Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

Jane E. Anderson

8. Globalising indigenous rights in intellectual property

A summary of the World Intellectual Property Organisation (WIPO) and its history of engagement with colonial/postcolonial relations establishes the initial discussion for this chapter. This is in order to contextualise the current politics involving the position of indigenous people and indigenous knowledge in international regimes of intellectual property. It will illustrate that the fluidity of issues within the international domain are related to both the decolonisation period following the Second World War and the increased globalisation of markets and trade that dominated the world economic stage for the last quarter of the twentieth century.

As already stated in Part One, prior to the establishment of WIPO in 1967, there existed a series of international conventions that regulated intellectual property frameworks and shaped intellectual property norms.[1] Theorists have highlighted how these conventions, in particular the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention on the Protection of Literary and Artistic Works* (1886), were established through political, social and cultural indices. For example, Saunders argues that the signing of the Berne Convention 'was the outcome of unforeseeable interactions between a variety of geopolitical interests, legal traditions, cultural politics, commercial calculations, literary and artistic professional pressures and governmental concern with trade economics, foreign policy priorities and national cultural distinction'.[2] Bently and Sherman take this argument as a point of departure in their analysis and conclude that, 'Berne emerged out of a complex matrix of pre-existing international and colonial relations'.[3] What is important in Bently and Sherman's reading of this history is the distinct presence of a colonial politics that informed the production of international standards for intellectual property protection. For instance, Britain was reluctant to enter a multilateral treaty owing to concerns regarding the negative impact such a treaty might have on Britain's relationship with its many colonies.[4] As Grosheide observes, '. . . for the domain of early intellectual property law, the relationship between law and culture is basically determined by the power structure within countries and between countries'.[5] Colonial (and later post-colonial) politics have always been formative to the law in this area.

The Convention establishing WIPO occurred in 1967. It replaced the numerous treaties and conventions relating to intellectual property and WIPO thus assumed a governing and administrative role in setting international standards and norms.[6] With the 1974 agreement to join the United Nations system, WIPO functions as the international government organisation (IGO) most central to the international intellectual property regime.[7] This is despite significant challenges from a turbulent and changing political environment that has marked the period. For instance, WIPO has faced encroachment by the World Trade Organisation (WTO) that sponsored the multilateral negotiations resulting in the TRIPs agreement, 'challenging its own position as the forum for making international intellectual property law'.[8]

The transition of WIPO to a United Nations international governmental organisation effectively tipped the balance of power in decision-making matters towards the decolonising and developing countries dominant in the new global polity.[9] 'For the first time since the industrial revolution [there was] a shift from the developed to the underdeveloped world.'[10] As Ryan notes, 'the postcolonial enlargement of the United Nations in the 1960s and 1970s offered the best institutional setting to become a universal organization with the goal of promoting the "protection of intellectual property throughout the world"'.[11] However, with the 'one vote, one nation' system, the international intellectual property framework developed with weak rules and limited enforcement capabilities.[12]

The 'one nation one vote' decision-making at WIPO gave developing countries control over the WIPO agenda.[13] This disrupted the ambitions of other wealthier states (aptly demonstrated in the Group of 77) that asserted 'state rights to rationalize foreign enterprises, create commodity cartels and regulate multinational organizations'.[14] WIPO provided a forum where advocates from developing countries were provided with a platform to suggest the lowering of intellectual property standards.[15] Drahos aptly captures the tension:

> As the number of developing countries joining WIPO grew, the task of the WIPO secretariat in managing conflict grew increasingly difficult . . . But there was little hope of achieving consensus between the numerous states of the South, which were intellectual property importers, and a few wealthy states that were intellectual property exporters, especially in the 1970s and 1980s when developing countries were claiming that much technological knowledge was in fact the heritage of mankind. Moreover since Western intellectual property systems did not recognize the intellectual property of indigenous people, the states of the South were participating in a regime that by definition made them part of the intellectual property poor.[16]

Beginning in the 1980s, intellectual property industries based predominately in the United States and governmental representatives began turning away

from WIPO in order to consider alternative and more effective ways of establishing and enforcing standards of international intellectual property protection.[17] Attention turned to the General Agreement on Tariffs and Trade (GATT) multilateral trade negotiations to secure such global ambitions. GATT, later the World Trade Organisation (WTO),[18] provided institutional support for developing and enforcing the agendas of states with intellectual property rich industries because it directly tied intellectual property protection and enforcement to trade. The most effective tool in securing this aim has been the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).[19] 'TRIPs for the first time covers all areas of ip [intellectual property] law and for the first time ever determines substantive minimum standards for the protection of iprs [intellectual property rights] . . . it really introduces global norms rather than being once more an instrument resting on a diversity of common rules.'[20]

