Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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3. Copyright and the categories of identification

It is surprising that copyright law still retains much of its pre-modern form, in that it is still relatively subject specific. One significant reason for this is because copyright law in the United Kingdom and its subsequent colonies, did not historically entertain prolonged engagement with the process of registration. Instead in 1911, copyright secured automatic protection for works. Prior to this period copyright protection had also been conditional on registration.[1] The problem and the reason for moving beyond the registration for copyright works was that the process of registration did little beyond determine 'title' to a text and perhaps unlike patents, trademarks and design, registration could not resolve the underlying difficulty of determining a property in a text.[2] The ellipse in the differential way in which copyright law emerged can also be explained through the hierarchical status that literary and artistic work held in relation to 'industrial property.' For continental copyright, the argument that justified automatic protection for literary works as against registration arose because it became extremely difficult to minimise a literary or artistic work into a representation of that work: the representation constituting the necessary form for registration. Significantly, the literary work retained its 'original' form and hence protection rather than shifting – as a consequent of registration – to acquiring protection through a representation of the subject matter.

This is not to say that copyright law didn't have its own modes of regulating knowledge through forms of categorisation. The categories of originality and authorship have functioned to maintain a perception of coherence within copyright law and established firm boundaries around its subject matter through determining what a work was and how it could be transformed. In this way authorship and originality became the key categories that provide the means for making identifications of what constitute 'legitimate' copyright subject matter.

As copyright did not require registration, it did not need to reproduce the intangible subject matter into an object of representation. However, copyright law was influenced by this way of understanding the intangible object, where the focus of the law was set upon the tangible 'creation' produced by the intangible subject matter – thus making the 'work' (the book,

the artwork) itself a decontextualised legal object. But copyright took on a unique form to the other categories of intellectual property where the actual intangible subject matter continued to exert pressure in determining its nature. Thus copyright law was never totally able to exist solely on the abstraction of its categories: the specific subject matter in each case was and remains ever present and ever influential. Indeed the dependence upon both abstract categories and subject specific concerns characterises modern copyright. To this end the effectivity of copyright law still actively involves negotiating the extent to which the nature of the intangible property can be determined.

The importance of authorship and originality in characterising the nature of the copyright is evident in many examinations of copyright.[3] Both notions have determined the specificity of copyright and facilitated the distinct modes of categorisation pertaining to the subject matter afforded through copyright. The following discussion of authorship and originality foregrounds the subsequent latter examination of indigenous knowledge: specifically its inclusion and making as a discrete category within law. This is because the two key concerns that were initially raised (and continue to exist) in relation to the inclusion indigenous knowledge (known to law at first instance through the tangible product, Aboriginal art) centrally engage(d) questions of authorship and originality. Both authorship and originality are considered specifically in relation to a work presented as if it were a closed entity, not to the more fluid dynamics constitutive and determining the existence of the work. It is in this way that criteria of the identifiable 'author' and the 'original' work facilitate the idea/expression distinction that underpins the copyright regime.[4] Importantly, both categories have also incorporated an economic rationale of measurement integral to the internal coherence of intellectual property law as a whole.

AUTHORSHIP

Mark Rose and Martha Woodmansee have done much to facilitate an appreciation of the importance of authorship to the emergence of copyright.[5] As has been exposed through their work it was ostensibly relations between booksellers and publishers that pushed the law to consider the category of the author, even though ironically, in the literary property debates, authors were noticeably absent.[6] As such, law became deeply involved in constructing how this subject (the author) was to be understood before the law and consequently within society.

Early histories of copyright, such as the work by Feather and Bonham-Carter[7] primarily sought to explain 'why the priority of the law was not

that of protecting the author's private property rights in the text'.[8] In such circumstances it was assumed that the law was relatively disinterested in the changing social status of the 'author'. The prevailing philosophical movement of romanticism in the eighteenth and nineteenth centuries however, meant that law did become concerned and quite instructive in the modern formation of the notion and identity of the 'author'. While certainly it is accurate to suggest that this was not a primary concern for the law, it was inevitably an effect of the law. By this I mean that because of the multiplicity of factors influencing law and its relationship with the legal idea of the 'author', an inevitable byproduct was the transference of characteristics identifying the 'author' within law to the wider society. The focus on questions of literary property in law could not help but be influenced by romantic assertions of 'natural rights': subsequently effecting how the concept of the author as an individual and also as a legal entity was seen before law as the agent determining status and authority within society.

Defining the category of the 'author' was the means for establishing the legitimacy of property in a 'work.' As Foucault has highlighted, the rise of the author in western liberal societies was intrinsically tied to relationship between the text and a system of property relations.[9] In authorising such property relations, law necessarily affected the functionality of the subject named as the 'author'. Foucault's interest was in the operation of what he calls the 'author-function'. Importantly, the first of the four general characteristics that Foucault identifies as marking the author-function is how it is 'linked to the juridical and institutionalized system that encompasses, determines and articulates the universes of discourses'.[10] Whilst Foucault was never particularly interested in law, and at times discussing it in ways that ignore and underplay the fluid power relations that make law a fundamental mechanism of governing, in this essay he does recognise the instructive relationship between the emergence of the entity named as an author, and the legal and institutional networks that uphold and endorse that same entity.

