Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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7. The politics of law

In the previous chapters I argued that the importance of undertaking a reading of case law is that it provides an instance of legal action: it becomes possible to recognise certain limits and expectations of law. This is because legal decisions are formative to the law itself. Considering the identification and inclusion of Aboriginal art as copyright subject matter through the judicial interpretation provided by Justice von Doussa, the cases can be seen as representative of assumptions made in copyright law.

Both the *carpets case* and *Bulun Bulun v R & T Textiles* are important cases in the landscape of copyright law as they spur debate about the terms of inclusion – for instance how authorship and ownership of indigenous works are to be identified. The judicial interpretation offered illustrates the cultural life of copyright law. It also highlights how values of liberal jurisprudence and legal positivism exert pressure: from trying to identify types of knowledge to securing the closure of copyright law wherein limitations of inclusion are explained in reference to the legislation rather than matters of judicial interpretation. The point is that politics, philosophy and cultural values underpin case law, and these factors duly exert influence in how new categories are incorporated and the extent to which cultural difference is treated. Legal instrumentality seeks to play down the 'specialness' of indigenous difference. This is in order to maintain management over the identification of markers that constitute a property right in Aboriginal art ensuring that they are in keeping with the principles and categories of copyright law. Simultaneously, however, the law is constantly evoking the indigenous difference in order to deflect attention away from its disorderly internal mechanics. In this sense, it is the new subject, indigenous knowledge, which creates the problem (which law is actively seeking to solve) not the consistent and more general issue of granting property rights in knowledge *per se*.

Justice von Doussa was certainly aware of the cultural dimensions presented in each case. To some extent, von Doussa J was positioned as a direct interpreter of indigenous culture.[1] The *carpets case* required an appreciation of difference within the law in terms of including Aboriginal art as a product that satisfied the categories and markers of property and exclusive possession. In *Bulun Bulun* the cultural specificity of the law was directly in question. This was in terms of authorship and ownership, where both the

traditional western concept of authorship and the philosophical valuation of the 'indigenous' relied upon possessive individualism. Importantly, as an interpreter of indigenous culture, von Doussa's J position necessarily became one of translator. Von Doussa's commitment to upholding the integrity of copyright law meant that indigenous cultural values were interpreted within the paradigm of copyright law. In this way, as Bowrey explains, the '*Bulun Bulun* decision can be confidently claimed as representative of copyright law in general. It is not just a "special" case where the law has to manage the consequences of the invasion'.[2]

In hearing extensive evidence from John Bulun Bulun regarding the creation of the artwork, and incorporating his affidavit within the body of the judgment, the unstable nature of the intangible that intellectual property law is set to identify and then mediate, is perhaps most explicitly revealed. In this sense, the artwork 'Magpie Geese at the Waterhole' is not just the product of an expression of ritual knowledge, it is ritual knowledge, and therefore Bulun Bulun cannot only be seen as the individual author or creator of the work. Von Doussa J however, perhaps makes a tenuous parallel between Bulun Bulun as the custodian of the work (in the context of trust law), and Bulun Bulun as the executor and 'owner' of the work (as per copyright law). This is a clear instance of the role of the judge in translating indigenous conceptions into the legal framework and policing those legal boundaries. In doing so difference is subsumed within the broader intellectual property narrative, but the real point of the translation displaces the unstable nature of (any) knowledge itself.

The two key ways in which the volatility of the subject matter is displaced are in the construction of identifiable artists, and the emphasising of the value of Aboriginal art as a cultural product. In both instances judicial interpretation is integral in establishing and normalising authorship and also endorsing the culture of commodification. Both elements draw attention away from the intangible subject matter, and more to the familiar features of engagement as 'art' in tangible form. Arguably it is the cultural differences in knowledge management and ownership unique to the Ganalbingu people that really threaten to reveal the erratic nature of copyright subject matter as a whole. The law retreats to a position where judicial interpretation consolidates and confirms the legitimacy of property rights in intangible subject matter, and normalises such modes of identification and classification. Copyright law naturalises various forms of social discrimination through endorsing a culture of commodification. How the law treats difference is on its own terms. Presented with complications in identifying intangible subject matter, for instance in the disruption of the category of authorship, the law is pressed to determine the essence of the metaphysical property. In the case of Aboriginal art, this is achieved

through the paradigm/prism of 'tradition' which reads 'indigenous as culture'.

