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November, 2017

A Submission on Indigenous Intellectual Property to the House of Representatives Standing Committee on Indigenous Affairs and the Museums Galleries Australia - Indigenous Roadmap Project

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Available at: https://works.bepress.com/matthew_rimmer/
NOVEMBER 2017

THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
INDIGENOUS AFFAIRS

A SUBMISSION ON INDIGENOUS INTELLECTUAL PROPERTY

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Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the Trans-Pacific Partnership, the Trans-Atlantic Trade and Investment Partnership, and the Trade in Services Agreement. His work is archived at SSRN Abstracts and Bepress Selected Works.

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on The Pirate Bazaar: The Social Life of Copyright Law (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.
Rimmer has a research interest in Indigenous intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers’ rights, authenticity marks, biopiracy, and population genetics. He has also explored access to genetic resources, cultural heritage, and native title. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015). His key publications in this area include:


Executive Summary

There is a long history of legal, political, and ethical debate in respect of the problem of misappropriation of Indigenous intellectual property in Australia. There has been perennial public policy inquiries into the topic of Indigenous intellectual property – although there has been only a partial and mixed array of responses.

I would comment that the Australian experience has been a mixed one. It is true that von Doussa J of the Federal Court of Australia has shown judicial innovation in a number of cases – most notably, the “Carpets” case, and the “Bulun Bulun” decision. However, there have been limits to the extent of judicial innovation in Australia – as illustrated by the refusal of the High Court of Australia to recognise the linkage between native title rights and traditional knowledge in the case of Ward v Western Australia. The case law has demonstrated that there is a need for a more fundamental legislative reform of laws with respect to traditional knowledge in Australia.

Unfortunately, the Australian Parliament has thus far failed to heed many of the recommendations of Terri Janke’s landmark report, Our Culture, Our Future from the 1990s.

The Howard Conservative Government did not fully realise its policy plans in respect of the protection of traditional knowledge. A Federal bill on the recognition of communal moral rights in respect of copyright works created by Indigenous communities has not been implemented.
Thus far, there have only been piecemeal reforms. The authenticity trade marks scheme, which was set up in 2000, has collapsed. The Federal access to genetic resources scheme does make reference to native title rights; but only provides limited remedies for non-compliance with the regime. The Queensland access to genetic resources regime fails to adequately address the issue of the protection of traditional knowledge.

The Rudd Labor Federal Government passed a right of resale – which would have the potential to benefit Indigenous artists and communities. However, instead of taking legislative action, it instead passed a code of conduct in respect of Indigenous art.

The Gillard Labor Federal Government passed plain packaging of tobacco products – which incidentally has been of benefit in addressing tobacco consumption in Indigenous communities.

The Andrews Victorian Government has passed some innovative Indigenous cultural heritage laws – which are designed to address some of the gaps and limitations in respect of Australian Indigenous intellectual property.

There are certainly policy opportunities for the Turnbull Government and the current Australian Parliament to provide further protection in respect of Indigenous intellectual property. The Prime Minister Malcolm Turnbull has certainly shown an interest in boosting Indigenous entrepreneurship and business during his tenure. A number of his Ministers have grappled with

Australian Aboriginal and Torres Strait Islander communities have been promoting the need for greater legislative protection of Indigenous Intellectual Property.
There has been international recognition of Indigenous intellectual property as part of the

In 2017, there have been a number of contemporary debates over Indigenous intellectual
property. There has thankfully been a resolution of long-standing debate over the copyright
ownership of the work of Albert Namatjira.1 There has also been controversy over Driller Jet
Armstrong using Wandjina images without permission of the cultural custodians.2 There has
been debate over high-end fashion company Chanel releasing boomerangs.3 The House of
Representatives Standing Committee on Indigenous Affairs has called an inquiry into the
persistent problem of fake art.4 Internationally, the Supreme Court of the United States ruling
on trade mark law and the First Amendment has had flow on consequences for the treatment
of derogatory trade marks about Indigenous communities in the United States.5

1  Isabel Dayman, ‘Albert Namatjira’s Family Regains Copyright of His Artwork After Dick Smith
returned-to-family/9050550
2  Claire Nichols, ‘SA Exhibition Closed Over Appropriation of Indigenous Wandjinasm, ABC Books and
art-appropriation/8879698
3  ABC News, ‘Chanel's $2,000 boomerang sparks complaints and confusion from Indigenous Australians’,
aboriginal-appropriation-claim/8531496
5  Matal v. Tam 137 S. Ct 1744 (2017)
Recommendation 1

International Law

It is the tenth anniversary of the *UN Declaration on the Rights of Indigenous Peoples* 2007. Nation states – including Australia – could do more to implement the articles relating to the protection of Indigenous intellectual property. Moreover, at an international level, there is a need to progress stalled discussions on an international agreement on Indigenous intellectual property in WIPO. The WTO could play a more significant role in the protection of Indigenous Intellectual Property. Moreover, the language on the protection of Traditional Knowledge under the *Convention on Biological Diversity* 1992 needs to be translated into effective action.

Recommendation 2

Copyright Law

Building upon the ‘Bulun Bulun’ decision, Australian copyright law should recognise communal ownership of Indigenous cultural works.

Recommendation 3

Moral Rights

During the debate over the introduction of moral rights in 2000, there was discussion about the need for better protection of Indigenous cultural works, and
recognition of communal ownership. Further reforms of moral rights should consider dealing with such matters.

Recommendation 4
Performers’ Rights
As a result of implementing international WIPO agreements, Australia provides some protection of performers’ rights under copyright law. There is a need to review whether Australia’s regime provides adequate and sufficient protection of Indigenous performers.

Recommendation 5
Right of Resale for Visual Artists
There is a need to review the conservative model for the right of resale for visual artists in Australia to determine whether the regime is meeting its aims and objectives. In particular, it should be evaluated whether the scheme has provided adequate benefits for Indigenous artists and their families. There could be further scope to strengthen the right of resale for visual artists in Australia – particularly in light of the High Court of Australia rulings on constitutional law and intellectual property.

Recommendation 6
Consumer Law
The ACCC has taken action under Australian consumer law in respect of misleading and deceptive conduct and representations made about Indigenous art
and craft. In the cases that it has intervened in, the ACCC has been effective. However, there has been concerns whether the regulator has been able to cope with the systematic nature of the problem. The Hon. Bob Katter has proposed the *Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017* (Cth). Thought should be given to giving the ACCC further resources in order to engage in comprehensive action in respect of misleading and deceptive conduct relating to Indigenous art and craft.

**Recommendation 7**

**Trade Mark Law**

Australia’s authenticity marks scheme was a failure. Nonetheless, trade mark law can play a useful role particularly in respect of protecting Indigenous businesses and entrepreneurs. There is a need for IP Australia to play an active role in policing the trade marks register for any deceptive marks relating to Indigenous culture.

**Recommendation 8**

**Plain Packaging of Tobacco Products**

Plain packaging of tobacco measures has proven to be an effective tobacco control measure – including for Indigenous communities. The Federal Minister Ken Wyatt has been pursuing various public health measures in order to close the gaps in respect of Indigenous healthcare, and to reduce tobacco consumption.
Recommendation 9

Geographical Indications

There has been an academic discussion about how geographical indications may be employed to protect Indigenous linkages between place and culture.

Recommendation 10

Designs Law

The work of Professor Maree Sainsbury has highlighted that there has been instances of misleading design registrations relating to Indigenous culture. IP Australia needs to take action in respect of the designs register in such matters.

Recommendation 11

Patent Law

The recent High Court of Australia decision in *Myriad* is an important precedent in respect of patentable subject matter in Australia. There is a need for IP Australia to take into account Indigenous knowledge as prior art when making determinations in respect of patent threshold standards – such as novelty, inventive step, and utility. There has been considerable policy discussion about the relationship between patent law, disclosure, informed consent and benefit-sharing in relation to Indigenous genetic resources.
Recommendation 12

Plant Breeders’ Rights

Much like in the patent regime, IP Australia needs to take into account Indigenous knowledge in respect of determinations of distinctiveness, uniformity, and stability, when assessing plant breeders’ rights applications.

Recommendation 13

Access to Genetic Resources

Australia has a fragmented federal and state system of regimes in respect of access to genetic resources. There is a lack of consistency and harmony between the systems – particularly in respect of the treatment of Traditional Knowledge and Indigenous intellectual property. There should be a review to determine whether there has been benefits passed onto Indigenous communities through the biodiscovery regimes – both Federal and State.

Recommendation 14

Confidential Information

Confidential information and trade secrets have been employed successfully in the past by Indigenous communities in Australia in disputes over Indigenous intellectual property.
Recommendation 15
Privacy

In one of its inquiries into privacy, the Australian Law Reform Commission recommended that ‘The Office of the Privacy Commissioner should encourage and assist agencies and organisations to develop and publish protocols, in consultation with Indigenous groups and representatives, to address the particular privacy needs of Indigenous groups. The Australian Government should undertake an inquiry to consider whether legal recognition and protection of Indigenous cultural rights is required and, if so, the form such recognition and protection should take.’ The Australian Law Reform Commission has also recommended the creation of a statutory cause of action in respect of serious invasions of privacy. That could be useful for Indigenous communities.

Recommendation 16
Cultural Heritage

In 2016, Victoria passed the Aboriginal Heritage Amendment Act 2016 (Vic) to provide protection for tangible and intangible cultural heritage. Under the new provisions in the act, a group of traditional owners or native title holders can apply to have a piece of intangible heritage included on the Aboriginal heritage register. Aboriginal Intangible Heritage means any knowledge of/or expression of Aboriginal tradition, including: oral and expressions (including language, songs and stories); performing arts (vocal and instrumental music, dance and performance); social practices, rituals and festive events; knowledge and practices concerning nature and the universe (including environmental and ecological
knowledge) and/or visual arts and craftsmanship (skills and knowledge involved in their production). The legislation then makes it an offence to knowingly use any registered Aboriginal intangible heritage for commercial purposes without consent from the ownership group, with penalties of up to $280,000 for an individual or $1.5m for a corporation. It will be worthwhile monitoring this regime in operation. If this system is effective, it could be a useful model to emulate by other Australian Governments.

Recommendation 17

Native Title

The *Connection to Country: Review of the Native Title Act 1993 (Cth)* [2015] ALRC 126 (p 262-270) reconsidered the relationship between intellectual property and native title:

“The decision in Ward HCA, and its approach to cultural knowledge, predates key international developments, including UNDRIP. Contemporary understanding of connection to country is being shaped by a growing body of academic and anthropological literature which is not reflected in the current state of the law.

Terri Janke has pointed to a ‘paradox’ where cultural material is used in native title claims as evidence of continuing connection, but where cultural knowledge is not recognised as a native title right.

