

## BOOK REVIEW

### LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN IP LAW

By Jane E. Anderson,  
Cheltenham, UK; Northampton, MA (USA): Edward Elgar, 2009, 255pp, ISBN 978 1  
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The challenge that indigenous knowledge (IK) poses for the law of intellectual property (IP) continues to be explored from diverse disciplinary perspectives. There is no consensus amongst scholars, policy makers, indigenous peoples and variegated stakeholders on whether and how the issue of IK can be resolved within the IP law framework. In this book, the author examines the checkered processes through which diverse actors and stakeholders, history, politics, law and miscellaneous factors have shaped the negotiation of IK, and particularly Aboriginal art and craft, within the Australian copyright regime.

The book is divided into three parts, in an attempt to capture the role of specific themes in the negotiation of a category of IK in IP. A stand-alone introduction explores the conceptual outlook of the book. Part One is devoted to discussions about law, especially IP and the copyright regime. Part Two explores the subject of IK, with a focus on Aboriginal art and the bureaucratic and judicial processes through which IK became part of Australian IP law. Part Three tries to provide a global perspective on the emergence of indigenous rights in IP law, construing culture and community as distinguishing aspects of indigenous claims to IP in Australia.

Anderson introduces her subject as an examination of the emergence of claims regarding protection of IK in Australia and the effect of placing such claims within an IP discourse. The practical orientation of her interest arises, in part, from her inquiry into how the epistemology of Aboriginal and Torres Strait Islander peoples was co-opted in the neo-liberal colonial settler state of Australia. In her view, the intersection of IK with IP provides a platform for understanding the social effects of law and for critical re-appraisal of the internal tensions that characterize IP jurisprudence.

Part I (chapters 1-3) begins with an historical sketch of the evolution of IP. The author demonstrates that IP as a subject is hardly neutral. Anderson argues that throughout its history, IP is informed and influenced by social and political contingencies. This understanding of IP that is crucial in appraising the processes through which the IK category entered the IP discourse. Dealings with indigenous peoples are rooted in colonial relationships of power. In the property context, the abrogation of the doctrine of *terra nullius* in the 1982 Australian decision, *Mabo*, posed a significant challenge to the way in which indigenous 'difference' has been accommodated in traditional western jurisprudence. Underscoring property as a site of social organization, the author explores the trajectory by which IP has become a complementary narrative of the Western construct of property, and its transformation into a tool for securing indigenous interest in knowledge control and management. The ability of IP law to adjust to IK is the result of its less celebrated dynamism, a trait that is consistently apparent in its ongoing grappling with new subject matters. A closer look at copyright

jurisprudence, through the narrative of authorship and originality, shows however that the law is only interested in placing the IK category in its own pigeon hole, in an attempt to uphold a facade of objectivity and rationality. Ironically, complex political, cultural and individual factors influence the response of the law to new subject matters such as digital technologies, thus demonstrating the subjectivity of the legal process. This is evident in the way in which the law of copyright accommodates the changing nature of intangible subject matters. Anderson argues that in the post modern subjective matrix of the legal process, IP law self-reflexively re-appraises its exclusion of IK and attempts to accommodate it, albeit by assigning it a different status.

In Part II (chapters 4-7), the author demonstrates the subjective character of law and the legal process, with particular attention to IP law, through her analyses of factors such as conceptual transformations in Aboriginal art, the “bureaucratic agenda”, key Australian judicial decisions and what she calls the “politics of law”. She examines the identification and accommodation of IK as a special category within Australian IP jurisprudence, and notes the paradigmatic effect of the combination of these factors in the production of IK within the law in Australia. Anderson argues that the complicity of law with economic or commercial valuation of certain phenomena is critical for the transformation or commoditization of Aboriginal art/IK into a novel economic or cultural product - one resulting from an industrial enterprise and socially productive process capable of legal protection and response. While securing the intangible status of Aboriginal art, the law struggles to co-opt the metaphysical, ethnographic and complex communal elements of that art. The result is that the approach of the law to IK is pushed toward cultural specification or differentiation in way that leaves the concept of originality and authorship inchoate.

In regard to the bureaucratic agenda, the author identifies two major reports as both fundamental and symbolic of Australian bureaucratic intervention on the subject of IK: 1981, *Report of the Working Party on the Protection of Aboriginal Folklore*, and 1994, *Stopping the Rip Offs: IP Protection for Aboriginal and Torres Strait Islander People*. These documents reflect an ongoing dilemma regarding the purpose of IK protection and the conflict of values provoked by the subject. The competing *raison d'être* for protection of Aboriginal folklore are: to ensure progressive evolution of the tradition without external influence, and to protect the economic interest of Aboriginal peoples. The author argues that one of the flaws of the bureaucratic agenda is that in its focus on folklore it fails to emphasize that these two perspectives are not mutually exclusive. The agenda accounts, in part, for a fixation on interpretation of Aboriginality, a questionable presumption of homogeneity of indigenous experience, and an unrealistic standard of ‘authenticity’ as cultural markers for Aboriginal art. The author suggests that this approach undermines the current nuances, dynamics and inter-cultural exchanges that shape contemporary indigenous experience and culture. She concludes that “[t]he issues of how the law treats difference are relatively benign in these Reports, that is, the bureaucratic agenda recognizes difference, but fails to engage with it in any meaningful way. Treating cultural difference is left to the courts ... where new and inventive ways of accommodating indigenous difference are imagined” (p 124).