TREATING CULTURAL DIFFERENCE

Extensive evidence reflecting the importance of Aboriginal art to indigenous people is incorporated into both judgments. The judicial interpretation offered in the *carpets case* shifts between recognising the value of the art in a western sense, through the western art spaces it occupies, to the statements by the artists about the importance not only of the art at the centre of the case, but more broadly the importance of the art as a 'traditional' form of expression tied to the identity and existence of the particular Aboriginal community. Yet, concerns for the commodity form that the art takes are centrally engaged whereas accounting for the manifold ways in which ownership, control and access to knowledge have historically been managed are temporal issues engaged at the margins. The space provided for translating cultural differences facilitates a means for authorising that knowledge through the legal discourse. This is due, in part, to the way in which the artist's claims have initially been framed, both in affidavits and expert evidence, which support the methods of classification utilised within the law.

Arguably however, judicial decisions function both as a strategy for governing difference, and providing a portal – a means for opening space for appreciating difference. By this I mean that whilst law, presented with difference, minimises this through applying certain frameworks of classification, nevertheless the account of difference remains. To the extent that Bulun Bulun's statement regarding the association with his community, land and responsibility is incorporated into the judgment, it remains a record of a different way of viewing Aboriginal art, community and management of knowledge. Although attempts were made to make Bulun Bulun's account knowable and functional within a legal sense, it maintains and conveys a differing cultural heritage and intellectual tradition.

> 'At the Waterhole' is the number one item of Madayin (corpus of ritual knowledge) for Djulibinyamurr – it is number one Madayin for Ganalbingu – Gurrumba Gurrumba people. It has all the inside meaning of our ceremony, law and custom encoded in it. 'At the Waterhole' has inside meaning encoded in it. Only an initiate knows that meaning and how to produce the artwork. It is produced in an outside form with encoded meaning inside. It must be produced according to the specific laws of the Ganalbingu people . . . Paintings, for example, are a manifestation of our ancestral past. They were first made, in my case by Barnda. Barnda handed the painting to my human ancestors. They have been handed from generation to generation ever since.[3]

Bulun Bulun's statement invites an appreciation of its power within this legal text. Here it is clear that cultural difference remains fundamental to the law, and informs how other identifications are to be made and assumed. Thus Bulun Bulun's statement exerts a dynamic whereby it fulfils a role in identifying how the metaphyisical dimensions of the intangible property are determined as 'traditional', but also a recognition of the differential cultural values engaged within the law.

It is significant that the cases exist as a response to infringement within the art market and that this context has provided leverage for social justice issues to be (re)framed. The cases arise from problems within the market. The remedy in the *carpets case* reflects the problem of marketplace origins, as does the additional award of 'cultural harm'. The problem here is not that the indigenous artists are outside the market, only to be incorporated in cases of infringement. They are intrinsically engaged with the market, by providing consumers with cultural products, and also in their engagement with each other. What is lacking in the case law, and how it is discussed in the subsequently extensive literature, is recognition of this reality and the intrinsic power that this position holds. Amongst other elements, Fred Myers has considered the competition for art sales from the western desert region.

> With so many communities turning to the popular medium of dot paintings, there is a competitive struggle as the objects take on the formal properties of commodities: 'Everybody's trying to promote their community and get a little bit ahead, you know. Come up with an idea that is going to get a slightly higher profile for their community, to promote those artists . . . I don't think that the market is so big that it can cope with such a huge number of players in it'.[4]

This highlights some of the growing issues, including competitiveness and the danger of saturating the market that characterises contemporary engagement in the art market by artists, communities and consumers with implications at both local and international levels. There is reluctance by commentators, legal academics, and policy makers to deal with these complications. The complex realities that produced the cases in the first place are sidelined in favour of a minimalist narrative privileging the responsive (and redemptive) scope of law.