In summary, the ALRC has raised the potential for a native title right to protect cultural knowledge and for cultural knowledge to be considered in relation to rights to be exercised for any purpose, including commercial purposes. The ALRC does not have a concluded view on whether this would be a desirable
development, but has identified the need for an in-depth inquiry that can assess
the legal and policy issues.”

Recommendation 18
Indigenous Cultural Authority
Terri Janke has called for the establishment of an Indigenous Cultural Authority
in order to provide a co-ordinate institutional response to the protection,
enforcement, and exploitation of Indigenous intellectual property. Such a regime
would provide institutional support for the array of codes and protocols for the
protection of Indigenous intellectual property in Australia.
The United Nations Declaration on the Rights of Indigenous Peoples 2007 provides a broad, holistic definition of Indigenous Intellectual Property. The preamble was of the view that ‘respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.’ Article 31 (1) provides a broad recognition of Indigenous intellectual property:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 31 (2) stipulates: ‘In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.’

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6 This literature review is based on this 2015 literature review - Matthew Rimmer, 'Mapping Indigenous Intellectual Property', in Matthew Rimmer (ed.), Indigenous Intellectual Property: A Handbook of Contemporary Research, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 1-44.


8 Ibid.

9 Ibid.

10 Ibid.
A number of other clauses of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 accentuate a number of contexts for the debate over Indigenous intellectual property. Article 11 emphasized: ‘Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.’ Article 11 noted that this right ‘includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.’ Article 12 emphasizes that ‘Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.’ Furthermore, Article 13 address cultural rights; Article 14 examines the rights to education and access to knowledge; Article 15 looks at cultural diversity; and Article 16 enunciates the importance of Indigenous media ownership and diversity.

There is a strong emphasis upon the principles of Indigenous representation, prior informed consent and benefit-sharing in the *United Nations Declaration on the Rights of Indigenous Peoples* 2007. Article 18 notes that ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their

11 Ibid.
12 Ibid.
13 Ibid.
own indigenous decision-making institutions.'\textsuperscript{14} Article 19 observed that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'\textsuperscript{15}

A number of articles highlight matters of access to medicines and health. Article 23 observes that ‘Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.’\textsuperscript{16} Article 23 emphasizes: ‘In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.’\textsuperscript{17} Article 24 provides that ‘Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.’\textsuperscript{18}

Further provisions address the relationship between Indigenous peoples, the environment, and access to genetic resources. Article 28 emphasizes that ‘Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used

\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
or damaged without their free, prior and informed consent.’ Article 29 stresses that ‘Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.’

Article 45 emphasizes: ‘Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.’

The United Nations Declaration on the Rights of Indigenous Peoples 2007 provides a conceptual framework by which to consider Indigenous intellectual property, law reform, and social justice. There is an extensive literature on Indigenous intellectual property, which has expanded over the last two decades. It is a difficult territory to chart and map. There is a palimpsest of writings on the topic. This literature review provides a selection of the scholarly literature on Indigenous intellectual property. There remains much debate as to the canonical texts in the field, and what should be included, glossed, and excluded. This literature review is necessarily partial and limited. The study cannot hope to be fully comprehensive or encyclopaedic. This research handbook represents a mosaic of studies and research in respect of Indigenous intellectual property. The literature on Indigenous intellectual property spans an impressively wide range of disciplines – including law, history, cultural studies, anthropology, economics, science, politics, and international law. There has been an investigation of a variety

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19 Ibid.
20 Ibid.
21 For a discussion of the issues relating to writing encyclopaedias of Indigenous history, society, and culture, see: David Horton (ed.), The Encyclopaedia of Aboriginal Australia: Aboriginal and Torres Strait Islander History, Society, and Culture, Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994.
of legal disciplines and their relevance to Indigenous knowledge – including copyright law, designs law, trade mark law, passing off, consumer law, patent law, access to genetic resources, confidential information, privacy law, cultural heritage law, land rights, and international law. There has been significant activity in terms of litigation, policy debate, and national and international initiatives. In terms of comparative law, there has been research across the globe – covering Australia and New Zealand, the Pacific Rim, South East Asia, the European Union, Canada, the United States, South America, and Africa. There has been a wide array of international institutions – including the United Nations Permanent Forum on Indigenous Issues; the World Intellectual Property Organization; the World Trade Organization, and various international environmental institutions - which have sought to address the question of Indigenous knowledge.

1. History

Traditionally, the historical canon of intellectual property paid little attention to Indigenous intellectual property. The question of traditional knowledge was often elided or marginalised in larger surveys of intellectual property law. There have been substantial efforts by a number of historians and scholars to revise, rewrite, and supplement such official histories to better document and account for legal and policy battles over Indigenous intellectual property.

Legal historian and philosopher, Kathy Bowrey, has provided a masterful historical overview of Indigenous intellectual property. In a study on emerging challenges on intellectual

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property, she observed that there has been significant contestation over terminology, legal disciplines, and subject matter in the debate over Indigenous intellectual property:

It has become conventional wisdom to assert that intellectual property (IP) provides inadequate protection to Indigenous peoples. An ill fit with Western categories of protection, and cultural bias, have frequently been noted in Australian case law, parliamentary proceedings, academic texts and articles, and Australian government reports. Significant international research and debate includes discussions about the need for international norms to ensure the effective protection of ‘traditional knowledge’, ‘genetic resources’ and ‘traditional cultural expressions’ or ‘folklore’. These terms are only some of those used in the literature to encompass legal and political issues relating to protection of Indigenous art, history, mythology, heritage, artefacts, scientific knowledge of the natural world, technology, design, and know-how.23

Bowrey has maintained that there is a need to situate the debate over Indigenous intellectual property in the broader context of colonialism and post-colonialism. She charted the various international and national dimensions to the efforts to address Indigenous intellectual property: ‘The issues transcend the conventional categories of Intellectual Property, connecting with regulations affecting cultural heritage, arts, education, environmental law, international law and human rights.’24


24 Ibid. 47.
After surveying the legal landscape, Bowrey concluded: ‘Since the late twentieth century the major obstacle to better protection of Indigenous intellectual property has not been a lack of legal interest, or disagreement about the need for reform, but the considerable uncertainty about how to achieve this objective.’ She posed the question: ‘Is it possible to redraw the legal landscape to encapsulate the diversity of Indigenous needs and interests, using our established legal categories, concepts and practices?’ In her view, there are significant philosophical and theoretical challenges involved in adequately and sufficiently representing Indigenous law under intellectual property law: ‘Much is lost and distorted in the process of translation into Western terms and priorities’.

Thinking ahead to the future, Bowrey recognised that ‘much critical thought, legal creativity and political will is required to redress past injustices and to prevent ongoing wrongs into the future’. She commented: ‘While we have achieved some definition of the parameters of the challenge to Intellectual Property law and social and legal attitudes have changed in the past fifty years, we remain far from reaching a solution.’

In her book, _Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law_, Jane E. Anderson provides a rigorous examination of the representations of Indigenous knowledge and culture in intellectual property law. She has

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25 Ibid. 66.
26 Ibid. 66.
27 Ibid., 67.
28 Ibid., 67.
highlighted the problems in reconciling intellectual property law and Indigenous knowledge as categories of law and subjects of governance:

Increasingly indigenous knowledge is, for the purposes of governmental intervention, being generated and identified as a ‘type’ existing within a legal domain, produced through case law, governmental reports, academic interest and international concern. In reality, indigenous knowledge is not ahistorical and uniformly coherent.\(^{30}\)

Anderson contends that intellectual property ‘provides a means of leverage for self-determination claims in that it allows the exercise of control over uses and circulations of information.’\(^{31}\) She recognised that ‘these are legitimate claims that engage international and national discourses of human rights and demand recognition of the troubling pasts that inform indigenous circumstance within many nations.’\(^{32}\) Nonetheless, Anderson observed the need for a politics of pragmatism: ‘We have to be realistic about what can be gained through an intellectual property regime: legal frameworks of themselves cannot ever adequately provide a stand-in-grid for issues that require social and cultural reflection and reconciliation.’\(^{33}\) She admonished: ‘It is time for critical engagement on problems that are already manifest – and this means reinterpreting this issue beyond that of a quaint intellectual property problem that can be addressed by academics from their offices.’\(^{34}\)

\(^{30}\) Ibid. 14.  
\(^{31}\) Ibid. 224.  
\(^{32}\) Ibid., 224.  
\(^{33}\) Ibid., 224.  
\(^{34}\) Ibid., 224-225.
In *The Making Of Modern Intellectual Property Law*, Brad Sherman and Lionel Bently have emphasized the need to consider contemporary battles over Indigenous knowledge in light of historical developments in intellectual property law.\(^{35}\) The pair noted: ‘The image of intellectual property law that developed during the nineteenth century and the narrative of identity which this engendered played and continue to play an important role in the way we think about and understand intellectual property law.’\(^ {36}\) Sherman and Bently stressed: ‘The cultural dimension of copyright law has also been highlighted in relation to the question of indigenous intellectual property rights which was raised, for example, as a consequence of the Australian High Court decision in *Mabo*.\(^ {37}\) The scholars concluded that there was a need to invent new narratives about history: ‘As intellectual property grapples with the issues that flow from its attempts to regulate digital technology and organic computing as well as indigenous artistic and cultural expression, these needs are as urgent and pressing as they ever were.’\(^ {38}\) Brad Sherman has further explored such issues with Leanne Wiseman.\(^ {39}\)

In her book, *From Goods to a Good Life*, Madhavi Sunder explores questions of intellectual property, traditional knowledge, and global justice.\(^ {40}\) She calls for ‘legal decision-makers to recognize contingency, bias, and unreasoned orthodoxy in the legal definitions that begin to


\(^{36}\) Ibid., 219.

\(^{37}\) Ibid., 219.

\(^{38}\) Ibid., 220.


appear natural.'"Sunder contends: ‘“Traditional knowledge” is continually being invented.’" She observes of the public discussion over Indigenous intellectual property:

Debates over the protection of traditional knowledge, however, often fail to recognize its dynamic character. ‘Traditional knowledge’ typically refers to knowledge handed down from generation to generation. This knowledge includes such forms of cultural expressions as songs, dances, stories, artworks, and crafts, as well as ‘symbols, marks, and often recurring expressions of traditional concepts.’ Agricultural, scientific, and medical knowledge is also covered.

Sunder laments that, ‘partly because of the difficulties of fitting poor people’s knowledge into Western frameworks and partly because this knowledge is valued as the opposite of property, the creative knowledge of the poor and their capacity for knowledge creation are often overlooked.’ There is a great focus upon technology transfer, foreign direct investment, and benefit-sharing. Sunder notes: ‘Much less attention is given to how law can tap the innovation and productive knowledge capacities of the poor.’ She observed that ‘tradition is cultivated, not discovered.’ In her view, ‘The concept of traditional knowledge, too, is a modern invention.’ Sunder maintains: ‘Forcing ourselves to see the modern aspects of traditional

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41 Ibid., 137.
42 Ibid. 137.
43 Ibid., 137-8.
44 Ibid. 138.
45 Ibid., 138
46 Ibid., 139.
47 Ibid., 139.
knowledge also helps us to view more critically our romantic notions of Western intellectual property as “new”. 