As discussed in the previous chapter, the *Donaldson v Becket* (1774)[11] case functions as the historical location where law begins to negotiate categories that identify specific kinds of intangible subject matter and in doing so produces legal authority, both in relation to law and society. With no 'authoritative legal precedent that endorsed the purported theory of right'[12] the power to define and limit copyright was left with parliament, through which statutes regulating the period of the right were endorsed. Through *Donaldson v Becket* (1774) copyright was affirmed as a creature of positive law,[13] whereby the power to limit and define the right rested within the statute, rather than existing as a common law right.[14] Through this judgment copyright was also affirmed as providing an 'economic right'.

Rose's particular interest is in how the case conveys the emergence of the author as a proprietor.[15] This is in order to highlight the historical emergence of the concept of an author, which began and was effectively completed in the eighteenth and nineteenth centuries. In this way Rose disputes the narrative of the ahistorical 'author-myth' positioned as a naturally occurring legal subject. He specifically points to *Donaldson v Becket* (1774) as a case that shows that there was no automatic connection between authors and texts. Instead, Rose points to a variety of factors, both cultural and legal, that were required before the notion of an author could be established. For example, 'before the modern author could come into being there had to exist a market for books to sustain a commercial system of cultural products'.[16] Rose observes that 'the concept of an *author* as an *originator* of a literary text, rather than a reproducer of traditional truths' had to be realised in society, before it could be actualised.[17] The notion of the author was also influenced by cultural specificities where writing and recording were understood as necessary processes of civilisation, progress and individuation.[18] In contrast, traditional truths were seen to circulate much more prolifically in oral cultures that were identified as 'communal'. This in part speaks to the dilemma of identifying and individuating indigenous works, as indigenous people are still largely seen to be reproducing traditional truths within an alternative paradigm of 'community' to that relied upon by intellectual property law. I will return to this in more depth in the second part of the book when considering how Aboriginal artists were interpreted in relation to their works in the Australian copyright cases of the 1980s.

Law was certainly responsive to the cultural influence of possessive liberalism in shaping the notion of an author. Nevertheless there were other ruptures and discontinuities that also facilitated the production of the author and the category of authorship before the law.[19] It is these multiple vectors that help configure the notion of authorship in the abstract, where the 'author' as an individuated subject, becomes known to law only in its abstraction. In this way authorship also becomes a legal category in its own right that can measure and identify a 'work'. Rose's insights about the rise of modern authorship expose the complexity of the law and the difficulty in locating a specific period where the law was seen to arrive at a particular definition of the author in relation to a text. In its abstraction authorship becomes a self-justifying concept that averts attention away from the problem of boundaries and importantly, subjectivity. In conjunction with the new economic logic of the law, authorship provides a useful (if not also self-fulfilling) category through which identification of legitimate legally identified and defensible works can be made.

It is precisely the lack of clarity in the terms that seek to identify the intangible, that still makes copyright susceptible to concerns regarding

definitions of what constitutes the property. According to modern copyright the author is seen as the first owner of the property. While 'author' is not defined in *Copyright Act 1968* (Cth),[20] the concept does imply that the author is the originator of the ideas expressed in a material form. The connection between authorship and originality remains important in modern copyright and it is in this way that the two terms function to identify copyright subject matter, for if there is no identifiable author, then there is no copyright. Likewise, if there is no originality invested in the work, then there is no protection. Of course the boundaries here are not as clear as they seem, for there is no definition of an author or of originality in the statute, therein providing the possibility for a range of cultural objects to be considered as legitimate copyright subject matter.

ORIGINALITY

Originality, like authorship, remains undefined in the (Australian) *Copyright Act 1968* (Cth). Similarly, originality has historically helped determine the nature of the intangible property. In the literary property debates, originality helped identify, to some extent, the process of individuating an idea and expressing it in a tangible work. In this way originality was concerned with a *judgment of the relationship* between the work and the creator.[21] It also functioned in the nineteenth century as a means of determining whether a work infringed another work.[22]

Through this early period, originality served as a means to identify the defendant's work from the plaintiff's, and inquiry into originality was not directed towards the plaintiff's work alone – this was a shift that occurred in the twentieth century.[23] Thus originality was used as a mechanism to consider the equilibrium of interests invested in a determination of an 'original' work. For example this was a key element in early cases involving sea charts,[24] road maps[25] and the French dictionary.[26] Drawing a balance between protection and access did not involve a determination between private property rights.[27] The key question was how to balance the original effort of both parties, rather than upholding the private rights of the plaintiff. In this way broad social considerations were imbued in determining a copyright, including the benefits to the public and the existing market for works of an informational nature.

The importance of the concept of originality in determining copyright is evident where the term functions as the means for identifying both the mental labour or 'creativity' of the 'author' and the nature of the property. Through a perception, consolidated in the literary property debates, that

ideas come from an 'intellectual commons',[28] the notion of originality was developed as a way to individuate and understand the distinct transformation of the 'ideas in common' as the unique expression of an individual who has a right to its ownership. In this way individualisation occurs when the idea is extracted from the shared space of knowledge and independently expressed. Originality then, performs a dual role as it not only pertains to the individual but also identifies the nature of the expression manifest in the intangible subject matter. The abstract notion of originality functions as a mechanism for identification, through which the work itself becomes knowable and individuated.