In *Bulun Bulun* von Doussa J states:

> The artistic work was painted by Mr Bulun Bulun in 1978 with permission of senior members of the Ganalbingu people. He sold it to the Maningrida Arts and Craft Centre. At that time Mr Peter Cooke was the arts advisor at the Centre. Mr Cooke then arranged the sale of the artistic work to the Northern Territory Museum of Arts and Sciences. It was reproduced with Mr Bulun Bulun's consent in the book 'Arts of the Dreaming – Australia's Living Heritage' by Jennifer Isaacs at page 198.[5]

Here von Doussa emphasises both the cultural origins and the commercial transaction associated with how the artworks circulated within the market and as such are transferred into commodities to be bought or sold. The 'aesthetic' value of the work produces it as an artistic activity that is always-already a product in the market and a category of law. Indeed it is the 'aesthetic' quality of the work that is strongly evoked through von Doussa's J description of the spaces that the art occupies in the *carpets case*. For example:

> The first four artists are from Central Arnhem Land. The artworks in question are bark paintings. The first three paintings are presently owned by the Australian National Gallery, ('the NGA'). In 1993 in recognition of the International Year for the World's Indigenous People, the NGA held the first solo exhibition of the works of an Aboriginal artist. The exhibition was a retrospective look at the works of Mr Milpurrurru, and included the art work 'Goose Egg Hunt' and was also featured in the publication 'The Art of George Milpurrurru' which was published by the NGA at the same time.[6]

These comments, as well as others within the judgment, confirm both the recognition of the creative endeavor implicit in the work and establish that a measure of the value of the artworks as works of art is that they appear or have appeared in the National Gallery of Australia and other important national and international cultural institutions. Their value is thereby justified through the western art spaces that they occupy and the abstraction of the subject from the cultural context facilitates the economic worth. This provides a context for the rearticulation of Bernard Edleman's observations where 'the aesthetic is subordinated to commerce'.[7] This then demands an appreciation of the power of the abstract aesthetic to generate value. In this sense, the market demand for the aesthetic value of Aboriginal art means that it necessarily functions as a commodity, the cultural context is repositioned as a marker of value and the subject of the law is abstracted. Tradition becomes central to the art's worth in the market but only for its transactional value, and is consequently generated as the essential core that determines the philosophical dimensions of metaphysical property. Indeed it is the market that helps develop ways that the identification of indigenous knowledge can be made.

In endorsing the 'works', von Doussa J also generates consequences through privileging good and worthy artwork for protection. With the shift from the aesthetic to the economic a further justice expectation is created. This is because the beneficiaries of the 'good' and 'worthy' artworks are not necessarily the artists themselves. The argument for resale royalties (*droit de suite*) sought to illustrate the extent that indigenous people are still disadvantaged in the art market.[8] Whilst such arguments

have recently been silenced, the proposed change in copyright law sought to remedy the disparity of economic return where Aboriginal works that sold for paltry amounts thirty, twenty, even ten years ago now command prices in the hundreds of thousands of dollars.[9] That the artists tend to receive little financial benefit illustrates the inequity within the market and thus fuels the debate for the introduction of resale royalties and indeed indigenous property rights.[10] The significant amount of money being paid for the artwork is a direct effect of the exponential growth and success of the Aboriginal art industry. However, as one indigenous commentator, who prominently critiqued the industry in an award winning painting stated, 'Aboriginal art is a white thing': the statement suggesting that the real beneficiaries of Aboriginal art industry are not indigenous.[11] Bell provides a highly political and challenging critique of the Aboriginal art industry. Yet it is at the expense of recognising there are real beneficiaries.[12] It is these real beneficiaries, Aboriginal artists and communities, that do raise justice claims for the equitable distribution of economic benefits – a claim that is not beyond the scope of intellectual property law.

Here the challenge for the law is set within its own framework. For instance, to remedy the economic balance to some degree, it is not a new law that is required, but instead a yet to be established intellectual property category. There is potential for this category because it exists elsewhere within intellectual property regimes.[13] Resale royalties are picked up as a real possibility because Aboriginal concerns compliment the greater intellectual property narrative. This is because the law is already intrinsically engaged in managing the economic capital generated by the Aboriginal art market.