In a series of work, Peter Drahos has investigated the philosophical, legal, and sociological debate about the protection of Indigenous intellectual property. He has been particularly interested the question of how best to design an international regime for the protection of Indigenous intellectual property. In an edited collection, Peter Drahos and Susy Frankel have argued that there is a need for a discourse shift, a reframing of the debate from ‘traditional knowledge’ to ‘Indigenous innovation’:

Perhaps the most important thing for indigenous innovation is to make ‘indigenous innovation’ rather than traditional knowledge the primary term of art in this field. Then policy-makers would have to start asking how they might support indigenous innovation, as opposed to dividing the spoils from traditional knowledge. Answering that question would lead to others. How might we encourage collaboration between cosmologically anchored indigenous networks and scientific networks? How might we intervene in the IP system to increase the bargaining power of indigenous innovators? What can we do to turn indigenous networks into development networks? One suspects this approach would lead to a

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48 Ibid., 139.


more testing but ultimately richer world for science, and a better world for indigenous people in which they would gain the respect that comes from being seen as innovators.51

Drahos is expanding upon his position, with empirical research and cases on Indigenous intellectual property and knowledge.52

2. Culture

There has been a significant debate about the appropriation of Indigenous cultural expressions in a range of artistic endeavours – including literature, art, design, music, drama, television, cinematographic films, and cultural heritage.

In the edited collection, Borrowed Power, Bruce Ziff and Pratima Rao provided a survey of cultural appropriation of Indigenous culture in the 1990s, particularly focusing upon the North American countries of the United States and Canada.53 The pair highlighted the need for an inter-disciplinary approach to the topic:


Appropriative practices, as we have seen, can be found in a number of domains… Because cultural appropriation may arise in so many realms, it has come under the scrutiny of scholars from a wide array of disciplines, including (but not limited to) anthropology, history (including art history), sociology, ethnomusicology, postmodern literary theory, political science, law, and (of course) cultural studies. In each of these realms a body of literature has developed.\textsuperscript{54}

The collection considers half-a-dozen domains – music and musical forms; art and narrative; colonial and post-colonial discourse; popular culture; science; and tangible cultural property.

Law academic and novelist, Stephen Gray, started out writing formal legal pieces about how copyright law had unsuccessfully sought to accommodate Aboriginal art.\textsuperscript{55} Such work led him to further investigate the philosophical questions underlying the legal issues affecting both traditional\textsuperscript{56} and urban Indigenous people.\textsuperscript{57} Gray was awarded The Australian/ Vogel Literary Award for his novel \textit{The Artist is a Thief}.\textsuperscript{58} He was inspired to write a book after being sent out to a community on a possible copyright claim as part of his job in the law faculty of Northern

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\begin{itemize}
\item \textsuperscript{54} Ibid., 20-21.
\item \textsuperscript{56} Stephen Gray, ‘Squatting in Red Dust: Non-Aboriginal Law’s Construction of the ’Traditional’ Aboriginal Artist’ (1996) 14 (2) Law in Context 29-43.
\item \textsuperscript{58} Stephen Gray, \textit{The Artist is a Thief}, Sydney: Allen and Unwin, 2001.
\end{itemize}
Territory University. Gray has provided a critical discussion of cultural protocols. Gray has also explored matters of bioprospecting in relation to Indigenous biological resources. He has investigated the introduction of a label of authenticity into Australia. Gray has examined the teaching of Indigenous intellectual property.

Gray has also published a number of articles about other legal issues affecting Indigenous people. He has explored such topics as native title, customary law, alternative dispute resolution, and criminal law.

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Australia has hosted a number of leading disputes over copyright law and Indigenous culture. Colin Golvan has recounted his role as a barrister in a number of leading Australian cases on Indigenous intellectual property. He noted that ‘the recent protection accorded to Aboriginal copyright by Australian courts has been the subject of considerable interest in Australia and internationally, particularly as it deals with the issue of the use of copyright principles applying to the protection of cultural interests associated with age-old indigenous cultures’. The barrister reflected that ‘the key issue here is whether contemporary copyright provides adequate or appropriate protection for the modern expression of ancient art-forms.’

There have been a number of histories written about battles over Indigenous intellectual property in Australia. In *White Aborigines*, art historian Ian McLean investigated how the relationships between Aboriginal and non-Aboriginal Australia were imagine in Australian painting. In particular, he highlighted the work of Margaret Preston, Imants Tillers, Gordon Bennett and Tracey Moffatt. In *Once upon a Time in Papunya*, Vivien Johnson recounts the rise of the Western Desert Indigenous art movement. She highlights the controversies which surrounded the creation of such extraordinary paintings. In her work on the artist Albert

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67 Ibid., 186.

68 Ibid., 186.


Namatjira, Alison French has highlighted outstanding issues over the copyright ownership of his artistic works.\footnote{71}{Alison French, \textit{Seeing the Centre: The Art of Albert Namatjira 1902-1959}, Canberra: National Gallery of Australia. For a commentary over the controversy, see Matthew Rimmer, ‘Albert Namatjira: Copyright Estates and Traditional Knowledge’ (2003) 24 (6) \textit{Incite} 6, \url{http://www.alia.org.au/publishing/incite/2003/06/albert.namatjira.html}}

In \textit{Dollar Dreaming}, art critic Benjamin Benocchio explores the evolution of the market for Indigenous art in Australia.\footnote{72}{Benjamin Genocchio, \textit{Dollar Dreaming: Inside the Aboriginal Art World}, Melbourne: Hardie Grant Books, 2008.} He has raised important questions about whether Indigenous artists and communities have obtained equitable benefits in respect of the sale and the resale of Indigenous art. The artist Lin Onus played an important role in encouraging legal responses and policy action in respect of Indigenous intellectual property.\footnote{73}{Margo Neale, \textit{Urban Dingo: The Art and Life of Lin Onus, 1948-1886}, Sydney: Museum of Contemporary Art, 2000.} His art work has shown an engagement with the larger debate over cultural appropriation.

The National Gallery of Australia’s exhibition \textit{Culture Warriors} curated by Brenda Croft provides a sense of the great diversity and innovation of contemporary Indigenous art in Australia.\footnote{74}{Brenda Croft (ed.), \textit{Culture Warriors: Australian Indigenous Art Triennial}, Canberra: National Gallery of Australia, 2009.} Particularly striking is the work of Daniel Boyd, which investigates colonialism,
appropriation, and piracy.\textsuperscript{75} The exhibition, \textit{unDisclosed}, provided further exploration of the diverse voices of Aboriginal and Torres Strait Islander people in the visual arts.\textsuperscript{76}

There have also been notable collaborations. After previously battling over matters of appropriation art,\textsuperscript{77} Michael Nelson Jagamara and Imants Tillers have reconciled and collaborated on a joint exhibition called \textit{The Loaded Ground}.\textsuperscript{78}

In the field of performance, Bangarra Dance Theatre has been pioneering in seeking to recognise the communal ownership of economic rights and moral rights in respect of cultural works.\textsuperscript{79} The organisation has shown great ability at weaving together dance, music, and performances from a range of Indigenous communities over a long period of time.\textsuperscript{80} In her book \textit{Sightlines}, Helen Gilbert explored how race, gender, and nation were expressed in

\begin{footnotesize}
\textsuperscript{77} Matthew Rimmer, 'Four Stories About Copyright Law And Appropriation Art' (1998) 3 (4) \textit{Media And Arts Law Review} 180-193.
\end{footnotesize}
Australian theatre and performance. In particular, she focused upon the representations of Aboriginality in the works of Australian playwrights. Gilbert maintained: ‘Aboriginal theatre, developed over the past two decades, poses the Australian stage’s most trenchant challenge to the hegemony of imperialism.’ In *Unsettling Sights*, Corinn Columpar considers the representations of Aboriginality in cinema. Columpar explores the work of film-makers in the United States, Canada, New Zealand, and Australia. In particular, Columpar examines works, such as *Black Robe*, *Map of the Human Heart*, *The Piano*, *Dead Man*, *Once were Warriors*, and *Ten Canoes*. There has also been a growth in documentary film-making by Indigenous directors and presenters.

There has also been much debate about the role of museums and Indigenous cultural heritage. In *Ochre and Rust*, Philip Jones tells stories about frontier encounters in Australia based on nine Aboriginal and colonial artefacts taken from museums. He writes:

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82 Ibid., 51.


The frontier is not a hard line separating cultures but a zone, which may unify and can also create new forms of engagement, new forms of exploitation. Artefacts have played a crucial role, as a medium along which important ideas passed, from colonised to coloniser and back again. Communication across this zone was often inarticulate or misunderstood, as one culture tried to see into, or past, the other. But for all the misattribution of motives and actions on the frontier, there has been a countering, positive impulse towards genuine communication and exchange.86

There has been much interest in questions about the management of intellectual property in respect of galleries, libraries, and museums.87 There has been much analysis of literary narratives and historical discourses about Indigenous people and communities.88

Christoph Beat Graber and Mira Burri-Nenova have highlighted the challenges posed to Indigenous intellectual property by the emergence of digital technologies.89 The pair commented: ‘The collisions between competing regulatory regimes and between global law and local traditions have been particularly intensified by the ever-expanding digital

86 Ibid.
environment, characterised by a plethora of content distribution platforms and networks.’

Graber and Burri-Nenova recognised: ‘Although admittedly this new digital environment
raises the risks of misappropriation of traditional knowledge and creativity, it may equally offer
new opportunities for traditional communities to communicate and to actively participate in
trade in cultural expressions of various forms thus revitalising indigenous peoples’ values and
providing for sustainability of traditional cultural expressions.’