In the early period of copyright law, prior to the *Imperial Copyright Act* of 1911 that, on adoption by commonwealth legislature, extended British copyright law to colonies and dominions including Canada, New Zealand, Australia and South Africa,[29] originality was implicit within the concept of creativity: each act by an individual in producing a unique object required creativity and was necessarily original. Following 1911, originality was written into the statute as the *Copyright Act 1912* (Cth) confirmed that every work that was claimed as copyright must be original. In Australia, by the *Copyright Act 1968* (Cth), subsistence of copyright existed in 'every *original* literary, dramatic, musical and artistic work'.[30] One of the outcomes of this interpretative process was that the originality requirement came to be read as a reference to the plaintiff's work alone, with the question of the originality of the defendant's work only arising as a sub-issue under the issue of infringement – in relation to whether or not an alleged taking of the plaintiff's work was substantial, given the changes that the defendant may have made to the work.[31] For example, in the Australian case, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937), protection was denied to the compilation of horse racing details written on a display board justified through the extent that,

> some original result must be produced. This does not mean that new or inventive ideas must be contributed. The work need show no literary or other skill and judgment. But it must originate with the author, and be more than a copy of other material.[32]

In another case that illustrates the difficulty with originality, *Kalamazoo (Aust) Pty Ltd v Compact Business Systems P/L* (1985), Thomas J determined that copyright subsists in the pegboard systems constructed by employees of Kalamazoo. The point of comparison is with the plaintiff's work alone. He states:

> while I refuse to find that the authors showed great skill, I did find that their preparation required a degree of concentration, care, analysis, comparison . . .

> In each case some awareness of contemporary developments and the marketability of such forms played a part in their creation.[33]

The shift in how originality is used to identify a plaintiff's work rather than a defendant's work speaks to the reprioritisation of interests in defining 'original'. Remembering the eighteenth century case of translation, it was the defendant's work that was considered closely to see what new elements had been added, not what had been taken from the plaintiff's 'original' work. Part of this shift in the twentieth century is due to concern that defining originality must be done as objectively and fairly as judicially possible, and this meant considering the plaintiff's work over that of the defendant's without reference to the work's value in aesthetic terms.[34] As the early twentieth century case (which underpins current Australian judicial interpretation), *University of London Press Ltd v University Tutorial Press Ltd* (1916) demonstrates, the formulation was:

> The originality which was required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.[35]

The difficulty of determining the boundaries of originality in particular cases however, demonstrates the challenge of applying such an abstract concept as a legally imposed standard. For the standard is ambiguous. It is difficult to determine who 'wins' through the indeterminacy of the law. Attention then, must be directed at specific instances of case law – for example what actually happens with the ambiguity of the categories in the actual practice of the law? The importance of judicial determination highlights the position of case law in informing the more 'abstract' theory.

Recent Australian case law highlights the extent to which a work constitutes originality has required questions of judgment by the court for which there is no clear point of reference.[36] This has pushed law to a space where the Court decides the merit of originality in works on a case by case basis, the law still being subject specific and case specific in its determination of 'originality'.[37] It also shows that issues about the nature of copyright and its justification and boundaries were not resolved clearly in the nineteenth century, despite the management discussed by Sherman and Bently of intangible rights.[38] The problems were merely hidden beneath a superficial classification of interests and impoverished definitional rubrics.

The Australian case law aptly demonstrates the difficulties facing the Court in deciding on matters of originality. Commenting in his judgment from the initial hearing of *Telstra v Desktop Marketing Systems* (2001), a case that, at first instance, involved determining whether the compilation

of names, addresses and phone numbers found in the white or yellow pages constituted copyright subject matter, Finkelstein J states;

> In precisely what sense a work must be original is not clear and the resolution of that question lies at the heart of this case. A work will lack originality if it is copied or adapted from another. This does not mean that the subject matter of copyright must be new or novel, as is the case of an invention the subject of patent protection. To the contrary, much of what is found in literature, drama or music is not new, but nevertheless it is proper subject matter for copyright.
>
> Originality means at least, that the work has been created by the author.[39]

The issue of originality underpins this case, but the indeterminacy of the term poses real difficulties in deciding both on the subsistence of copyright and consequently, infringement. As noted above, Finkelstein J and subsequently Chief Justice Black and Justices Lindgren and Sackville in the Full Federal Court appeal, recognise that it is the slippery question of originality that underpins the case.