With such changes the WTO has had a significant impact on the organisational responsibilities of WIPO.[21] Whilst WIPO has struggled to remain relevant, both the WTO and WIPO have redefined their respective roles and cooperate where their roles intersect, for example in the implementation of TRIPs; the creation of new norms; and, intellectual property dispute settlement.[22] WIPO has also remained relevant by taking charge of discrete research interests that have arisen in relation to the increased promulgation of intellectual property regimes throughout the world. It is in this way that discussions regarding the possible protection of indigenous knowledge, in these forums known predominately through the analogues 'traditional knowledge, folklore and genetic resources', have fallen under the auspices of WIPO. The immense literature now produced by WIPO on traditional knowledge matters signals both the elevated status of the issue within the international domain as well as its discursive and political limits. One obvious limit emanates from unresolved tensions between member states and their indigenous populations. Whilst the stated ambitions of indigenous people in relation to intellectual property often conflict with those of member states, in the WIPO forums, they are afforded co-existence. However, any decision-making that might need to be made remains a privilege of those same member states owing to their recognition within the UN system.[23] The inevitable dilemma that this creates has established a certain kind of circularity within the debate, which in turn limits the development of resolutions that might change intellectual property agendas so that they benefit indigenous people. Whilst this has not escaped the attention of sympathetic WIPO bureaucrats, representatives from indigenous alliances or even member states with majority indigenous populations, it remains a substantial stumbling block for the development of an international consensus (and a binding treaty) on traditional knowledge issues. Nevertheless

and despite such core problems, the international concern for indigenous/local/traditional knowledge matters is certainly more visible than it has historically been and this does affect the extent that indigenous advocacy can even be voiced and documented within these contexts. Certainly how 'traditional knowledge' gained the attention of WIPO as a 'special' intellectual property concern is also directly related to colonial/postcolonial politics and the emergence of indigenous people as subjects within international law.[24]

Indigenous people and indigenous interests have slowly been recognised in the international arena.[25] The 1957 International Labor Organisation (ILO) Convention 107 was instrumental in positioning the initial claims for the recognition of indigenous rights.[26] However, as Martin Nakata suggests, the 'specific concerns relating to indigenous populations had not been on the agenda at all prior to 1969'.[27] The study on indigenous people in 1970 'directly led to the establishment of the UN Working Group on Indigenous Populations in 1982'.[28] Coupled with special reports on discrimination and racism as part of a human rights agenda,[29] the concerns of indigenous people are currently dispersed across several United Nations forums.[30] In 2002 the General Assembly endorsed the establishment of a Permanent Forum on Indigenous Issues. The Forum now meets annually and conducts specialist expert meetings throughout the year on issues considered critical to the advancement of indigenous rights.[31] Yet the recent difficulties in passing the draft Declaration on the Rights of Indigenous Peoples highlights the continued reluctance to endorse fully indigenous participation within the international domain.[32] The power dynamics between indigenous people and state frameworks remain relatively intact even though postcolonial politics has informed the indigenous rights platform. As the opening quote to this part of the book demonstrates, the question of indigenous representation remains a significant challenge. Both the moderator and the interlocutor face the same anxiety. Yet the problem of 'who to ask' is only one of a series of unresolved issues relating to indigenous inclusion, participation and procedural concerns within the international domain.

During the last seven years, WIPO has reinvigorated fresh research to the area of traditional knowledge.[33] This was initially achieved by targeted 'fact-finding missions' and led to the development of a special inter-governmental committee within WIPO that now meets annually to discuss recent developments as well as working towards some kind of joint resolution.[34] This attention must also be understood as part of the WIPO continuum, and in the light of my earlier comments about WIPO – given that trade issues were being decided elsewhere, to remain relevant WIPO has taken on issues of 'culture' and other fringe concerns.[35] However, now

that trade is also in 'culture', new strategies for controlling and protecting traditional/indigenous knowledge are being hotly debated in both national and international political and policy contexts.

Yet complicated political elements integral to indigenous interests in intellectual property remain peripheral concerns within the international domain. For instance, critical questions of sovereignty, entrenched racism and the equitable participation of indigenous people within nation states, are repetitively raised, but not addressed in any substantial manner by member states: WIPO's authority not extending to such issues. The reluctance of member states to engage with such complex concerns results in a continual relegation of these to the periphery. The dominant discourse remains one of member state choosing: of intellectual property rights and its classificatory frameworks. Indeed, because of the difficulty of incorporating the diversity of indigenous contexts and expectations of law, there remains a sense of 'pan' indigeneity at the heart of global theorising of indigenous concerns.