3. Marketing

There has also been significant interest in the use of trade marks to protect Indigenous symbols,
designs, and culture.92

In her book *Intellectual Property and Traditional Cultural Expressions*, Daphne Zografos
maintained that copyright law was limited in its potential for protecting traditional cultural
expressions.93 She argued that trade mark law and related rights could serve as a better means
of providing comprehensive protection for traditional cultural expressions:

> This study argues that ‘origin related intellectual property rights’, such as trade marks, certification and
> collective marks and geographical indications, as well as passing off and laws against misrepresentation,
> appear to be conceptually best suited for the protection of traditional cultural expressions, because of

90  Ibid, xi.
91  Ibid., xiii.
    Journal (University of Toronto) 139-179.
93  Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions*, Cheltenham (UK) and
    Northampton (Mass.): Edward Elgar, 2010.
their specific nature and characteristics. Such characteristics include the fact that they are usually produced within a community, which is often linked to a specific place, and according to traditional methods and know-how transmitted from generation to generation, often using raw material from sustainable resources. In addition, this method of protection also seems to accommodate the fact that traditional cultural expressions are usually already in the public domain and to take into consideration some of the aims of traditional cultural expression holders, such as the fact that they would like a protection that is unlimited in time.94

Zogafros submits that ‘origin related intellectual property rights provide a quick, practical and effective solution, as most of those rights can be used as such, or with minor adaptations.’95 She insists that a ‘system based on origin related intellectual property rights to protect traditional cultural expressions represents a workable, balanced compromise that can satisfy most of the concerns and policy objectives of traditional cultural expression holders.’96

There has been a significant use of certification trade marks, such as authenticity marks in Australia,97 the Toi Iho Maori Made Mark in New Zealand,98 Igloo Tag in Canada,99 and even the Fair Trade Label.100 There are examples of what Professor Margaret Chon would call

94 Ibid., 1.
95 Ibid., 224-5.
96 Ibid., 225.
98 Toi Iho Maori Made Mark http://www.toiiho.com/
100 Fair Trade International http://www.fairtrade.net/
‘marks of rectitude.’ 101 Chon suggests that ‘soft law initiatives such as standardization through certification and labelling should address the increasing intertwining of private and public, national and international, as well as commercial and social justice domains of law.’ 102 She maintains that ‘trademark law can and should facilitate meaningful marks of rectitude by harnessing consumer involvement and oversight.’ 103 The success of certification trade marks often depends upon marketing strategy and business acumen.

In the United States, there has often been controversy over representations of Native Americans in trade mark law. There has been intensive public and legal debate over offensive trade marks, such as the Washington Redskins. 104 The United States Congress has even debated bills over the disparagement of Native American persons under trade mark law. 105 In 2014, fifty

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103 Ibid.


105 Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2013 HR 1278 (US); Catalina Camia, ‘Bill in Congress Challenges Redskins Trademark’, USA Today, 20 March 2013;
Democrat Senators in the United States Congress – including Harry Reid, Maria Cantwell, Barbara Boxer, Sherrod Brown, and Elizabeth Warren - called upon the NFL to change the team name of the Washington Redskins.\textsuperscript{106} The letter stressed:

\begin{quote}
We urge you and the National Football League to send the same clear message as the NBA did: that racism and bigotry have no place in professional sports. It’s time for the NFL to endorse a name change for the Washington, D.C., football team… The Washington, D.C. football team is on the wrong side of history.\textsuperscript{107}
\end{quote}

The United States Senators observed that ‘this is a matter of tribal sovereignty – and Indian country has spoken clearly on this issue.’\textsuperscript{108} The United States Senators observed that every national Tribal organization have ‘passed resolutions in support of a name change as they find the Washington, D.C. football team name to be racially offensive.’\textsuperscript{109} The United States Senators emphasized that there was an array of federal laws intended to protect and respect

\begin{itemize}
\item Mike Jones, ‘Members of Congress urge Snyder to Change Redskins Name’, \textit{The Washington Post}, 28 May 2013;
\item Michele Richinick, ‘Dozens of Senators Call on NFL to change Redskins Team Name’, MSNBC, 22 May 2014, \url{http://www.msnbc.com/msnbc/senators-nfl-must-change-redskins-name}
\item Ibid.
\item Ibid.
\end{itemize}
tribal culture and identity – including the *American Indian Religious Freedom Act*,\(^\text{110}\) the *Native American Languages Act*,\(^\text{111}\) the *Indian Arts and Crafts Act*,\(^\text{112}\) and the *Native American Graves Protection and Repatriation Act*.\(^\text{113}\) The United States Senators lamented: ‘Yet every Sunday during football season, the Washington, D.C. football team mocks their culture.’\(^\text{114}\) The United States Senators stressed: ‘The NFL can no longer ignore this and perpetuate the use of this name as anything but what it is: a racial slur.’\(^\text{115}\)

United States President Barack Obama has suggested that the owners of the team should change the name.\(^\text{116}\) James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, has called upon the owners of the Washington Redskins football team to recognise


\(^{111}\) *Native American Languages Act* 1990 (US) Public Law 101-477.


\(^{115}\) Ibid.

that the name of the team is a ‘hurtful reminder’ of the ‘long history of mistreatment of Native American people in the United States.’\textsuperscript{117}

Despite this criticism, Bruce Allen, the President of the Washington Redskins has refused to change the name of the club, and has maintained that the trademark is not offensive: ‘Our use of “Redskins” as the name of our football team for more than 80 years has always been respectful of and shown reverence toward the proud legacy and traditions of Native Americans.’\textsuperscript{118} The opponents to the trademark will run advertisements against the Washington Redskins as part of the ‘Change the Mascot’ campaign.\textsuperscript{119}

On the 18th June 2014, the Trademark Trial and Appeal Board at the United States Patent and Trademark Office cancelled the trade marks.\textsuperscript{120} Amanda Blackhorse and other Native Americans sought to cancel trade mark registrations relating to the term ‘Redskins’ for professional football-related services in a proceeding under Section 14 of the \textit{Trademark Act} of 1946 (US), 15 U.S.C. 1064 (c) on the grounds that the marks disparaged persons and brought


\textsuperscript{118} Associated Press, ‘Redskins Still Insisting Team Name is “Respectful” after Senators’ Call for Change’, \textit{The Huffington Post}, 24 May 2014, \url{http://www.huffingtonpost.com/2014/05/24/redskins-team-name-senators-change_n_5385588.html?ncid=tweetlnkushpmg00000067}

\textsuperscript{119} John Keim, ‘Opponents to Run Anti-“Redskins” Ad’, ESPN.com, 10 June 2014, \url{http://espn.go.com/nfl/story/_/id/11061396/opponents-run-anti-washington-redskins-ad-nba-finals}

\textsuperscript{120} Amanda Blackhorse, Marcus Briggs-Cloud, Philip Gover, Jillian Pappan, and Courtney Tostigh v. Pro-Football Inc. (18 June 2014), Trademark Trial and Appeal Board, United States Patent and Trademark Office, Cancellation No. 92046185, \url{http://ttabvue.uspto.gov/ttabvue/?pno=92046185&pty=CAN&eno=199}
them into contempt and disrepute. The majority of the Trademark Trial and Appeal Board led by Karen Kuhlke decided that ‘based on the evidence properly before us, that these registrations must be cancelled because they were disparaging to Native Americans at the respective times they were registered in violation of section 2 (a) of the Trademark Act of 1946 (US), 15 U.S.C. 1064 (c).’\textsuperscript{121} The Board emphasized that the National Congress of American Indians had passed a resolution, objecting to the trade marks in respect of the term ‘Redskins’:

\begin{quote}
The statement about Native Americans’ past views of the word REDSKINS in the 1993 resolution is corroborated by the meeting held with the former owner Edward Bennett Williams in 1972. At the meeting, the president of NCAI at the time, Mr. Leon Cook, represented that Native Americans find the term REDSKINS to be a racial slur. Respondent characterizes Mr. Cook’s views as solely his own and opines that he merely represented himself at this meeting. The president of NCAI is elected by the membership to represent them. It is unreasonable and illogical to characterize the views regarding something of importance to the members of an organization as only belonging to that individual president where he is attending in his capacity as the president of that organization. It is equally unreasonable and illogical to reduce Mr. Cook’s representative capacity in such a manner. His attendance at this meeting was, not surprisingly, referenced as representing an Indian organization, both by the press and by Mr. Williams himself.\textsuperscript{122}
\end{quote}

The Board ruled: ‘Petitioners have shown by a preponderance of the evidence that a substantial composite of Native Americans found the term REDSKINS to be disparaging in connection with respondent’s services during the relevant time frame of 1967-1990.’\textsuperscript{123}

\textsuperscript{121} Ibid., 1.
\textsuperscript{122} Ibid., 70
\textsuperscript{123} Ibid., 72.
The Board’s Mark Bergsman dissented: ‘It is astounding that the petitioners did not submit any evidence regarding the Native American population during the relevant time frame, nor did they introduce any evidence or argument as to what comprises a substantial composite of that population thereby leaving it to the majority to make petitioner’s case have some semblance of meaning.’124

The decision received wide attention.125 Bob Raskopf, the trademark attorney for the Washington Redskins, remained defiant, observing: ‘Just like last time, today’s ruling will have no effect at all on the team’s ownership of and right to use the Redskins name and logo.’126 He maintained: ‘We are confident we will prevail once again, and that the Trademark Trial and Appeal Board’s divided ruling will be overturned on appeal’.127 Raskopf observed: ‘This case is no different than an earlier case, where the Board cancelled the Redskins’ trademark registrations, and where a federal district court disagreed and reversed the Board.’128

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124 Ibid., 84.


127 Ibid.

128 Ibid.
In a study of the impact of Native Mascots and Team names on American Indian and Alaska Native Youth, Erik Stigman and Victoria Phillips have documented how ‘these stereotypical representations are too often understood as factual representations and thus “contribute to the development of cultural biases and prejudices”’.\textsuperscript{129}

Consumer law has also been deployed to take action in respect of misleading and deceptive representations made about Indigenous art and culture.\textsuperscript{130} In Australia, the Australian Competition and Consumer Commission have been active in bringing legal action against false and misleading representations as to the authenticity of Indigenous artwork.\textsuperscript{131} Consumer and competition regulators have been able to provide important oversight in respect of the Indigenous art and craft markets.


\textsuperscript{130} Milpurruru \textit{v.} Indofurn Pty Ltd (1994) 30 IPR 209.

There has also been an interest in the use of geographical indications to protect Indigenous culture – as they recognise a linkage between place and culture.\textsuperscript{132} A number of researchers, such as Daniel Gervais, have noted that geographical indications can, in part, provide a solution for Indigenous communities. Some scholars like Susy Frankel and Shivani Singhal, though, remain sceptical whether geographical indications can really deliver the protection that Indigenous peoples seek in order to benefit from their traditional knowledge.\textsuperscript{133}

The Canadian scholar, Rosemary Coombe, considered the cultural life of intellectual property law.\textsuperscript{134} She considered how First Nations engaged in parody, satire, and culture-jamming against government and corporate trade marks, logos, brands, and insignia. In her subsequent work, Coombe has explored the intersections between trade mark law, and geographical

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{132} Daniel Gervais, ‘Traditional Knowledge: Are We Closer to the Answers? The Potential Role of Geographical Indications’ (2009) 15 (2) \textit{ILSA Journal of International and Comparative Law} 551-567.
\end{itemize}
\end{footnotesize}
indications. She has also considered the relationship between copyright law and cultural heritage.

In Australia, there was constitutional conflict over Indigenous symbolic protests relating to the Bicentennial celebrations. There was also an unsuccessful effort by the Aboriginal Tent Embassy to claim ownership of representations of the Kangaroo and the Emu on the Australian Coat of Arms. There has also been significant conflict over the ownership of national iconography – such as Indigenous flags in Australia.