Von Doussa J is motivated to put a positive spin on the consequences of the Aboriginal art market and thereby to make the most of that for indigenous owners. However, his efforts feed back into and support that dynamic whereby copyright and intellectual property law facilitates and legitimises further appropriation and commodification. Von Doussa J presents his task as simply dealing with the end of commodification and rectifying injustices related to that – but at the same time his stance is reinvigorating and re-legitimising the 'indigenous' capital threatened by 'offensive misappropriation and insensitive commodification'.

The cases present law with the challenge of recognising indigenous rights deriving from differences in cultural knowledge but also require a recognition of the relations of power that have historically positioned indigenous people's claims for recognition of full rights of sovereignty and self-determination at the margins of the law. In this sense, the cases can be read as directly managing the 'excesses' of colonial dispossession. Pressed with this difficulty von Doussa J resorts to an engagement with standard

jurisprudential concerns central to copyright. He understands that he has pushed the law as far as it can go, and he is sympathetic to indigenous claims, but in his position these can only be reconciled within the limits of the Copyright Act. He does not want, nor cannot necessarily engage in broader philosophical concerns about protecting cultural identity, power imbalances nor effects of Empire. The danger in doing so would be that such recognition would require intellectual property law to acknowledge its own cultural specificity. As Bowrey explains:

> Von Doussa's acknowledgement that the law has limitations in reckoning with significant cultural differences was potentially radical. It could have led the judge to expressly formulate the values of copyright law in cultural terms. Once these values were articulated, they could have been more broadly examined and their contemporary relevance debated. However this path was precluded by the jurisprudential choices he made. Von Doussa hints at the cultural particularity of the law but fails to address the privileged cultural values at stake . . . Ultimately he prevents the hearing of a debate that could lead to a challenge to the presumed neutrality, generality and universality of copyright law.[14]

In this way, the arguments that test the limits of copyright law also appear in the broader intellectual property discourse because they raise an awareness of the cultural contingency of laws categories of identification. These limits are political as they are set up and informed by a specific system of power.[15] Certainly there is recognition of indigenous cultural difference, but such considerations do not challenge the coherence of the body of law to deal with indigenous knowledges. Rather the cases consolidate the position of indigenous knowledge within an intellectual property discourse: a point consolidated through the debate for resale royalties and even moral rights legislation which will be explored in the final part of this book. These points of inclusion reaffirm the power of the law to sustain itself and perpetuate its abstracted categories. The problem is thus phrased as one that indigenous people have with copyright law, not the problem that copyright law has with the intangibility of indigenous knowledge. The onus is on indigenous people to accommodate the difficulties of the law. It is their responsibility. These decisions provide an instance of producing an account of the interaction between the cultural specificity of copyright and an understanding that difference can be managed through legally informing parameters. In providing an account of this interaction, a position for indigenous knowledge within the law is produced that is as complete as it is temporary and partial.

In reading case law it is possible to discern the many social and cultural elements that duly influence the way in which copyright law engages with new subject matter. It also reveals the manifold ways in which indigenous

differences are treated within the law. On one hand, indigenous perceptions of ownership, communal or custodial, are reduced to standard interpretations – there is a uniformity of approach that maintains the consistency and cohesion of classifications and categories. However below the surface of mainstream jurisprudential concerns, indigenous difference is left to speak for itself and in so doing exerts an influence that helps the law come to terms with a key problem: the determination of the dimensions of the property right in this new subject matter.

Case law is an important instance for facilitating the production of categories that influence and identify exclusive possession within a commodity discourse. Legal decisions provide an account of legal action, they help us understand what happens in the practice of the law: where the limitations are, and how expectations are generated. It is nevertheless ironic that these instances of legal practice also reveal the instability of copyright categories, (re)exposing contingencies that have remained relatively hidden. In de-emphasising the 'special' case of indigenous art, the law unwittingly exposes the inconsistency of its modes of identification. For if the law had admitted the 'special' status of indigenous subject matter, it would have been able to shift the problem from the inability to secure the closure of the subject matter to the 'specialness' of the indigenous demands within the case. Instead, in disavowing any particular problem with the indigenous category, the issue of the unstable intangible is revealed as still operating as the fundamental element of intellectual property as a whole. Thus the politics of law are rendered visible.