I will return to the dangers of pan-indigeneity and expand it in terms of considering the future expectations of indigenous people in relation to intellectual property in the concluding chapter. At this point I want to continue with an exploration of how the international debates summarily exclude politics and context. This is inevitably related to the effects of recent globalisation trends in intellectual property promulgation, which directly impacts the way indigenous knowledge is imagined as an intellectual property category in a global regime. What happens with this new global category, is that through the exclusion of politics and context, the culture trope comes to occupy a new reified space – but only in relation to indigenous issues.

GLOBALISING INTELLECTUAL PROPERTY

Recent literature has highlighted the significance of globalisation (and the counter effects of regionalism) on intellectual property protection.[36] As globalisation has generated an increased intersection of markets and stakeholders, new economic rights have been produced.[37] Concern for the effects of protecting these new rights at both an international and institutional level have left many commentators wary of the corresponding development of global standards for intellectual property frameworks.[38] As Drahos notes, '[t]he dangers of central command and loss of liberty flow from the relentless global expansion of intellectual property *systems* rather than individual possession of an intellectual property right'.[39]

To demonstrate and hence examine the effects of the global expanse of intellectual property systems focus has been directed to the multilateral TRIPs agreement.[40] TRIPs provides an example of how intellectual property harmonisation can profoundly alter strategies of global governance. For TRIPs makes explicit the direct relationship between trade, economics and intellectual property. It has effectively consolidated a power dynamic privileging countries that are already key players in international markets of information and industrial technology.[41] Thus the TRIPs agreement has fundamentally shifted the way individual countries engage with intellectual property rights, the market and other nation states. As Ryan explains,

> TRIPs is potentially the most important legal advance for the world trading system since the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. Postwar diplomats conducted an 'industrial diplomacy' . . . Now post-cold war diplomats are conducting a knowledge diplomacy that is institutionalising trade in products of invention and expression, offering innovators the incentive to make their products for the global market.[42]

The implementation of the TRIPs agreement is significant in determining what options for global reform of intellectual property to protect indigenous knowledge can be considered for the future. Yet there remain considerable political tensions within and between states that the TRIPs agreement has ignored and these have come to characterise the debates regarding the inherent inequities codified through the agreement and the sense that it presents deeply perspectival positions.

Work that investigates the new global politics of intellectual property has been slow to develop.[43] Indeed it was predominately non-legal scholars who drew attention to the wider political issues that surround concerns for intellectual property protection and the social effects generated by such rights. Christopher May has emphasised the need for discussion of intellectual property law to be set within broader political contexts.[44] As he states:

> . . . much of the current legal discussion misses important global political issues related to the general balance between the private right to reward and the construction or fostering of a public realm of 'free knowledge' . . . While legal scholars have much to offer these debates they also need to think about the global context of these issues and address the issues that stem from the mismatch of the (national) justifications and (global) society.[45]

One primary problem is how inequitable relations of power are disguised under the rubric of 'equitable' international standards. There is a presumption of equality in the global politic that belies the multiple social and economic inequalities that characterise relations between (and within)

countries and nation states.[46] 'We are currently in a transitory period, where the global governance regime of IPRs has been established but the political community on which the justification of intellectual property itself depends is far from globalised.'[47] Here May makes a pertinent point, namely the danger of assuming a generality of purpose from international discussions about intellectual property to the particular social and political contexts governing their adoption and utilisation. As Aoki also notes, '[o]ne of the biggest mistakes one can make when considering the globalisation of intellectual property law is to assume away the increasingly contentious politics of the phenomenon'.[48]

Differing national concerns and contexts destabilise the universality approach in setting global intellectual property standards. Attention to the increased globalisation in knowledge management frameworks of intellectual property and the attempts at harmonisation of standards and procedural rules misunderstands the underlying disparity in social and economic wants of individual countries and stakeholders. As Ryan has observed, '[k]nowledge diplomacy is being conducted with participation from nearly all the world's states. But state's interests and goals differ widely because of variations in levels of wealth, economic structure, technological capability, governmental form and cultural tradition'.[49] This makes for contested politics informing both national and international domains. Yet circularity characterises the tension between the national and the international development of intellectual property standards because 'each depends on the other for integrity'.[50]