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140 Thomas v. Brown and Another (1997) 37 IPR 207; Flags 2000 Pty Ltd v. Smith [2003] FCA 1067; and
4. Science

An important genre of scholarship and research has focused upon the relationship between intellectual property, science, and Indigenous knowledge.

In *Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Law and Knowledge*, Laurelyn Whitt charts the history of imperial science, biocolonialism, and the appropriation of Indigenous Knowledge.\(^{141}\) Her methodology focuses upon history, imperialism, and science. Whitt contends that ‘certain areas of contemporary bioscience, currently in the service of western pharmaceutical and agricultural industries, are enabling the appropriation of indigenous knowledge and genetic resources at a prodigious and escalating rate.’\(^{142}\) Whitt provides a case study of the Human Genome Diversity Project. Whitt explores the role of intellectual property law in the commodification of knowledge. She contends: ‘The microworld “factories” of the new imperial science have become crucial outposts in the establishment of an international intellectual property rights regime primed to serve the interests of biocolonialism’.\(^{143}\) Whitt highlights instances of resistance and recovery:

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\(^{142}\) Ibid. xiv.

\(^{143}\) Ibid., xv.

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'Indigenous responses to biocolonialism include efforts to transform the concept and practice of sovereignty'.144

There have also been a number of environmental histories written about Indigenous culture and knowledge in Australia. In *The Biggest Estate on Earth*, Bill Gammage explore written and visual records of the Australian landscape.145 He highlights the land management strategies of Aboriginal people in Australia. In *The Reef: A Passionate History*, Iain McCalman writes about the history, culture, science, and politics of the Great Barrier Reef.146 The work tells a dozen tales about the Great Barrier Reef. An important theme of his book is the relationship between settlers and Australian Aboriginal communities in the region. McCalman highlights the representation and misrepresentation of Indigenous people in stories of the region of the Great Barrier Reef.

In the collection, *Biodiversity and the Law*, Charles McManis highlighted the relationship between intellectual property, biotechnology, and traditional knowledge.147 He emphasized that the volume addressed ‘one of the great questions of our times – namely how to promote global economic development, while simultaneously preserving the local biological and

144  Ibid., xv.
cultural diversity of “this fragile earth, our island home”. The collection particularly highlights the interaction between the TRIPS Agreement 1994, the Convention on Biological Diversity 1992, and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001. McManis observes: ‘The often fractious but nevertheless productive international debate leading up to and generated by the adoption of these three treaties has produced a cascade of “thinking globally and acting locally” to reconcile the goals of economic development and the conservation, sustainable use, access to and an equitable sharing of the benefits arising from the use of biodiversity, and associated traditional knowledge.’

In Seed Wars, the late Professor Keith Aoki explored the debate over traditional knowledge in the context of larger controversies and cases on plant genetic resources and intellectual property. There has been much debate over plant breeders’ rights, patent law, farmers’ rights, and Indigenous Knowledge.

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In *Global Biopiracy*, Ikechi Mgbeoji considers the relationship between patents, plants, and Indigenous knowledge.\(^{153}\) He provides a historical, legal, and political analysis of biopiracy:

Biopiracy raises serious issues pertaining to the conservation of biological diversity and genetic resources in agriculture, the integrity of plant life forms, a just international economic order, and development. Since the emergence of the biotechnology industry, ‘biopiracy’ has become a lightning rod for activists in the biodiversity and anti-commons debate.\(^{154}\)

In his view, ‘The relationship between patent law and indigenous peoples knowledge is inherently predatory and harmful to the interests, worldviews, and self-determination of the Third World’.\(^{155}\) Mgbeoji maintains: ‘Biopiracy is a function of institutional and juridical structures operating within a complex milieu of notions of cultural superiority/inferiority.’\(^{156}\) He concludes: ‘[I]f the rhetoric on protecting plant genetic diversity and global cultural diversity is to congeal into a course of action… we must create avenues for a conversation between cultures, and this is not to occur solely at the marketplace.’\(^{157}\)

Professor Graham Dutfield – a specialist in international governance - has undertaken significant work in respect of intellectual property, agriculture, biotechnology, and traditional knowledge. He has written the conflicts over national sovereignty, common heritage, genetic


\(^{154}\) Ibid., 8.

\(^{155}\) Ibid., 8.

\(^{156}\) Ibid., 200.

\(^{157}\) Ibid., 200.
resources, and traditional knowledge. Dutfield has also explored intellectual property and rise of the life science industries. He has also investigated the development of global intellectual property law, and the rise of traditional knowledge as a possible right.

In *Genetic Resources and Traditional Knowledge*, Tania Bubela and E. Richard Gold explore case studies in respect of access to genetic resources and traditional knowledge. The collection seeks to describe early efforts to define and protect traditional knowledge; the efforts to provide national action; and the international movement, which culminated in the *United Nations Declaration on the Rights of Indigenous Peoples 2007* and the *Nagoya Protocol on Access and Benefit-Sharing*. Bubela and Gold comment:

> Indigenous peoples possess internationally recognized knowledge in areas as diverse as conservation and agricultural practices, classification systems, land use practices, and medicinal properties of local species. Because of the value of this knowledge, both indigenous people and commentators have been concerned

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163. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity*, COP 10 Decision, (*Nagoya Protocol*).
about its exploitation by non-indigenous peoples; the same concerns apply to the diverse genetic resources found on indigenous lands. These concerns have led to calls for the protection of indigenous or traditional knowledge (TK), and calls for sharing of the benefits derived from the exploitation of TK.164

Bubela and Gold commented that ‘Traditional Knowledge plays a broader role in indigenous communities than the type of information or knowledge that is conventionally encompassed by the legal framework of intellectual property rights and other property rights’.165 The editors observed that ‘Traditional Knowledge functions in another dimension as a system for regulating community interactions with the environment and embedding traditional medicine and agriculture within the social structure of indigenous communities.’166

Evanson Kamau and Gerd Winter have undertaken extensive collective work in respect of genetic resources, traditional knowledge, and international law.167 In a 2013 collection, Kamau and Winter contend that common pools of resources may help ensure equitable benefit-sharing of genetic resources, modern knowledge, and Indigenous knowledge.168 Winter observes that


165 Ibid., 27.

166 Ibid., 27.


‘a common pool may very generally be defined as resources that are provided by resource holders for common use by a group of people.’169 He comments:

Common pools of this kind are not new inventions but have existed for a long time. Examples include seed exchange systems, networks of botanical and zoological gardens, networks of microbial collections and biological databanks. However, commons – ideal as they appear to attain equity and free R&D for sustainable use and protection of biodiversity – are exposed to problems of construction.170

Winter explains: ‘Taking an inductive approach, the book strives to portray a variety of pools in order to understand under which conditions they develop and how they contribute to the equitable sharing of benefits, innovative sustainable uses of genetic resources and, finally, to the conservation of biodiversity.’171

In his work on the commons, David Bollier raises thoughtful questions about Indigenous commons.172 He explores the diversity of Indigenous peoples’ commons:

The Aboriginal Australians have long fought to protect their sacred places, cultural knowledge and striking artistic designs from outside appropriation, especially by commercial interests. India and Southeast Asia are home to many ‘traditional knowledge commons’ that protect and use highly specialized types of knowledge about local plants and medicinal treatments. Some transnational


170 Ibid., 4.

171 Ibid. 5.

companies are attempting to appropriate this knowledge in order to patent it for genetically engineered crops or drugs – a type of enclosure often known as ‘biopiracy’.

Bollier noted that ‘corporate enclosures of traditional knowledge commons have prompted some innovative responses.’\textsuperscript{173} He highlights the development of a traditional knowledge libraries and databases to challenge patent applications that would privatize the knowledge. Bollier also focuses upon the use of community protocols to protect cultural traditions and practices from appropriation by outsiders.

There has been considerable controversy over gene patents.\textsuperscript{174} In his book \textit{Identity and Invention}, Shubha Ghosh highlights the problem of race-specific gene patents.\textsuperscript{175} He comments: ‘Race-specific patents are problematic because they incorporate a sociological category that is of dubious value and of possibly pernicious implications’.\textsuperscript{176} Ghosh observes: ‘As a reward, race-specific patents create incentives for the wrong types of invention.’\textsuperscript{177} He contends that ‘patent law needs to promote openness, freedom, and justice through greater

\begin{flushleft}
\textsuperscript{173} Ibid., 131. \\
\textsuperscript{175} Shubha Ghosh, \textit{Identity and Invention: The Culture and Ethics of Personalized Medicine Patenting}, Cambridge: Cambridge University, 2012. \\
\textsuperscript{176} Ibid., 63. \\
\textsuperscript{177} Ibid., 63.
\end{flushleft}
access to the process of how patents are assessed and to greater dialogue about the meaning of race. Such concerns raise larger issues about traditional knowledge.

There was an ethical debate over the Human Genome Diversity Project. A conflict between the Arizona State University and the Havasupai Tribe over genetic research was eventually settled. Large-scale population genetic projects as the Genographic Project have raised complex legal and ethical issues about Indigenous intellectual property, traditional knowledge, and cultural heritage.

Susanne Berthier-Foglar, Sheila Collingwood-Whittick, and Sandrine Tolazzi from the University of Grenoble have edited a history of population genetics and Indigenous knowledge, Biomapping Indigenous Peoples. In a scene-setting piece on ‘Human Genomics and the Indigenous’, Susanne Berthier-Foglar comments:

In the field of population genetics, an emotionally charged subject for Indigenous peoples, the point here is not to discuss whether the findings of hard science are ‘true’ or not, but to investigate the way they are...

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178 Ibid., 167.
perceived by the public who are being investigated. In order to understand the Indigenous viewpoint, we have to place the dialectic of discourse on human genetics in the context of a history of abuse and dispossession.\textsuperscript{183}

The collection considers the tensions between Indigenous communities and scientific groups in such projects as the Human Genome Diversity Project, and the Genographic Project. Susanne Berthier-Flogar reflects: ‘In a global context where ethnic and regional identities are reaffirmed almost everywhere, cultural identity appears as a refuge threatened by hard science.’\textsuperscript{184}

There have been significant controversies over the repatriation of Indigenous ancestral remains from museums, and collecting institutions.\textsuperscript{185}

5. Law Reform and Social Justice

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Michael F. Brown’s book, *Who Owns Native Culture?*, was a work of cultural anthropology, which has been highly influential in the canon of work on Indigenous intellectual property. Somewhat tentatively, Brown contended:

We should be asking not ‘Who owns native culture?’ but ‘How can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass cultures?’ The cases documented here suggest that the quest for dignity in the expressive life of indigenous communities will best be advanced through approaches that affirm the inherently relational nature of the problem. These include judicious modification of intellectual property law, development of workable policies for the protection of cultural privacy, and greater reliance on the moral resources of civil society. All of us – native and non-native alike have a stake in decisions about the control of culture, for these decisions will determine the future health of our imperilled intellectual and artistic commons.