In chapter six, the author uses the two celebrated cases: *Milpurrurru & Others v. Indofurn Pty. Ltd and Bulun Bulun & Others v. R & T Textiles* to demonstrate the inventiveness of the courts in accommodating IK. These decisions reinforce the legal dichotomy between the tangible form of Aboriginal art and IK (embedding the

metaphysical element) as the intangible form. The decisions illustrate the legal construct of an essential core of IK within a framework of tradition, culture and cultural difference, creating an uncertain legal subject matter and new category of intellectual property based on cultural differentiation. Thus, the problematic and unstable nature of the “intangible” in the copyright jurisprudence reappears. *Milpurrurru* demonstrated the extent of preparedness of IP law to fill the gaps for the protection of IK amidst prevalent appropriation of Aboriginal art. On the other hand, *Bulun* explores the cultural specificity of copyright. Since the cases were both heard by the same judge (von Doussa), they provide an opportunity for “establishing a distinct indigenous narrative within IP law” (p 131). These cases are not only instances of legal action, but demonstrate the conservatism of the law in ensuring consistency within the borders of copyright law and its failure to recognize the culturally contingent nature of categories and its capacity to amend and even foist its own categories. Judge von Doussa moved discussions on the culturally contingent indigenous narrative to other areas of law, namely equity, and failed to use the opportunity presented by IK to challenge core categories of copyright law. In each case, judicial interpretation indicated a cultural view of copyright law that unravels “the politics, philosophy and cultural values [that] underpin case law, and these factors duly exert influence in how new categories are incorporated and the extent to which cultural differences are treated” (p 157). On one hand, the law subordinates the special nature of Aboriginal difference in order to underscore the coherence of its copyright principles and categories. On the other hand, law often appeals to indigenous difference in order to shift attention away from the inconsistencies of its internal mechanics. Thus, IK is victimized and problematized while the law plays the role of an objective rescuer. The foregoing is, in a nutshell, the author’s conception of the politics of law in the production of IK.

Part Three (chapters 8-10) explores the emergence of culture as the singular differentiating marker used in entrenching IK within IP law. Curiously, in the first chapter of this Part (chapter 8), the author seems to have realized, albeit belatedly, that beyond Australia the issue of IK has global traction. The chapter makes a quick and sketchy historical detour into the evolution of international IP law-making - from WIPO to the WTO-led changes under the TRIPS Agreement - as a basis for understanding the gap that IK poses for the globalization of knowledge frameworks. She argues that similar mistakes, such as the homogenization of IK at the national level, feature also in the global approach to the intersection of IK and IP. There is a hole in the analysis in Part Three of this book. It fails to give regard to the Convention on Biological Diversity and its ramifications for international production of IK. Also, in contrast to the earlier impression given by the author that IK is fully entrenched in IP law, in this Part she makes a *volte-face* and claims that “to date the exact position of IK within IP discourse remains uncertain. [But] [w]hat is certain is that culture or cultural (sic) will be deployed as exploratory tool for indigenous differentiation” (p 180). The author objects to this fixation on the amorphous or volatile concept of culture as a marker of the indigenous claim to IP. The appeal to culture is premised on a naïve presumption of homogeneity of the indigenous category, and perhaps some ignorance over the disparate, transformative and polyvalent character of culture and knowledge. Culture makes IK the subject of continued colonial politics of power relations; in the present setting, it has a tendency to exclude from the discourse critical sections of IK holders, such as those who do not identify with a distinct indigenous community.

The book concludes by returning to the Australian national situation; the author critically examines a failed attempt to implement the “labels of authenticity” program that would identify, for marketing purposes, the origin and authorship of Aboriginal artwork. She attributes the failure, in part, to the fact that the project could not bring any definitional certainty to the meaning of “authentic Aboriginal art”. In her view, the failure is indicative of the misalignment of theory and policy development around the subject, as well as ongoing struggles between IP and IK. Instead of an IP approach to IK premised on dubious notions of homogeneity and primitive markers of difference, she suggests that the focus would be better placed on more localized strategies with proven and promising community-based approaches to knowledge management. The author avoids exploring the implications of that model for IP governance under current global frameworks, but points out that it would incorporate many different indigenous historical and cultural contingencies which are presently largely ignored.

This book is an interesting addition to the increasingly interdisciplinary work at the interface of IK and IP law. It is a well-researched and well written book that would be quite resourceful for scholars and researchers from diverse disciplinary backgrounds that straddle the subject of the book, especially those that focus on the Australian context.

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