It is crucial to note that within each nation state multiple subjectivities exist that also respond, engage and interact within the circularity of local and global engagement. The presumption that power is vested in nation states misunderstands the dynamics internal to these same states and that individual subjectivity is intrinsic to the complicated relays, dispersions and resistances of power. As Sarat and Simon have noted, '[r]ealist legal studies almost always operate within a political body, usually the nations, although this body is not often itself an object of realist analysis. The boundaries and exclusions wrapped up in this national frame are made up not just of its political borders, but also of its racial, cultural and linguistic embodiments'.[51]

It is the interwoven strategies of the global and the local that makes the dichotomy between the two unworkable. This runs against the popular argument that the 'global entails homogenization and undifferentiated identity whereas the local preserves heterogeneity and difference'.[52] Whilst there lies an homogenisation of indigenous interests (a pan-indigeneity) at an international level, this is an observation about the lack of politics and subjectivity informing the construction of the 'indigenous knowledge' category.

For instance, the diversity of indigenous political interests within a state like Australia remain relatively undisclosed. Politics and particularity can be missed in both national and international contexts: this allows the imaginary Aboriginal/indigenous to be stretched across transnational borders.

The global and the local are intermeshed with the production of the local context informing the interest in the global spaces. Hardt and Negri suggest that this process requires reflection upon the 'production of locality, that is, the social machines that create and recreate the identities and differences that are understood as the local'.[53] Thus the governing strategies are understood as mutually engaged but produce 'different networks of flows and obstacles in which the local moment or perspective gives priority to the reterritorialising of barriers and boundaries and the global moment privileges the mobility of deterritorialising flows'.[54] What Hardt and Negri suggest here is that mobile and modulating networks of power produce problems of differentiation.

Whilst political elements may underpin (and contest) the classification of other intellectual property subject matter, indigenous knowledge presents special difficulties for the law owing to its now highly politicised character. Broader political claims (like those for sovereignty and/or self-determination) and diverse indigenous contexts and expectations are flattened, with attention to indigenous differences deflected by the primacy of the established modern/tradition polarity within the intellectual property framework. Any incongruity is identified as cultural in nature. Increasingly, it is through indigenous claims that the culture trope is implicitly brought within a legal discourse.

The turn to culture within legal study more generally indicates a conscious sensitivity to these issues. The law has been forced to consider the world beyond its boundaries through the specific moments where claims of legal expectation also incorporate arguments regarding cultural integrity and identity. As examined in Part One, the implications such claims have for law point to the need for legal studies to engage more fully cultural critiques.[55] The position of cultural issues within law significantly indicates a shift in how culture has become a nexus for governing. As Sarat and Simon explain, '[w]hether we like it or not, the practices of governance help set the agenda for legal scholarship'.[56]

To some extent political and cultural contexts are rendered explicit in the identification of indigenous subject matter in intellectual property frameworks. However, rather than finding a stable legal object, the recognition of the cultural elements also influence perceptions of the incompatibility of the subject matter. This is not a problem for those comfortable with post-structuralist deconstruction and cultural approaches to the law. However with indigenous knowledge the interest in the 'indigenous' exceeds that

particular discursive legal framework. For the more traditional legal scholar, such as the legal realist, the lack of solidity and universality in the legal object creates an unhappy tension. Under such circumstances, cultural politics within the 'indigenous' category are underplayed so that attempts to manage the legitimacy of the broader negotiation of cultural inclusion, within the law's established terms, can be effected. It is this interplay between acknowledging the cultural politics and reducing it that characterises the position of indigenous knowledge within both Australian and global systems of intellectual property.

MAKING A 'GLOBAL' INDIGENOUS KNOWLEDGE CATEGORY

Since 1967 discussion about how to protect indigenous knowledge adequately has featured in international forums, and since that time there has been contest over the identification and even the instrumentality of the law in this area.[57] For instance, as mentioned above, attention to secure indigenous knowledge as subject matter in intellectual property discourse was made difficult by the ambiguity of term 'folklore'. National reports like the Australian 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*[58] and the discussion stimulated internationally following the 1967 Tunis Model Law, indicated the varying difficulties in developing a representational consensus about the nature of 'folklore' and how an identification of folklore might be achieved.

The sustained international struggle to describe indigenous knowledge was illustrated in the Introduction through a quote from a key WIPO Report.[59] To date the exact position of indigenous knowledge within the intellectual property discourse remains uncertain. What is certain however, is that in any literature that discusses indigenous knowledge and intellectual property, culture or cultural will be deployed as an explanatory tool for indigenous differentiation. The following example, taken from a public academic forum dedicated to the subject of indigenous rights in intellectual property (of which there are now many) aptly illustrates the point.