Establishing the originality of the telephone book speaks to the problem central to intellectual property law: the difficulty in determining what the intangible element actually is within the product brought before the court. Within Australian copyright legislation, the phone book comes under protection as a special kind of literary work: as a compilation.[40] In this regard the question of arranging the information becomes one of labour rather than creativity. Desktop Marketing argued that as copyright cannot exist with facts, and as names, phone numbers and addresses found in the white pages are constituted as facts that freely circulated in the public domain, copyright did not exist and by virtue of its non-existence, was not infringed. Alternatively, Telstra argued that by way of the *intellectual labour* exerted in the directories, the product was an industrious collection of factual data sufficient to attract copyright protection as a compilation. The extent of the labour, mental and physical, exerted in compiling the phone book, became the measure of its originality. Finkelstein J seems genuinely astonished when he comments that '[a] casual reader of a directory might be surprised to learn of the complexities involved in its preparation'.[41]

The stability of the category of originality is maintained by shifting the way in which originality is determined. Intellectual labour becomes the signifier for originality and is justified through considering the plaintiff's work in isolation. It is in this way that the surety of the category is upheld. Indeed, it could be argued that the position taken in regards to originality functions as an institutionalised justification that maintains the coherence of legal categories of originality and authorship, because copyright depends upon them for its own perpetuation.[42] The legal principle of originality is

decontextualised, elevating it to a more universal and abstract, rather than specific, level and the law maintains the appearance of objectivity, even if it has to decide on a case by case basis what constitutes an 'original' work. However, for those who remain unsatisfied with the judicial claims of objectivity, it is clear, as with most legal classifications, 'originality is not natural and secure, but culturally and historically determined'.[43]

The decision by the Full Bench of the Federal Court in *Desktop Marketing*[44] demonstrates how the linkages are made that connect authorship and originality but also points to how copyright law depends upon the specific, in this case the technological facts that led to the creation of the database, for confirmation of the abstract, that is, the production of an 'original' work. The case also highlights how low the Australian threshold for originality actually is. Chief Justice Black and Justices Lindgren and Sackville in the appeal follow the precedent set in the first instance by Finkelstein J. In his judgment Lindgren J cites from *Halsbury's Laws of England* that:

> Only original works are protected, but it is not requisite that the work should be the expression of thought, for Copyright Acts are not concerned with the originality of the ideas, but with the expression of thought, and in the case of a literary work, with the expression of thought in print and writing. The originality which is required relates to the expression of the thought. It is not required that the expression should be in an original or novel form but that the work should not be copied from another work; it should originate from the author.[45]

The argument linking authorship to originality is nicely demonstrated in this citation. Its utilisation in *Desktop Marketing* highlights two points. The first is that it represents the standard judicial argument that justifies both the property right and the work as property through categories of copyright. The second is the reluctance of the law and the courts to recognise the difficulty that evoking the abstraction of such categories perpetuates an inability within the law to fully grasp the problem. Jane Ginsburg has also argued that the law 'encounters far more difficulty accommodating works at once high in commercial value but low in personal authorship'.[46] In the silences brought into the law with its modern 'development', what is made possible is the reification of the author and work, giving both a suggestion of secure, self-evident meaning. When proprietal claims challenge the status of either the author or the work by a competing commodity, it is necessary to affirm the priority of the legal precepts of the author and the original, so that the stability of the categories and the law itself is maintained. As McKeough, Bowrey and Griffith observe;

> To some extent the concept of what constitutes a work within the Act and the concept of originality are intertwined. It is difficult to discuss what amounts

to a work without discussing originality, since without a sufficient degree of originality, a work will not come into existence.[47]

Thus the problem still remains one of determining and identifying what the intangible element is for copyright protection through abstract categories and circular relations of justification. In this way, legal argument functions as a powerful forum, 'in which dominant narratives of social reality are produced and alternative discourses silenced'.[48]

The category of originality, because of ambiguities in definition, depends upon the judgment of the court to translate and apply the abstraction into contextual meaning. The function of the court then becomes one that manages categories of copyright and inevitably the stability of the law. In short, the court plays a fundamental role in upholding the legitimacy of categories that measure and identify copyright. The court governs the way in which interpretations of the law are made. To this end, each judgment of originality that the court makes in order to contextualise the abstract term becomes a matter of fact and degree determined differently in every case.[49] Recognising that judges do not exist in a vacuum but are social and cultural beings very much like the rest of the population then means that if each case is measured by fact and degree and each judge has their own interpretation and methods of applying the law, then it is possible to argue that these methods are not and have never been 'objective'. Instead such decisions and questions of degree embody cultural influences. Inevitably when making a decision, the law will be influenced by cultural factors emanating from the subjective position of the judge in applying the abstract principle upon which the stability of the law depends. The abstract principle primarily being the singularity of an author/original identification as a substitute for a more metaphysical determination of ownership.

THE SUBJECTIVITY OF COPYRIGHT

The argument that has been built so far is that the authoritative narrative that promotes law as abstract and *a*historical fails to engage meaningfully with the reality of subjective decisions that shape the direction taken by law. Indeed it could be argued that the key failing of the literature accounting for the emergence of intellectual property law (which the previous section has drawn from) is characterised by an absence of political and economic discourses within the theory. The legal literature, although informed by critical legal sensibilities, addresses the jurisprudence of copyright and literary property and its philosophical pretensions whilst scaling over the practice and contemporary nineteenth century politics. The stance

is justified because of difficulties in factoring in law's indeterminacy. For instance, because the actual emergence of intellectual property is so discordant and diversely expressed, the tendency for legal historians and theorists has been to look to a way of encapsulating the broad sweep, with little focus on the existing cases. However, as McKeough, Bowrey and Griffith observe,

> In reading copyright case law it is important to consider whether theories like romanticism have influenced judicial understandings. Though copyright is . . . a creature of positive law, despite *Copyright Act 1968* (Cth) s8, not all important copyright principles are expressed in the text of legislation. Further, in many places the legislation relies upon 'ordinary' or 'common sense' meaning of terms. There is ample space for romantic and other values coming into the body of copyright law. *Therefore understanding copyright law requires an interpretation of case law in view of many possible social and cultural influences and prejudices, including romanticism.*[50]

As already discussed, it is a combination of postmodern and critical legal critiques that has led to dissatisfaction with the authority of legal reasoning in copyright case law. Such critiques point out that the law does not function in isolation, but produces and is produced by cultural values and perspectives. This is in particular regard to 'common sense' decisions that are made in any number of ways by the court when applying a principle that is not explicitly defined in the legislation. This complexity highlights the discontinuity of the law, for cultural and political factors inevitably influence the shape that the law takes.