Brown was pessimistic about the utility of law reform: ‘The goal of maintaining cultural integrity, inseparable from questions of collective privacy and a desire for dignity in the face of unwanted interest by outsiders, will be far more difficult to achieve through legislative means.’ His book, though, suffers from a lack of engagement with law reform initiatives in respect of Indigenous intellectual property.

In Australia, there have been a number of policy initiatives in respect of Indigenous intellectual property, but little in the way of legislative action by successive Federal Governments. In the 1994 discussion paper, *Stopping The Rip-Offs*, the Attorney General's Department highlighted

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187 Ibid., 10.

188 Ibid., 242.
the issue of the appropriation of Indigenous intellectual property and considered a range of policy options available to protect the intellectual property of Indigenous Australians.\(^{189}\) In the 1998 *Our Culture, Our Future* report, Terri Janke proposed that the Federal Government should implement a "sui generis" legislative scheme to protect traditional knowledge.\(^{190}\) Thus, she ideally preferred that the Government pass special legislation to deal with Indigenous cultural property because of its uniqueness. In the alternative, Janke advised that there should be a number of reforms to existing regimes of intellectual property - including confidential information, copyright law, trademark law, and patent law.

Despite such direction provided by law reformers, policy-makers have been haphazard in taking action to protect Indigenous intellectual property. A proposal for the recognition of communal ownership moral rights for Indigenous communities floundered in Parliament.\(^{191}\) In 1999, the Federal Government provided funding to the Association to establish a national authenticity label, through the Aboriginal and Torres Strait Islander Commission (ATSIC)\(^{192}\)

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\(^{190}\) ‘Sui generis’ is a Latin phrase meaning ‘of its own kind’. In intellectual property, ‘sui generis’ legislation refers to legal regimes developed to deal with specific subject matter - such as plant breeder's rights, circuit layout protection, database protection, and traditional knowledge.


\(^{192}\) The Aboriginal and Torres Strait Islander Commission was established by the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth), and began operations on 5 March 1990 as a means to involve Indigenous people in the decision-making processes of the Australian government: [http://www.atsic.gov.au/](http://www.atsic.gov.au/)

The conservative Federal Government has proposed the abolition of the Commission in 2004.
and the Australia Council. However, the authenticity marks scheme collapsed, without much success. The Federal Government has introduced a regime for access to genetic resources. There has been the introduction of a right of resale into Australian – which may be of benefit to Indigenous communities. There has been a concern, though, that the overall regime has done little to boost the protection of traditional knowledge or share benefits with Indigenous communities. The Indigenous Knowledge Consultation in 2013 had no discernible outcomes.

In New Zealand, there have been dramatic developments in Indigenous intellectual property, with the Wai 262 decision handed down under the Treaty of Waitangi. In her book Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New

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Zealand Experience, Jessica Christine Lai provides a thoughtful reflection upon the significance of the ruling:

The Treaty of Waitangi is a living and breathing document, of absolute importance to modern New Zealand, even with respect to research and IP laws. It is not just about historical grievances, but about the foundations upon which New Zealand was built (or purportedly built) and upon which New Zealand should develop. Vitally, it reflects a partnership between Maori and the Crown, outlining rights and obligations of both parties relative to each other, including in the realm of the intangible. The Wai 262 report and this discourse make recommendations that do not need to be feared. The recommendations are relatively simple, capture the interests of Maori and, importantly, set the Treaty at the centre of New Zealand law and society.

Lai concluded that: ‘As with all things Treaty-related, bringing the knowledge systems together will always be a question of partnership, proportionality and balance.’ She recognised that the future of the report remains unclear: ‘At the time of writing, the report remained in limbo, likely because of the negotiations for a free-trade agreement with Australia and the US (among many other states), the Trans-Pacific Partnership Agreement.’

There has also been significant work undertaken in respect of Indigenous intellectual property in the Pacific. In her book Treasured Possessions, Haidy Geismar explores how global forms

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200 Ibid. 323.
201 Ibid. 323.
202 Ibid., 301.
of intellectual property and cultural heritage are being defined in New Zealand and Vanuatu.\textsuperscript{203} Drawing upon cultural anthropology and law, Geismar seeks to envisage alternative futures for the relationship between Indigenous peoples, states, and global markets:

The cultural interests, political engagement, and identity of indigenous people in Vanuatu and Aotearoa New Zealand are less vulnerable to the fluctuation of global markets than the nation-state that encompasses them. Vanuatu’s traditional economy is thus constituted as an alternative to the failures of international participation to bring monetary wealth to all citizens. The failure of toi iho to generate an income worthy of government investment has not hampered the emergence of a strong visible community of Maori artists, intent on using aesthetics as a way to promote the cultural values of self-determination. In this way, treasured possessions come to mediate between sovereignty and the state, between market and culture, and themselves instantiate a space in between.\textsuperscript{204}

Gaismar is optimistic and hopeful about the future potential for Indigenous people to activate their resources in respect of Indigenous intellectual property and cultural heritage: ‘But, today, indigenous people have a new kind of voice, a new kind of authority and entitlement, which, while seeking recognition, also requires new kinds of partnership.’\textsuperscript{205}

As part of an Australian Research Council project, Dr Miranda Forsyth has been investigating how Pacific Rim island countries are addressing demands to revise intellectual property laws.\textsuperscript{206} In particular, she has considered the position of Pacific Rim countries in the face of

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\textsuperscript{204} Ibid., 215.
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\textsuperscript{205} Ibid., 215.
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\textsuperscript{206} Miranda Forsyth, ‘Intellectual Property Pacific Islands’, \url{http://www.ippacificislands.org/index.html}
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the World Trade Organization’s *TRIPS Agreement* 1994 and bilateral trade Agreements such as the European Union’s Economic Partnership Agreement and the proposed PACER Plus agreement with Australia and New Zealand. Forsyth has undertaken much work in Vanuatu.\(^{207}\) She has also explored whether the traditional knowledge and Indigenous intellectual property of Pacific Rim countries have been adequately protected from the risk of exploitation by third parties.\(^{208}\) She also highlighted how intellectual property raises larger public policy questions in the Pacific Rim about access to medicines and public health, food security,\(^{209}\) access to knowledge, technological transfer and development, and climate change.

As well documented by the Bishop Museum, Hawai’i and the broader Pacific have a rich history of Indigenous intellectual property and cultural heritage.\(^{210}\) Professor Danielle Conway from the University of Hawai’i has written about the need to safeguard Hawaiian traditional knowledge and cultural heritage.\(^{211}\) She stressed that ‘protection of Hawi’ian traditional


\(^{210}\) The Bernice Pauahi Bishop Museum, [http://www.bishopmuseum.org/](http://www.bishopmuseum.org/)

knowledge and cultural heritage has to emanate from a sui generis system originating with Native Hawai’ians.’212 Danielle Conway has also discussed Indigenous communities could benefit licensing Indigenous intellectual property.213 She noted that ‘Indigenous peoples have identified licensing a reliable interim mechanism to promote, conserve, and benefit from the value of their article 31 indigenous assets and resources.’214 Danielle Conway has also addressed Indigenizing Intellectual Property Law.215 She has argued that ‘implementation of the U.N. Declaration on the Rights of Indigenous Peoples and the recognition of Indigenous law and legal systems are two vital tools to refind Indigenous rights for the survival of Indigenous identity in a constantly evolving, globalizing, and resource hungry society.’216

Professor Debora Halbert – a political scientist at the University of Hawai‘i – has also undertaken much work on the politics of intellectual property.217 In her most recent book on The State of Copyright, Halbert highlights the hypocrisy of the intellectual property regime in failing to acknowledge the debt of human innovation owed to Indigenous knowledge systems:

212 Ibid., 762.


214 Ibid., 1125.


216 Ibid., 256.

Indigenous communities see traditional cultural expressions and knowledge as part of the larger struggle for autonomy, sovereignty, and self-governance. From the perspective of indigenous communities, history is a story of the West benefiting from indigenous knowledge and practices while imposing a colonial politics over the world. As a result, many indigenous peoples have come to realize that they must play a move in the intellectual property game. Intellectual property discourses have become one important avenue through which indigenous groups establish their difference in the face of the homogenizing forces of the nation-state, modernity, and the international order that supports this conceptual ordering of the world.218

Halbert notes that the ‘efforts of indigenous peoples to redefine the debate over creativity and control of ideas has served as a catalyst for others who are also interested in a future for creativity that is more flexible than that advocated by the culture industry.’219 She maintains: ‘For indigenous peoples who have struggled to retain traditional culture in the face of modernity and the powerful pull of the nation-state system, making protection of traditional knowledge and traditional cultural expressions a political issue has helped create the possibility of a paradigm of creativity and cultural integrity that retains knowledge, art, music, and dance as part of a culturally integrated whole that is not easily located within an individual author or bought and sold as commodities.’220

There is significant contemporary debate over traditional knowledge and Indigenous intellectual property in the United States. The American Washington University College of Law held a symposium on Traditional Knowledge, Intellectual Property, and Federal Policy in

219 Ibid., 144.
220 Ibid., 144.
The event focused upon the intersection of intellectual property law and federal policy relating to traditional knowledge in the United States. In particular, the event considered such matters as copyright law, trade mark law, patent law, access to genetic resources, and international law. Professor Margaret Chon and Danielle Conway explored non-traditional solutions to intellectual property rights-related problems affecting traditional knowledge and its custodians.

The Smithsonian Institution has also undertaken significant research in respect of Indigenous intellectual property and cultural heritage. The Smithsonian National Museum of the American Indian has been most interested in matters about intellectual property, cultural heritage, and Indigenous rights, particularly in respect of museums and cultural institutions. The Anchorage Museum – in collaboration with the Smithsonian Institution – has provided hundreds of indigenous Alaska artefacts for ‘hands-on study by Alaska native elder, artists, and scholars’.

In his work as an author and an editor, Christoph Antons has surveyed traditional knowledge, traditional cultural expressions, and intellectual property in the Asia-Pacific region. He has investigated the relationship between traditional knowledge, intellectual property, and cultural


222 Smithsonian National Museum of the American Indian, [http://www.nmai.si.edu/](http://www.nmai.si.edu/)


heritage in Southeast Asia. Antons has sought to chart geographies of knowledge in South East Asia – looking at cultural diffusion and the regulation of traditional knowledge, cultural expressions, and cultural heritage. He has particularly engaged in significant empirical research in respect of Indonesia, and the protection of Indigenous intellectual property.

In his book, *Confronting Biopiracy*, Daniel Robinson from the University of New South Wales has explored the debate over biopiracy – looking at both patent disputes and other controversies. He has noted that there is a need to focus upon case studies: ‘Despite the frequent international negotiations on issues relating to intellectual property, biological resources, traditional knowledge and folklore, there has been hesitancy among these international negotiators regarding the overt use of biopiracy to describe specific cases of unfair or spurious intellectual property claims over biological resources and traditional

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knowledge.' In his fieldwork, Daniel Robinson has focused in particular upon Thailand, and more broadly, South East Asia.  