> We are going to discuss two issues: a *cultural* one which is loosely referred to as 'folklore' and a *scientific* one, which is referred to as 'traditional knowledge and genetic resources' – traditional knowledge being those remedies which indigenous people usually have developed over time.[60]

In the last few years, in an attempt to understand and manage the amorphous character of indigenous knowledge, new kinds of categorisation that separate parts of indigenous knowledge to accord with the international intellectual

property framework have occurred. In this instance, traditional knowledge is deployed in a limited sense – it refers only to a medicinal and hence scientific discursive form which in intellectual property law tends to map easily onto the already existing operational system of patents not copyright. Through such separation, a troubling binary is replayed where folklore equates to 'culture' whilst traditional knowledge becomes scientifically identifiable and consequently set apart from the 'cultural'. To this end 'culture' becomes representative of difference whereas 'traditional knowledge' is made identifiably familiar through its association with science. In similar circumstances to those analysed in reference to the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, the problem of identifying the substance of folklore is remade as ambiguous and anthropological. Indigenous 'cultural' expression remains unidentifiable to the law except in the circumstances of knowledge pertaining to 'remedies' classified through a scientific lens. The very presumption of such a division reproduces the artificial divide assumed between indigenous and scientific knowledge. Echoing similar concerns but in a different context, Long has also observed that 'culture and intellectual property appear to have gotten a divorce'.[61] Culture remains a term that is utilised to indicate (irreconcilable) difference rather than recognised as intrinsic to the emergence and function of intellectual property law.[62] This is because, as Geller reiterates, 'the categorical terms of the law do not easily translate into the terms of the constantly mutating cultural discourse'.[63]

It is somewhat troubling then, that these international divisions and false segmentations are being adopted and becoming normalised through their incorporation into state jurisdiction. For example, in Indonesia, there are three new laws currently being drafted by different Indonesian government ministries.[64] One law specifically addresses traditional knowledge (and replicates current Indonesian patent law: traditional knowledge will need to be registered in order for it to be protected), the second addresses genetic resources (and follows guidelines being established through the convention on biological diversity) and the third law focuses on cultural expressions in art (and hence resembles a reinvigorated highly protective copyright approach to be administered through the creation of a new bureaucracy and the Indonesian state). From an abstracted perspective, this developing categorisation and segmentation appeals to both international and national governmental ambition to solve the problems through new forms of regulation. However, from the perspective of local and traditional communities across the Indonesian archipelago, it is a false distinction that threatens to undermine belief systems, functioning social structures as well as creating substantial burdens and conflicts between people.[65] It raises serious questions as to whom these new intellectual property laws will really benefit.

The extent of interest in developing an intellectual property remedy for indigenous knowledge furthers the production of the category within global frameworks. In addition, globalisation trends also inform the identification and hence the construction of the category. Correspondingly, effects of globalisation that result in increased markets for cultural commodities means that expressions of indigenous cultures are remade into commodities of high value within national contexts and also across international borders – 'culture' is big business.[66] But as Appadurai explains, 'The new global cultural economy has to be understood as a complex, overlapping disjunctive order, which can no longer be understood in terms of centre-periphery models'.[67] Like other evolving and lucrative industries, indigenous knowledge has been subject to new strategies for identification in order to streamline and better regulate these new markets. This is because the 'complexity of the current global economy has to do with certain fundamental disjunctures between economy, culture and politics'.[68]

The resulting international attention to indigenous knowledge subject matter has established the broader significance of the category 'indigenous knowledge'. Yet the preferred analogue 'traditional knowledge' or more often the acronym TK circulates as a global term that is relatively featureless. Arguably the category of 'traditional knowledge' functions as a viable standard that can cut across national and international borders, and contested political and cultural environments. The postcolonial politics in which the international arena is engaged means that terms have to be inclusive of the diverse political environments that characterise the world order. But, 'in a world composed of diverse cultures, histories, and political, economic and legal realities, a universal standard is not only incapable of achievement but also poses the risk of being an externally imposed standard'.[69]

This observation also has direct relevance in regard to the opening quote to this part of the book – where in certain forums it is enough that the 'traditional knowledge' issue is on the agenda, but it is not engaged with any real sensitivity or particularity. As inferred from the quote, the respondent appears to suggest that cultural particularity or specificity would be disruptive and pose problems of legitimacy. With such potential challenges, it is far safer (and easier) to avoid the problem by abstraction, objectification and exclusion. The very politics of indigenous knowledge remain absent from discussions of its (potential) intellectual property protection. Local identities might be privileged in making the category legitimate in terms of international discussion, but these identities are displaced when they actually threaten to reveal the explicit cultural politics (and prejudices) at play within the global polity.