While Mark Rose's work pointed debate in this direction, he maintained a strong interest in the particular category of authorship. Indeed, the cultural production of the author and the twinned concepts of authorship and originality in intellectual property law are among the many potential sites for the recognition of the cultural influence and production of categories within the law. Following from Rose's work and also influenced by Foucault, Rosemary Coombe has written extensively on the inevitable influence of cultural factors on the law.[51] With an interest in the peculiar political intersections that legitimate intellectual property laws, Coombe has also pointed to the dynamism of contemporary cultural practices that promote individual resistance to monopoly privileges extant within an intellectual property regime. Thus Coombe highlights the multiplicity of experience through which individuals and the law are interconnected.[52] Rather than the spheres being abstract and separated, they are intertwined and contingent upon the other for future development and direction. As a result of cultural influence, the possibilities for shaping the direction that the law takes function within a network of multiple relations, where

the constant process of reshaping the law is in direct response to multiple cultural productions.

The inevitability of the engagement of law with cultural functions is, in part, due to the difficulty of people as legal subjects who do not necessarily behave in a predictable manner for law or governance. Thus one of the difficulties for the law is that it must be dealing constantly with the complexity of individuals and how they perform as legal subjects.[53] It is almost impossible to speculate upon the specificity of action undertaken by individuals as legal subjects.[54] For certain legal subjects, the law intersects their lives at an extreme rate, almost to the extent that individual lives embody a *performativity* in relation to law and legal bureaucracy.[55] In short, there is no certainty in how individuals relate to the law, and this makes for complex legal subjects. One of the reasons why law is so messy and disorderly is that 'citizens make challenging legal subjects'.[56] A snapshot of the broader landscape of litigation law points to such difficulties.

This dilemma is also present in copyright law, where the law has also attempted to accommodate demands raised through the increase in new and different technologies. How individuals negotiate around new knowledge and new knowledge industries and lay claims of ownership to knowledge affect the response of the law. In this way then, copyright is influenced by relationships between individuals, as legal subjects who intersect the law through an engagement with cultural products, for instance, those increasingly produced through information technologies and digital communications.

Notably Coombe engages with a variety of theoretical and philosophical positions in order to more fully understand the dynamics generated by the law in contemporary cultural practice. Avoiding traditional jurisprudential thought that considers the law through positions that have been historically favoured by the law to the exclusion of others, she notes the tendency within scholarship devoted to intellectual property to limit consideration to legal doctrine and legal rationality.[57] Such literature accounts for the function of the law without critically examining its operation. Coombe continues her point through emphasising that:

> [t]here has been too little consideration of the cultural nature of the actual forms that intellectual property laws protect, the social and historical contexts in which cultural proprietorship is (or is not) assumed, or the manner in which these rights are (or are not) exercised and enforced to intervene in every day struggles for meaning.[58]

The particular effects of the law need to be considered not in isolation, but with regard to the individual and cultural products generated through the intersection of law and 'culture'.

These critical cultural legal frames point to the role that individuals play in exercising autonomy from the law and also generating new and productive ways of intersecting with law. Individual interpretative agency constitutes an embodied approach to the effects of law and how these effects impact in a variety of dispersed locales. For when judges make decisions based on 'common sense', they are only one in a number of players that duly influence the cultural shape that the law takes: multiple parties push and wrestle, influence and negotiate the form of the law. These influences occur through particular resistances to law, but also in the cases that are tested through law. For cases do not exist in abstraction either, but are generated from a particular time and space, and as reaction to a particular incident or against the law. Recognising this inherent politics allows for alternate readings of the emergence of discrete categories within law.

As new knowledge and knowledge products come before law, increasingly law must determine the extent of the protection it can grant and the identifying characteristics of the material. But this exposes a challenge, whereby calls for protection of new material – an expectation of legal action – increasingly mean that the law must employ its principles of measurement and identification and ultimately widen the scope of what is considered to be intellectual property. Thus the difficulties are part of a continuum, where the law can be seen to be working through an ongoing set of concerns. The problems are however modified through the changing nature of the intangible subject matter and the multiple levels of expectation generated through individual actors.