Vandana Shiva has been a prominent figure in debates over intellectual property, farmers’ rights, and Indigenous Knowledge in India. Shiva has been particularly concerned about the problem of biopiracy – in which genetic resources are appropriated by companies and governments, without informed consent or benefit-sharing. She despairs that intellectual property law facilitates the problem of biopiracy: ‘Paradoxically, them, a legal system aimed at preventing “intellectual piracy” is itself based on legitimizing piracy.’ Shiva has maintained that ‘this diversity of knowledge needs to be recognized and respected, and a pluralistic IPR regime needs to be evolved which makes it possible to recognize and respect indigenous knowledge, and protect the indigenous knowledge systems and practices and livelihoods based on it.’ Shiva has also written about the challenges of climate change, peak oil, and food security: ‘Soil, not oil, offers a framework for converting the ecological

229 Ibid., Xiii.
233 Ibid., 18.
234 Ibid., 51.
catastrophe and human brutalization we face into an opportunity to reclaim our humanity and our future.\textsuperscript{235}

In the European Union, there has been debate over the application of the European Biotechnology Directive in respect of controversies over traditional knowledge.\textsuperscript{236} There has been a push for the implementation of the \textit{Nagoya Protocol} in the European Union.\textsuperscript{237} There has been much discussion as to how the regime will impact upon Indigenous rights.\textsuperscript{238} There has also substantial scholarship in the European Union on Indigenous intellectual property. Professor Johanna Gibson has examined community resources, intellectual property, international trade, and the protection of traditional knowledge.\textsuperscript{239} Professor Silke von

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Lewinski is one of the leading European researchers upon Indigenous intellectual property. She has edited a significant collection on *Indigenous Heritage and Intellectual Property*.  

There has been significant about access to knowledge, access to medicines, access to clean technologies, and the protection of Indigenous intellectual property in a range of African countries. The African Group has pushed for international protection in respect of traditional knowledge, traditional cultural expressions, and genetic resources.

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245 Ibid.
In South Africa, there has been an extensive debate over the *Intellectual Property Laws Amendment Act* 2013 (SA). In February 2014, Minister of Trade and Industry Rob Davies emphasized that the legislative regime would protect indigenous knowledge using the current intellectual property system, which includes copyright and related rights, trademark, designs and geographical Indications. A press statement noted:

> Minister Davies says the objectives of the Act are to bring Indigenous Knowledge (IK) holders into the mainstream of the economy and to improve the livelihoods of the communities. The Act is providing a legal framework for protection of the rights of IK Holders and empowers communities to commercialise and trade on IKs to benefit the national economy.

Linda Daniels noted for *Intellectual Property Watch* that the legislation remained hotly contested in South Africa. Patekile Holomisa was supportive of the regime: ‘The intention of the act is noble and what we need in order to gain financially from our knowledge instead of others.’ However, a number of intellectual property firms were hostile to the introduction of the regime. Professor Owen Dean argued for an alternative sui generis model of protection


249 Ibid.
of Indigenous intellectual property. The operation of the new regime of protection of Indigenous knowledge in South Africa will be closely watched.

6. International Law

International law in respect of Indigenous intellectual property law has been fragmented and fractured. There have been tensions and border disputes between a number of international institutions and agencies – including the United Nations Permanent Forum on Indigenous Issues, the World Trade Organization, the World Intellectual Property Organization, the United Nations Environment Programme, the Convention on Biological Diversity 1992 and the Nagoya Protocol, and the United Nations Framework Convention on Climate Change 1992. In addition to such multilateral forums, there has also been the further complication of regional arrangements – such as the Andean Pact, and proposals in the Trans-Pacific Partnership. Wistfully, Kathy Bowrey has commented: ‘International discussion is marked by strong aspirations, but has been less successful in relation to reaching agreement that could lead to practical proposals for reform of domestic law.’ The global governance of Indigenous intellectual property has been a fraught affair.

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In the 1990s, leading intellectual property scholars – such as Professor James Boyle, Professor Peter Jaszi, and Professor Martha Woodmansee – drafted the Bellagio Declaration. The document highlighted the failure of intellectual property law to accommodate the authorship and culture of Indigenous communities. *The Bellagio Declaration* recognised:

Intellectual property laws have profound effects on issues as disparate as scientific and artistic progress, biodiversity, access to information, and the cultures of indigenous and tribal peoples. Yet all too often those laws are constructed without taking such effects into account, constructed around a paradigm that is selectively blind to the scientific and artistic contributions of many of the world’s cultures and constructed in for a where those who will be most directly affected have no representation.253

*The Bellagio Declaration* lamented that ‘contemporary intellectual property law is constructed around the notion of the author’ and ‘those who do not fit this model – custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties, for example – are denied intellectual property.’254 *The Bellagio Declaration* warned: ‘Increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries of origin unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements, backed by the threat of trade sanctions’.255 *The Bellagio Declaration* advocated ‘consideration of special regimes, possibly in the form of “neighboring” or “related” rights regimes, for the following areas: the protection of folkloric

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254 Ibid., 193.

255 Ibid., 193.
works; the protection of works of cultural heritage; and the protection of the biological and ecological “know-how” of traditional peoples.’

The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 has been significant in the debate over Indigenous rights – and more particularly, Indigenous intellectual property. Melissa Castan provides an excellent account of the ensuing debate over the regime. She highlights a number of areas of ongoing debate:

The adoption of the Declaration is seen by many as a fundamental affirmation of the identity and protection of Indigenous people, and indeed necessary to their very survival. However, the adoption of the Declaration is not the conclusion of an era of focus and development of international law but, rather, the culmination of a period of dynamic change: the transition from ‘object’ to ‘subject’ of international law is complete. Many outstanding areas of debate about Indigenous peoples’ rights are not concluded, and some debates are still evolving, particularly on those issues revolving around the meaning of self-determination, the emerging standard requiring full prior and informed consent and the relationship between collective and individual rights.

One of the critical areas of discussion is the question of Indigenous intellectual property rights.

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256 Ibid., 194.


259 Ibid., 492.
There has been much debate and discussion as to how to realise the potential of the United Nations Declaration on the Rights of Indigenous Peoples. Jennifer Hartley, Paul Joffe, and Jennifer Preston have contended that the United Nations Declaration on the Rights of Indigenous Peoples is a powerful symbol of triumph and hope:

The human rights of the world’s Indigenous peoples are routinely trampled even when entrenched in national laws. Indigenous peoples urgently require international affirmation and protection of their human rights. Developed in response to the deep injustices and extreme human rights violations that they suffer, the Declaration affirms the ‘minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.’ These standards develop and promote a human rights-based approach to addressing issues faced by Indigenous peoples. The Declaration provides a principled legal framework for achieving reconciliation, redress, and respect.

In particular, the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for the protection of Indigenous intellectual property.

In 2013, the United Nations Secretary-General Ban Ki-Moon has emphasized that the Declaration should inform future developments in international law. He has highlighted ‘the

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importance of honouring treaties, agreements and other constructive arrangements between States, their citizens and indigenous peoples’. Ban Ki-Moon stressed: ‘Such consensual arrangements enable better understanding of their views and values and are essential for protecting and promoting rights and establishing the political vision and necessary frameworks for different cultures to coexist in harmony.’ The Secretary-General has also maintained that there is a need to take into account the cultural, linguistic, and political diversity of Indigenous nations and communities throughout the world:

Indigenous peoples represent remarkable diversity — more than 5,000 distinct groups in some 90 countries. They make up more than 5 per cent of the world’s population, some 370 million people. It is important that we strive to strengthen partnerships that will help preserve cultural vigour while facilitating poverty reduction, social inclusion and sustainable development.

Ban Ki Moon has insisted that Indigenous peoples should play a key part in action towards achieving the Millennium Development Goals and defining the post-2015 development agenda: ‘We must ensure the participation of indigenous peoples — women and men — in decision-making at all levels’. He noted: ‘Indigenous peoples have made clear that they want development that takes into account culture and identity and the right to define their own priorities’. He has exhorted member states of the United Nations to ‘work together to strengthen indigenous peoples’ rights and support their aspirations’ and ‘create a world that values the wealth of human diversity and nurtures the potential it offers.’

263 Ibid.  
264 Ibid.  
265 Ibid.  
266 Ibid.  
267 Ibid.
Francis Gurry, the Director-General of the World Intellectual Property Organization, has maintained that there is hope for international protection for Indigenous intellectual property:

Indigenous Peoples’ traditional knowledge (TK) and traditional cultural expressions (TCEs) embody significant innovation and creativity and contribute to the diversity and richness of the planet’s civilizations and cultures. They also contribute to the cultural identity, sustainable development and social cohesion of Indigenous Peoples and local communities, and, globally, to the conservation of the environment, the promotion of food security and the advancement of public health. The enhanced promotion, preservation and protection of TK and TCEs are called for by Indigenous Peoples and local communities, who seek greater control over if and how their TK and TCEs are accessed and used outside the traditional context.  

Gurry maintained that ‘various modalities to ensure the full and direct participation of Indigenous Peoples in the IGC’s negotiations are in place, including the WIPO Voluntary Fund, participation of Indigenous-selected experts in expert drafting groups, Indigenous Panels which precede each IGC session, and a WIPO-financed secretariat for Indigenous and local community participants during each session’. He also stressed that ‘WIPO offers the opportunity for an Indigenous Fellow to work within the WIPO Secretariat as a full and direct member of the team that works on TK, TCES and genetic resources.’

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269 Ibid.