Arguably the cultural particularity is deemed a subject more worthy of consideration by each nation state. In this sense, the nation state is posited as more qualified to address the issue in view of the distinct colonial and postcolonial experiences of governing indigenous people. This also presents the quandary where the international forums seek to set the terms of the debate and authorise discussions set in those terms, but ignore quite fundamental questions about the limitations of the debate. Cultural particularity is relegated to a position that does not disrupt the dominant circulation and proliferation of preferred classificatory indices.

While indigenous people may increasingly be recognised as an international group commanding attention, they remain situated in incredibly difficult subject positions that must be mediated. Especially in forums (academic and otherwise) where indigenous issues are addressed, but indigenous people themselves are absent, it is easy to perpetuate romantic assumptions about indigenaity and disavow the ongoing political battles of which intellectual property is just one. The communicative practices that affect the expression of indigenous subjectivities in global law have significant consequences for indigenous agency. Appadurai aptly captures this paradox of representation wherein he states: 'The critical point is that both sides of the coin of global cultural processes today are products of the infinitely varied mutual contest of sameness and difference on a stage characterized by radical disjunctures between different sorts of global flows and the uncertain landscapes created in and through these disjunctures'.[70]

The international arena is integral in setting the key terms of the debate and sidelines discussion that may compromise the adoption of those terms within national contexts. This way of shaping the categories and hence the terms of the debate has direct correlation with processes of harmonisation. In this context, harmonisation means the adoption of very broad abstract statements that imply an intention to 'do better' in relation to a particular concern. It suggests agreement upon the various cultural aspects embedded within the construction of the categories and the subsequent relation to economics and obligations for the enforcement of private property rights. At the same time it deflects attention from claims that do not fit that particular formula of rights. Whilst critiques of harmonisation point to the inequitable frameworks of intellectual property that are imposed as regulatory standards, the very construction of the category of 'traditional knowledge' imposes its own regulatory standards. In this context, the term most utilised to establish the standard is the trope of 'culture'. It is the prevailing emphasis on culture to explain why indigenous claims are different to any other that intellectual property law has had to deal with in its long history that I will now explore.

NOTES

1. Arup suggests that through these conventions, intellectual property provided one of the earliest occasions for multilateral agreement. C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property*, Cambridge University Press: Cambridge, 2000 at 65.
2. D. Saunders quoted in L. Bently and B. Sherman, 'Great Britain and the Signing of the Berne Convention in 1886', (2001) 48 (3) *Journal of the Copyright Society of the USA* 311 at 312. See: D. Saunders, *Authorship and Copyright* Routledge: London and New York, 1992. See also: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1996* Centre for Commercial Law Studies, Queen Mary College: London, 1987. This text is limited to a discussion of politics as primarily a product of the nation state – which is not my interest here.
3. Ibid., at 339.
4. Ibid., at 318.
5. F.W. Grosheide, 'General introduction' in Grosheide, F.W., and J.J. Brinkoff (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge*, Intersentia Publishers: Antwerp, Oxford, New York, 2002 at 7.
6. M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, Brookings Institution Press: Washington D.C. 1998 at 94–101.
7. Ibid., at 125.
8. Ibid., at 125. See also: C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property*, supra n.1 at 40 for an account of the norms and processes of the WTO.
9. Grosheide comments, 'As a consequence of decolonization the geopolitical and demographic map changed dramatically. In Asia the amount of internationally recognized states multiplied by a factor of five. Whereas Africa in 1939 knew of only one such state, after the war this amounted to about fifty. Even in South and Central America, some twelve states were formed.' F.W. Grosheide, 'General Introduction', supra n.5 at 13.
10. Ibid., at 13. It is important to note that the distinction between 'developed' and 'underdeveloped' nations is not clear. Moreover the terms of description are unsatisfactory in that they convey negative associations. For a good consideration of this problem see: D.E. Long, '"Globalisation": A Future Trend or a Satisfying Mirage?', (2001) 49 (1) *Journal of the Copyright Society of USA* 313 at ft.11 at 317.
11. M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, supra n.6 at 127.
12. Drahos (with Braithwaite) argues that 'WIPO's deepest failure from the US perspective lay in the arena of enforcement. The general view in the US private sector was that even if they could get a treaty through WIPO there was little point if the treaty standards were not enforceable.' P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan: London, 2002 at 111.
13. M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, supra n.6 at 91.
14. Ibid., at 127.
15. P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.12 at 195.
16. Ibid., at 112.
17. M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, supra n.6 at 132. See also: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.12 at 110.
18. The WTO was established at the end of the 1994 Uruguay Round and replaced GATT. See: C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property*, supra n.1 at 45–48.
19. For a considered study of the political, bureaucratic, cultural and individual influences that led to the TRIPs agreement see generally: P. Drahos with J. Braithwaite,

Information Feudalism: Who Owns the knowledge Economy?, supra n.12. Also see: M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, Sweet and Maxwell: London, 1996.