It is the widening of the scope of what comes under and can be protected as intellectual property that has become a focus for critical inquiry. The increased power of intellectual property to protect cultural products has facilitated such a focus.[59] In a social environment where trademarks circulate to designate ownership of a product, where digital technology pushes for rethinking the concept of the author and where an individual is exposed to endless merchandising protected by intellectual property laws, critiques of intellectual property seek to point to how such laws are functioning to increasingly control the flow of information.[60]

Contemporary theoretical critiques also point to what is excluded from intellectual property and have prompted a reflexivity regarding these exclusions. For instance, this includes indigenous and/or local knowledge. In this regard the process for inclusion evokes a sustained and prolonged rethinking of how and to what extent these 'new' knowledges can be incorporated. The process is not an instantaneous one. Rather it evolves from a political location that develops and produces itself as a category to be known before the law. The process is sustained and draws on multiple

actors and employs a network of relations that eventually produce the 'new' knowledge as a category in its own right.

It was through postmodern and related critiques that intellectual property law became sufficiently self-reflexive to address the exclusion of indigenous knowledge from its sphere. Yet indigenous knowledge is still seen as a kind of 'special' case for the law. The perception has developed through a reflection of the cultural specificity of the law in regards to indigenous people and the effects of colonisation. It is also perhaps because there has been hesitancy in moving beyond the social construction of indigenous people as 'reproducers of traditional truths', rather than as 'authors' (albeit in different forms) of contemporary narratives.

CONCLUSION

Recognising the plurality of relations that have contributed to the production of the category of the 'indigenous' within intellectual property provides a space to understand the connections between legal scholarship, history, politics and legal practice. In this way, there is no singular factor that could explain the emergence of a concept of indigenous knowledge within an intellectual property discourse, but rather a multiplicity of factors pushing, constructing and producing indigenous knowledge as a distinct issue to be taken up and advanced and hence as a category to be known before the law. Perhaps as Martin Nakata suggests, it is the 'Indigenous Knowledge enterprise'[61] and the increased national and international inquiries into indigenous knowledge[62] that help locate concerns and generate levels of expectation for the legal protection of indigenous knowledge. But what characterises the position of indigenous knowledge within intellectual property law (as within other discourses) is how it is unproblematically assigned a 'different' status. The challenge then is to recognise the extent that law is also dependent upon other authoritative discourses, such as anthropology, in its identification of the indigenous as 'other'. This position directly affects the way in which the law treats the inclusion of indigenous knowledge.[63] Thus the law becomes deeply involved in constructing how this new category of subject matter is to be understood both in law, and as suggested through the case of the 'author', also in society. Law is involved in making an 'indigenous knowledge' category as well as responsible for distributing this new category within social and political contexts.

The purpose of this first part of the book has been to expose the complexity and messiness of the law – specifically, that intellectual property law, far from being a coherent body of law, is characterised by internal struggles to identify and determine the nature of the intangible elements

that it seeks to protect. In this regard, the history of intellectual property law that has been provided, functions to illustrate that what we currently know as intellectual property is a relatively recent phenomenon. Indeed, it is the difficulties within modern law itself that have led to the construction of categories that identify the subject matter of the law. This work has followed from Sherman and Bently in locating a history of intellectual property law that speaks to the construction of intellectual property law as a whole, rather than subject specific interests.

In looking at the characteristics of copyright law, the point has also been to show how a range of cultural factors also engage and intersect with law, ultimately influencing the direction that the law takes. This approach is integral to an appreciation of how and to what extent indigenous knowledge has been produced as a category in its own right within intellectual property law. My point is to show the extent of elements that push, negotiate and construct indigenous knowledge within an intellectual property framework, and that this framework imposes conditions of possibility in regards to outcomes and discussions of property rights in indigenous knowledge.

The second part of the book will now consider more closely the concomitant factors that have been involved in making the category of indigenous knowledge within intellectual property law. Importantly, it considers the conditions of existence for government intervention articulated through the key governmental reports which function as important precursors for the case law. Ultimately, as we move into the second phase of the book, it is important to remember that the production of indigenous knowledge within intellectual property discourse is still actively occurring, as the law continues to grapple with the difficulty and difference of the subject matter; particularly in specific circumstances that demand the functionality of the law while also pointing to its complexity.

NOTES

1. The *Copyright Act 1911* (UK) was adopted in Australia through the *Copyright Act 1912* (Cth). The main reason for adopting the law in Australia was that, as the new Imperial legislation was designed to apply to members of the Berne Convention (1886), it was argued that if Australia adopted the Act, Australian copyrights would automatically be respected in France, Belgium, Germany and Spain (amongst others). In addition the Imperial legislation offered a longer period of protection. The *Copyright Act 1968* (Cth) is Australia's current copyright act.
2. For example, in the registration of patents a precise description of the invention was necessary in order to limit the specific right to a graphical and textual description available for public inspection. If copyright had kept to the 'title' rationality, copyright claims would have been limited to exact/precise reproductions.
3. For example see: M. Rose *Authors and Owners: The Invention of Copyright*, Harvard

University Press: Cambridge MA, 1993 at 113–129; and, D. Saunders, *Authorship and Copyright*, Routledge Press: UK, 1992.

