81. M. Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous People: An Australian Perspective', (1997) 6 *European Intellectual Property Review* 298 at 300.
82. See: A. Weiner, *Inalienable Possessions: The Paradox of Keeping While Giving*, University of California Press: Berkeley, 1992.
83. V. Kerruish, 'Reconciliation, Property and Rights' in Christodoulidis, E., and S. Veitch (eds), *Lethe's Law: Justice Law and Ethics in Reconciliation*, Hart Publishing: Oxford, 2001 at 195.

84. M. de Certeau, *The Practice of Everyday Life* (trans S. Rendall), University of California Press: Los Angeles, 1984 at xiii.
85. See G. Edmond, 'Thick Decisions: Expertise, Advocacy and Reasonableness in the Federal Court of Australia' 74 (3) *Oceania* 190–230; P. Fitzpatrick, *Mythology of Modern Law*, Routledge: London and New York, 1992; P. Fitzpatrick, *Modernism and the Grounds of Law*, Cambridge University Press: Cambridge, 2001.
86. E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Duke University Press: Durham, 2004.
87. K. Bowrey, *Law and Internet Cultures*, Cambridge University Press: Cambridge, 2005; J. Litman, *Digital Copyright: Protecting Intellectual Property on the Internet*, Prometheus Books: New York, 2001 at 195.
88. H. Geismar, 'Copyright in Context: Carvers, Carving and Commodities in Vanuatu', (2005) 33 (3) *American Ethnologist* 437–459.
89. V. Kerruish, 'Reconciliation, Property and Rights', supra n.83 at 195; N. Pearson, 'Aboriginal Law and Colonial Law since Mabo', supra n.79; C. O'Faircheallaigh, 'Negotiating Major Agreements: The 'Cape York Model', supra n.78.
90. J. Anderson, L. Aragon, I. Haryanto, P. Jaszi, A. Nababan, H. Panjiatan, A. Sardjono, R. Siagian, R. Suryasaladin, *Traditional Arts: A Move Towards Protection in Indonesia* (forthcoming).
91. I thank Tim Rowse for discussion with me about this point.