20. F.W. Grosheide, 'General Introduction', supra n.5 at 17. Arup also notes that the 'agreement cuts across provisions made in other international organisations but in some instances defer to or actively support them.' But the question remains whether the WTO is serious about this project of complementarity. C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property*, supra n.1 at 42.
21. 'WIPO was rather taken by surprise by the TRIPs agenda.' C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property*, supra n.1 at 182.
22. M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, supra n.6 at 132.
23. See: www.un.org/aboutun/.
24. See: R.L. Barsh, 'Indigenous Peoples: An Emerging Object of International Law', (1986) 80 *The American Journal of International Law* 369.
25. See: S. Pritchard, 'The United Nations and the Making of a Declaration on Indigenous Rights', (1997) 3 (89) *Aboriginal Law Bulletin* 4; and generally, S. Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights,* Zed Books: London, 1997; P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press: Oxford, 1991.
26. International Labor Organisation, *Convention 107 concerning Indigenous and Tribal Population* (1957). See also: the International Labor Organisation, *Convention 169 concerning Indigenous and Tribal peoples in Independent Countries,* 76th Session, Geneva Switzerland, 1989.
27. M. Nakata, 'The United Nations and Indigenous People' in Nakata, M. (ed), *Indigenous Peoples, Racism and the United Nations*, Common Ground: Sydney, 2001 at 18.
28. Ibid., at 18.
29. In 1970 the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that a complete and thorough study of the problem of discrimination against indigenous people be undertaken. See: J. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, U.N Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4(1986); and E.I. Daes, *Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous Peoples*, Final report of the Special Rapporteur, Mrs. Erica-Irene Daes in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights, Geneva, 47th Session, E/CN.4/Sub.2/1995/26.
30. For example: UNESCO; the UN Development Program; and WIPO.
31. See [www.un.org/esa/socdev/unpfii/] See also: P. Havermann, 'The Participation Deficit: Globalisation, Governance and Indigenous Peoples', (2001) 3 *Balayi: Culture: Law and Colonialism* 9 at 24.
32. Australia, Canada and the United States repeatedly vote against the draft. The Declaration on the Rights of Indigenous Peoples was adopted in a majority vote (143–4) by the UN General Assembly on 14 September 2007.
33. As Nakata notes, 'In 1998, WIPO was mandated to identify and explore the issues with intellectual property aspects of traditional knowledge and folklore protection.' M. Nakata, 'The United Nations and Indigenous People', supra n.27 at 18.
34. The interest was initially in folklore. See: M. Blakeney, 'Protection of Traditional Knowledge under Intellectual Property Law', (2000) 22 (6) *European Intellectual Property Review* 251. E.I. Daes, *Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous People,* presented by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and President of the Working Group on Indigenous Populations, Geneva, 45th Session, E/CN.4/Sub.2/1993/28. See: *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.*

Written and adopted at the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatane, New Zealand, 12–13 June 1993.