4. The basis for the idea/expression distinction is that property cannot be vested in ideas themselves, only the expression of those ideas that is conveyed in some tangible form.
5. M. Rose, *Authors and Owners*, supra n.3.
6. Whilst the author was the focal point of the literary property debates, they were argued between the different booksellers, hence the term 'battle of the booksellers'. The author provided both sides with a vehicle to mobilise arguments. For example the author became representative of the argument of a common law right, even though it was the booksellers who were arguing for this right.
7. J. Feather, *The Provincial Book Trade in Eighteenth Century England*, Cambridge University Press: Cambridge, 1985; and, V. Bonham-Carter, *Authors by Profession, Volume One and Two*, The Society of Authors: London, 1978.
8. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition), The Law Book Company: Sydney, 2002 at 17.
9. M. Foucault, 'What is an Author?', in Rabinow, P. (ed), *The Foucault Reader: An Introduction to Foucault's Thought*, Penguin Books: London, 1984.
10. Ibid., at 162.
11. *Donaldson v Becket* (1774) 4 Burr 2408, 98 Eng. Rep. 257.
12. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials*, supra n.8 at 20.
13. Ibid., at 20.
14. R. Deazley, 'Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters', (2003) 25 (6) *European Intellectual Property Review* 270; and 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.
15. M. Rose, 'The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship', Sherman, B., and Strowel, A. (eds), *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press: Oxford, 1994.
16. Ibid., at 29.
17. Ibid., at 29. Emphasis mine.
18. S. Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human*, Routledge: London and New York, 2001 at 99.
19. Most obviously these include significant economic and political changes. See M. Rose, 'The Author as Proprietor' supra n.15. Also see: M. Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author', (1984) 17 *Eighteenth Century Studies* 425.
20. Except for photographs where the author is the person who takes the photograph, *Copyright Act 1968* (Cth) s.10(1).
21. B. Sherman, 'From the Non-original to the Ab-original', in Sherman, B., and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press: Oxford, 1994 at 119.
22. See my earlier comments about the case of translation.
23. The early twentieth century case that signals this shift is *University of London Press Pty Ltd v University Tutorial Press Ltd* [1916] 2 Ch 602.
24. *Sayre v Moore* (1785) 1 East 361, 102 Eng. Rep. 139.
25. *Cary v Kearsley* (1802) 4 Esp. 168, 170 Eng. Rep. 679.
26. *Spiers v Brown* (1858) 6 WR 352.
27. K. Bowrey, 'Originality in Copyright: How low can you go?' UNSW Seminar Paper, 11 September, 2001 [on file with author]. As Bowrey explains, 'Many nineteenth century cases do not see originality as referring to a question about the subsistence of copyright – in terms of testing what the plaintiff has done to produce the expression. They understand originality as involving a contextual and relational judgment about this works position to the marketplace. Whether copyright should protect this 'original' work depends upon the consequences of its protection for others.'

28. For a useful discussion on the concept of intellectual commons see: P. Drahos, *A Philosophy of Intellectual Property*, Dartmouth Press: Sydney, 1991 from 54.
29. S. Wright. *International Human Rights, Decolonisation and Globalisation: Becoming Human*, supra n.18 at 119.
30. *Copyright Act 1968* (Cth) s.32.
31. K. Bowrey 'Originality in Copyright: How low can you go?' UNSW Seminar Paper, Sept 11, 2001.
32. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 511 (Dixon J).
33. *Kalamazoo (Aust) Pty Ltd v Compact Business Systems P/L* (1985) 5 IPR 213.
34. This corresponds with laws own concern with aesthetics that marks its modern development. See Chapter Two.
35. *University of London Press Ltd v University Tutorial Press Ltd* (1916) 2 Ch 602.
36. The recent Australian case law is *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.
37. This is further illustrated by the different decisions and rationales utilised in other jurisdictions faced with the same problems of originality, fixation and phone books. Whilst the Australian case followed the English case *Walter v Lane* [1900] AC 539, the decision in the United States case, *Feist Publications, Inc., v. Rural Telephone Service Co.,* 499 U.S. 340 (1991) found that there was no copyright in Rural's telephone book.
38. B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911*, Cambridge University Press: Cambridge, 1999 at 101–128.
39. *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* (2001) FCA 612.
40. In the *Copyright Act 1968* (Cth) s.10(1) a *literary work* includes:
    a. a table, or compilation, expressed in words, figures or symbols; and,
    b. a computer program or compilation of computer programs.
41. *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* (2001) FCA 612.
42. J. Gaines, *Contested Culture: The Image, the Voice and the Law*, University of North Carolina Press: Chapel Hill, London, 1994 at 13–17.
43. B. Sherman, 'From the Non-original to the Ab-original' supra n.21 at 120.
44. *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.
45. *Halsbury's Laws of England Second Edition*, 1932, vol 7 at 521 cited in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) FCAFC 112.
46. J. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865 at 1866. However the United States has adopted a different standard see: *Feist Publications v Rural Telephone Service* (1991) 499 U.S. 340.
47. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials*, supra n.8 at 55.
48. D. Otto, 'Subalterity and International Law: The Problems of Global Community and the Incommensurabilty of Difference' in Darian-Smith, E., and P. Fitzpatrick (eds), *Laws of the Postcolonial*, University of Michigan: United States, 1999 at 162.
49. The notion of 'fact and degree' in originality cases was developed by Lord Atkinson in *Macmillan & Co Ltd v K & J Cooper* (1923) LR 51 Ind. App. 109 at 125 where he states, 'In every case it must depend largely on the special facts of the case, and must in each case be very much a question of degree.'
50. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials*, supra n.8 at 23 [emphasis mine].
51. Much of her earlier work has been collected in the book, R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press: Durham and London, 1998.
52. Ibid., see generally the 'Introduction'.
53. K. Bowrey and M. Rimmer, 'Rip, Mix, Burn: The Politics of Peer to Peer', (2002) 7 (8) *First Monday*.
54. I have explored this elsewhere in relation to community based legislation. See: J.

Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill', (2004) 27 (3) *New South Wales Law Journal* 585.

55. In this way I mean that lives become acted out and mediated through law in multiple contexts. For many individuals much daily life is played out or performed in spaces of legal influence such as courts, prisons or mediated through legal officers such as police and lawyers. I describe this as being the 'performativity' of the law, following from Judith Butler's work on the performance of gender. See: J. Butler, *Gender Trouble: feminism and the subversion of identity,* Routledge: New York, 1990. Thoughts in this context have developed through consideration of the legal performativity of indigenous youth in north west New South Wales. It prompts questions about what the effects of this are for a variety of (social and cultural) futures. I thank my sister, Sophie Anderson, Senior Solicitor, Western Aboriginal Legal Service, for extended discussions with me on this subject.
56. K. Bowrey and M. Rimmer, 'Rip, Mix and Burn' supra n.53.
57. R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* supra n.51.
58. Ibid., at 7.
59. See for instance: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan Publications: London, 2002.
60. For a varying opinions regarding this subject: P. Drahos with J. Braithwaite *Information Feudalism*, ibid; L. Lessig, *The Future of Ideas: The Fate of the Commons in an Interconnected World*, Random House: New York, 2001; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property Future*, Brookings Institution: Washington DC, 1998; S. Shulman, *Owning the Future*, Houghton Mifflin: Massachusetts, 1999; J. Litman, *Digital Copyright*, Prometheus Books: New York, 2001; J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society*, Harvard University Press: Cambridge MA, 1996; S. Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, New York University Press: New York, 2001.
61. 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 at 282.
62. A. Agrawal, 'Dismantling the Divide Between Indigenous and Scientific Knowledge', (1995) 26 *Development and Change* 413 at 415.
63. This will be taken up in Part Three.

PART II

Knowledge

Introduction

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

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

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

The early reaction of the law was promising but uncertain.[2] There was hesitancy in regards to the 'appropriateness' of reconciling western legal principles to indigenous concepts of knowledge and ownership. However, the subsequent developments in the production of indigenous

knowledge within the law were not achieved through further litigation. It was governmental action. For law is not just court determined (directly applying the law). It is also managed through bureaucratic intervention, as law establishes and defines new spaces of intervention which may ultimately lead to legislative reform.

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

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

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

bureaucratic reports lies in the way they have functioned simultaneously to set the legal trajectory and affirm the authority of intellectual property. As such they have been instructive in the development of a specific kind of governable space, where debates concerning intellectual property and indigenous knowledge may be heard, phrased and understood.[3]

Following from this study, the third chapter will provide a close examination of how this 'new' issue of bureaucratic attention and management was dealt with in case law. The chapter will consider the two cases: *Milpurrurru & Others v Indofurn Pty Ltd*[4] (hereafter the *carpets case*) and *Bulun Bulun & Others v R & T Textiles Pty Ltd.*[5] While both these cases involve the unauthorised reproduction of Aboriginal art each is distinctive owing to the differing elements of copyright law that constitute their focus, and the extent to which the recognition of cultural differences is incorporated into the law through the decisions made. The *carpets case* (1994) sets the precedent that enables *Bulun Bulun v R & T Textiles* (1998) to push the limits of the law with regards to 'difference'. Fundamentally exposed through this case law is how the function of the law is influenced by cultural expectations of how the law should react in specific circumstances, for instance those of misappropriation of Aboriginal cultural imagery and products. Nevertheless, the inability of intellectual property law to secure successfully the closure of 'indigenous' as a category, consequently reflects the power of certain kinds of knowledge to elude standardised systems of organisation and management. This also suggests that the possibilities for recognition and protection are not solely dependent upon legal processes of identification and classification.

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

The corollary drawn between early literary property debates in the eighteenth century and the difficulties presented by indigenous knowledge highlight how the problems of identifying indigenous knowledge are part of a continuum; where intellectual property law must revisit earlier

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

NOTES

1. P. O'Malley, *Law Capitalism and Democracy*, Allen and Unwin: Sydney, 1983 at 104.
2. See my earlier discussion in regards to *Yanggarrny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported and *Bulun Bulun v Nejlam Pty Ltd* (1989) Federal Court, unreported.
3. Here I draw on the work of Peter Miller and Nikolas Rose in 'Governing Economic Life', (1990) 19 (1) *Economy and Society* 1. This is expanded in N. Rose, *Powers of Freedom: Reframing Political Thought,* Cambridge University Press: London, 1999.
4. *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209.
5. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513.
6. M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law*, Pluto Press: Chicago and London, 1996 at 57.
7. See Chapter 1. Also R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press: Durham and London, 1998.
8. J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Material* (third edition), The Lawbook Company: Sydney, 2002 at 23.