NOTES

1. K. Bowrey, 'The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture', (2001) 12 *Law and Critique* 75 at 79.
2. Ibid., at 79.
3. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 518.
4. F. Myers, *Painting Culture: The Making of an Aboriginal High Art Market*, Duke University Press: Durham and London, 2002 at 217. Quoting from an interview with Christine Lennard from Warlukurlangu Arts at Yuendumu.
5. *Bulun Bulun & Others v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 520.
6. *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209 at 212–213.
7. B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. Kingdom. E.), Routledge and Keegan Paul: London, 1979 at 57.
8. *Droit de suite* or resale royalties provides that visual artists or their estates receive the royalties on the resale of the artworks. The royalty is usually between 3% and 5% of the price of the artwork.
9. There are too many examples to cite here. Nevertheless see: 'Aboriginal artwork bought for $20 sells at $120,000', *The Advertiser*, 1 August 2003; 'Royalties for art's sake' *Sydney Morning Herald*, 6 September 2002.
10. See: Australian Copyright Council, *The Art of Resale Royalty and its Implications for*

Australia, February 1989; *Fourth National Aboriginal and Torres Strait Islander Visual Arts Conference: Conference Report*, March 2002 at 32.

11. See Richard Bell's manifesto: *Bell's Theorem – Aboriginal Art: It's a White Thing,* at www.kooriweb.org/foley/news/bell.html.
12. Bell himself being one – walking away with $40,000 prize money for his artwork in the 2003 Twentieth National Aboriginal and Torres Strait Islander Art Award.
13. It was raised in the *Berne Convention on the Protection of Literary and Artistic Works* (1886) and remained voluntary. It was adopted in France in the 1920s and the European Union now has the *EU Resale Royalty Directive* which harmonises legislation in the various EU states. The discussion over the introduction of Resale Royalties in Australia has been ongoing. In 2006 the Australian government decided that it would not introduce resale royalties and instead would commit six million dollars over four years, to the arts sector. Attorney–General the Hon Philip Ruddock MP and Minister for Arts and Sport Senator the Hon Rod Kemp, *Press Release* 9 May 2006.
14. K. Bowrey, 'The Outer Limits of Copyright Law – Where Law meets Philosophy and Culture', supra n.1 at 82.
15. M. Davies, *Delimiting the Law: Postmodernism and the Politics of the Law*, Pluto Press: Chicago and London, 1996 at 94.

PART III

Culture

Introduction

> Question: My name is Marie Samuel. I am with the NGO Yachy Wasi, based in Peru and New York. I am not indigenous but our constituency is. I am glad to see WIPO is there, but at the same time I have a question. As you know the Permanent Forum on Indigenous Issues has been adopted. I assume that one of the questions that they will deal with is traditional knowledge. Now I see that there is a panel of scholars, but you do not have an indigenous representative speaking from their point of view . . .
> Professor Hugh Hansen: May I ask you a question? From which indigenous group should we have had a representative?
> Questioner: It could have been any indigenous group.
> Professor Hugh Hansen: What would they have said that was not said today or that you did not say?
> Questioner: Well it is like speaking about a dead body or something. The person is not there to speak. Apparently none of you are indigenous. It would have been good to have an indigenous point of view. That is my point.
> Professor Hugh Hansen: Okay. I might say we did put out a word to invite some NGOs to speak and, for whatever reason it never happened. But there was an invitation.[1]

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

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

The first chapter of this final part begins with a consideration of the global politics of intellectual property. This is necessary for understanding the way in which indigenous knowledge is positioned as a particularly

pressing, yet differential 'global issue' of international legal concern. It will illustrate how many of the problems that are present in the national discourse on the protection of indigenous knowledge also thrive in and underpin international efforts and debate. However, these are moderated through differing political agendas engaged at the international level.

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

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

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

The concluding chapter will take the deployment of 'culture' in intellectual property law as the point of departure for considering two recent Australian initiatives within this field: The Labels of Authenticity and

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

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

NOTES

1. 'Global Intellectual Property Rights: Boundaries of Access and Enforcement. Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources' (2002) 11(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 753 at 793.
2. See the World Intellectual Property Organisation – Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions www.wipo.org. The eleventh meeting was held in July 2007 and incorporated a range of statements produced from smaller regional meetings.