35. Grosheide argues that it was UNESCO that 'started introducing treaties, organizing conferences and setting up projects in order to stimulate a process of world wide reflection as to how cultural policies could be integrated into development strategies.' F.W. Grosheide, 'General Introduction', supra n.5 at 21.
36. See for instance: D.E. Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective', (1998) 23 *N.C.J. Int'l L. & Com. Reg*. 229; D.E. Long, 'Democratising "Globalisation": Practicing the Politics of Cultural Inclusion' (2002) 10 *Cardozo Journal of International and Comparative Law* 218; C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property*, supra n.1. See also the following collection of essays: P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development*, Palgrave Macmillan: Hampshire, 2002.
37. P.E. Geller, 'Copyright History and the Future: What's culture got to do with it?', (2000) 48 *Journal of the Copyright Society of the USA* 210 at 251. See also: P. Hirst and G. Thompson, 'Globalisation and the History of the International Economy' in Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate*, Polity Press: Cambridge, 2000; and, J. Perraton, D. Goldblatt, D. Held and A. McGrew, 'Economic Activity in a Globalising World' in Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate*, Polity Press: Cambridge, 2000.
38. R. Gana, 'Has Creativity Died in the Third World? Some Implications of the Internationalisation of Intellectual Property', (1995) 24 *Denv. J. Int'l L. & Pol'y* 109; R. Oekdiji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System', (2003) 7 *Singapore Journal of International and Comparative Law* 315; and, K. Aoki, 'Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property and the Internet', (1998) 5 *Ind. J. Global Leg. Studies* 443.
39. P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.12 at 5 (emphasis in text).
40. For a selection in the otherwise extensive literature see: S. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*, State University of New York Press: New York, 1998; S. Sell, 'Industry Strategy for Intellectual Property and Trade: The Quest for TRIPs and post-TRIPs Strategies', (2002) 10 *Cardozo Journal of International and Comparative Law* 79; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development*, supra n.36; P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.12; C. Correa, 'Harmonisation of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?', (1997) *N. Y. U. J. Int'l L. & Pol'y*. 109.
41. K. Aoki, 'Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', (1998) 6 *Ind. J. Global Leg.Stud.* 11.
42. M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, supra n.6 at 1. See also: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, supra n.12.
43. C. May, 'Why IPRs are a Global Political Issue', (2003) 1 *European Intellectual Property Review* 1.
44. Ibid., at 1.
45. Ibid., at 5.
46. May understands the most obvious economic divide to be between 'developed' and developing countries (despite the inherent problems in making such a neat division). See also: C. May, *A Global Political Economy of Intellectual Property Rights: The New Enclosure?*, Routledge: London and New York, 2000; S. Sell, *Power and Ideas: North South Politics of Intellectual Property and Antitrust*, supra n.40; P. Drahos, 'BITs and

BIPs: Bilateralism in Intellectual Property', (2001) 4 (6) *The Journal of World Intellectual Property* 791.
47. Ibid., at 4.
48. K. Aoki, 'Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', supra n.41 at 11.
49. M. Ryan, *Knowledge Diplomacy Global Competition and the Politics of Intellectual Property*, supra n.6 at 191.
50. K. Aoki, 'Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property and the Internet', supra n.38 at 469.
51. A. Sarat and J. Simon, 'Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship', (2001) 13 (35) *Yale Journal of the Humanities* 1 at 7.
52. M. Hardt and A. Negri, *Empire*, Harvard University Press: Cambridge MA and London, 2000 at 45.
53. Ibid., at 45.
54. Ibid., at 45.
55. See the collection of essays in: A. Sarat and J. Simon (eds), *Cultural Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism*, Duke University Press: Durham and London, 2003.
56. A. Sarat and J. Simon, 'Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship', supra n.51 at 6. See also: N. Mezey, 'Approaches to the Cultural study of Law: Law as Culture', (2001) 13 (35) *Yale Journal of Law and the Humanities* 35.
57. See: M. Blakeney, 'The Protection of Traditional Knowledge under Intellectual Property Law', supra n.34.
58. Department of Home Affairs and the Environment *Report of the Working Party on the Protection of Aboriginal Folklore* Canberra, December 1981.
59. World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999),* Geneva, Switzerland, 2001. See Introduction.
60. '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 754 [emphasis mine].
61. D.E. Long, 'Democratising "Globalisation": Practicing the Politics of Cultural Inclusion', supra n.36 at 217.
62. The cultural production of intellectual property law was considered in Part One.
63. P.E. Geller, 'Copyright History and the Future: What's culture got to do with it?', supra n.37 at 261.
64. J. Anderson, L. Aragon, I. Haryanto, P. Jaszi, A. Nababan, H. Panjiatan, A. Sardjono, R. Siagian, R. Suryasaladin, *Traditional Arts: A Move Towards Protection in Indonesia* (forthcoming).
65. Ibid. See also: J. Anderson, 'The Politics of Indigenous Knowledge: Australia's Communal Moral Rights Bill,' (2004) 27 (3) *University of New South Wales Law Journal* 85.
66. D.E. Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective', supra n.36 at 229–231.
67. A. Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' in Held, D., and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalisation Debate*, Polity Press: Cambridge, 2000 at 231.
68. Ibid., at 231.
69. D.E. Long, 'Democratising "Globalisation": Practicing the Politics of Cultural Inclusion', supra n.36 at 225.
70. A. Appadurai, 'Disjuncture and Difference in the Global Cultural Economy', supra n.67 at 237.