270 Ibid.
The World Intellectual Property Organization has hosted open-ended dialogue over an international instrumental in respect of traditional knowledge and traditional cultural expressions. There has been strong advocacy for Indigenous communities for greater protection under international intellectual property.\(^{271}\) However, there remain deep divisions between member states over whether there should be a binding instrument, and, if so, what its contents should be.\(^{272}\) The World Intellectual Property Organization has also developed a database of laws and regulations on traditional cultural expressions and traditional knowledge throughout the world.\(^{273}\)

There has been significant debate in the World Trade Organization over intellectual property, access to genetic resources, and traditional knowledge within the context of the *TRIPS Agreement* 1994.\(^{274}\) In *A Practical Guide to Working with TRIPS*, Antony Taubman reflects


that ‘the debate over biotechnology, traditional knowledge, and genetic resources… takes on the character of a contentious dialogue between different cultures, expressing diverse values and interests, that reach dramatically beyond the conventional scope of intellectual property law and policy.’ He observed that there have been a dizzying array of proposals in respect of Indigenous intellectual property: ‘We see initiatives to curtail existing intellectual property (for instance, calls to ban patenting of life forms); proposals to reform the patent system (notably by requiring source or origin of genetic resources and traditional knowledge used in an invention to be disclosed by a patent applicant); and ideas for entirely new forms of intellectual property protection (collective rights of indigenous and local communities over their traditional knowledge).’ Taubman suggested that such ‘technical questions mark a deeper debate about the values embedded in intellectual property law; what kinds of innovation should be recognized and privileged by the intellectual property system; and what it means to distribute equitably the benefits from the use of traditional knowledge and genetic resources, with due recognition to the ongoing contribution of traditional custodians and those who innovate within a traditional context.’ Moreover, he commented that there are tensions between the disciplinary categories and schema of intellectual property, and the desire of Indigenous communities to obtain a holistic protection of Indigenous intellectual property: ‘[F]or many traditional communities and indigenous peoples, it is artificial or even offensive


276 Ibid., 185.

277 Ibid., 185.
to split these aspects of their holistic intellectual and cultural heritage into separate categories.\textsuperscript{278}

Antony Taubman commented that the reconciliation of the *TRIPS Agreement* 1994 and the intellectual property system with concerns about traditional knowledge systems and the rights of Indigenous peoples and communities could take three main forms. First, he said that it could involve ‘more effective use of existing mechanisms to protect communities’ interests.’\textsuperscript{279} Taubman gives examples such as protecting traditional knowledge based products through geographical indications, trade marks and certification and collective marks; protecting traditional cultural expressions through copyright and performers’ rights; and providing grounds for opposition to contentious patents, which claim inventions based on traditional knowledge and genetic resources. Second, he noted that a second range of policy responses involved ‘adapting the existing principles of intellectual property law and extending their effect to respect more effectively community interests.’\textsuperscript{280} He emphasized that examples included protecting collective rights and interests through the copyright system, and providing for a special disclosure requirement in the patent system for inventions using traditional knowledge and genetic resources. The third approach involved ‘creating altogether new, stand-alone (‘sui generis’) forms of protection for traditional knowledge and traditional cultural expressions, and strengthening the effect of *Convention of Biological Diversity* principles on the right to grant access to biodiversity and on the right to an equitable share of benefits when genetic resources are exploited.’\textsuperscript{281} The TRIPS Council has debated these possibilities.

\textsuperscript{278} Ibid., 185.
\textsuperscript{279} Ibid., 189.
\textsuperscript{280} Ibid., 189.
\textsuperscript{281} Ibid., 189.
Professor Daniel Gervais has promoted a TRIPS-compatible approach to intellectual property and traditional knowledge.282 He has recommended the development of a Declaration on Traditional Knowledge and Trade as a means of legitimising the protection of Indigenous intellectual property.

There has been discussion about the protection of traditional knowledge and Indigenous intellectual property in a range of environmental forums – from Agenda 21 to Rio+20, with its statement on the Future We Want.283

The Convention on Biological Diversity 1992 has provided for significant recognition of traditional knowledge.284 Article 8 (j) of the Convention on Biological Diversity 1992 stipulated:

Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities

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embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

There has been much debate, though, as to extent to which such aspirations about the protection of Indigenous knowledge have been realised. The interests of Indigenous communities have often come into conflict with the interests of National Governments and pharmaceutical and biotechnology companies in respect of access to genetic resources. The Nagoya Protocol 2010 has sought to provide further clarification of the operation of the Convention on Biological Diversity 1992, particularly with respect to access to genetic resources, informed consent, benefit-sharing, and the protection of Indigenous knowledge.285

There are also larger issues about the position of Indigenous communities under the United Nations Framework Convention on Climate Change 1992.286 Randall Abate and Elizabeth Ann

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285 Nagoya Protocol on Access to Genetic Resources and the Fair Equitable Sharing of Benefits Arising from their Utilization, Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18-29 October 2010, 2 November 2010 (‘Nagoya Protocol 2010’).

Kronk have edited a collection on *Climate Change and Indigenous Peoples: The Search for Legal Remedies*.287 The pair commented upon the vulnerabilities of Indigenous communities to the effects of climate change:

> Each indigenous community is unique in its location, customs, languages, laws, religion and culture. Yet, despite these poignant differences, indigenous communities all face the threat of climate change. There is commonality amongst indigenous communities. Many such communities face increased vulnerability due to their location and strong connection, both culturally and legally, to the land.288

Abate and Kronk observe that there has been a legal and political response by Indigenous communities to address the effects of climate change: ‘In response to this commonality of experience, indigenous communities around the world are seeking legal remedies.’289

Naomi Klein has been concerned about the impact of climate change upon Indigenous communities. She has written that ‘the exercise of Indigenous rights has played a central role in the rise of the current wave of fossil fuel resistance.’290 Naomi Klein, though, recognises that

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287 Randall Abate and Elizabeth Ann Kronk (ed.), *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013.


289 Ibid., 18.

the costs of taking on multinational extractive companies in court are enormous, and ‘isolated, often impoverished Indigenous peoples generally lack the monetary resources and social clout to enforce their rights.’ She observes that ‘in perhaps the most politically significant development of the rise of Blockadia-style resistance, this dynamic is changing rapidly—and an army of sorts is beginning to coalesce around the fight to turn Indigenous land rights into hard economic realities that neither government nor industry can ignore.’ Naomi Klein also charts the development of international law to help recognise and protect Indigenous rights:

As the Indigenous rights movement gains strength globally, huge advances are being made in recognizing the legitimacy of these claims. Most significant was the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in September 2007 after 143 member states voted in its favor (the four opposing votes—United States, Canada, Australia, and New Zealand—would each, under domestic pressure, eventually endorse it as well). The declaration states that, “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.” Some countries have even taken the step of recognizing these rights in revised constitutions. Bolivia’s constitution, approved by voters in 2009, states that Indigenous peoples “are guaranteed the right to prior consent: obligatory consultation by the government, acting in good faith and in agreement, prior to the exploitation of non-renewable natural resources in the territory they inhabit.” A huge, hard-won legal victory.

Activist, Martin Lukacs, had hoped that ‘implementing Indigenous rights on the ground, starting with the United Nations Declaration on the Rights of Indigenous Peoples, could tilt the balance of stewardship over a vast geography: giving Indigenous peoples much more control,

291 Ibid., 378.
292 Ibid., 370.
293 Ibid., 377.
and corporations much less.’ 294 He suggests that in Canada, ‘Sustained action that pits real clout behind Indigenous claims is what will force a reckoning with the true nature of Canada’s economy—and the possibility of a transformed country’. 295 Naomi Klein highlights a number of collaborative efforts at activism—such as the ‘ Honour the Treaties’ tour with Neil Young, 296 and the Cowboys and Indians Alliance. 297

In the 2013 Declaration on Climate Justice, Mary Robinson emphasized: ‘For many communities, including indigenous peoples around the world, adaptation to climate change is an urgent priority that has to be addressed much more assertively than before’. 298 She stressed that ‘Climate justice increases the likelihood of strong commitments being made as all countries need to be treated fairly to play their part in a global deal.’ 299

There has also been discussion of Indigenous intellectual property in the context of international labour law. 300

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294 Ibid., 383.
295 Ibid., 383.
296 Ibid., 383.
297 Ibid., 318-323.
299 Ibid.
Professor Susy Frankel from the Victoria University of Wellington wonders whether there could be greater scope for addressing the relationship between intellectual property and traditional knowledge in free trade agreements.\textsuperscript{301} She acknowledged that ‘countries that are serious about protecting traditional knowledge have not been able to gain agreement over norms in the trade forum of the WTO.’\textsuperscript{302} Frankel wonders whether bilateral and regional agreements may be able to provide better protection for Indigenous intellectual property:

Outside of the multilateral system there is an opportunity to agree to norms through FTAs. FTAs are imperfect instruments and have been shown to do some harm to aspects of international intellectual property law, particularly where parties to the FTA are not in reality equal negotiators. Nevertheless, FTAs could provide an opportunity to start the spread of some norms for the protection of traditional knowledge, particularly when the multilateral venues are not making progress.\textsuperscript{303}

Frankel suggests: ‘It is difficult to see why like-minded parties such as Peru and China, or even Chile or Brazil, do not seize the opportunity to start agreeing to certain norms.’\textsuperscript{304} She laments that this ‘opportunity seems to have been, and continues to be missed’.\textsuperscript{305} Frankel concludes: ‘In any event, such countries should not agree to conditions that undermine the protection for traditional knowledge protection in the future and will no doubt continue to progress the debate


\textsuperscript{302} Ibid., 142.

\textsuperscript{303} Ibid., 142.

\textsuperscript{304} Ibid., 142.

\textsuperscript{305} Ibid., 142.
over the protection of traditional knowledge in multilateral for a other than the WTO, such as WIPO’.306

There has been much controversy over the Trans-Pacific Partnership.307 As revealed by publications by WikiLeaks, a number of participants in the Trans-Pacific Partnership have pushed for the inclusion of text on the protection of genetic resources and traditional knowledge in the Intellectual Property Chapter.308 Peru, New Zealand, Mexico, and Singapore proposed joint text for the Intellectual Property Chapter on Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. This is enumerated in Article QQ.E.23. The first clause recognised ‘the importance and contribution of traditional knowledge, traditional cultural expressions, and biological diversity to cultural, economic and social development.’ The second clause proposed: ‘Each Party exercises sovereignty over their biological diversity and shall determine the access conditions to their genetic resources and their derivatives in accordance to their domestic legislation.’ The third clause called for prior informed consent to access genetic resources and traditional knowledge, and equitable benefit-sharing. The fourth clause recognised that information about genetic resources and traditional knowledge can be

306 Ibid., 142-3.
useful in assessing patent applications. The fifth clause sought to promote quality patent examination of applications concerning genetic resources and traditional knowledge to ensure that the eligibility criteria for patentability are satisfied. The sixth clause affirmed that the parties will endeavour to establish appropriate measures to protect traditional knowledge and traditional cultural expressions. The seventh clause emphasized that each Party will take appropriate, effective and proportionate measures to address situations of non-compliance with provisions on informed consent and benefit-sharing. The eighth clause stressed that ‘The Parties shall, through their respective agencies responsible for intellectual property, cooperate to enhance understanding of how the intellectual property system can deal with issues associated with traditional knowledge, traditional cultural expressions and genetic resources.’

The United States was hostile to the inclusion of text on traditional knowledge, traditional cultural expressions, and genetic resources in the Trans-Pacific Partnership – particularly because it was not a member of the Rio Convention on Biological Diversity 1992. Australia was also critical of the proposed text, often opposing the inclusion of particular clauses.

The text itself is quite deficient. Arnie Saiki provided a thoughtful analysis of the leaked text for the Hawaii Independent. The commentator observed of the agreement:

> The inclusion of indigenous peoples’ properties in the TPP Intellectual Property chapter suggests that there are other chapters that also include indigenous peoples’ rights and properties. The leaked Intellectual Properties chapter concludes with, “This text is placeholder, to be reconsidered depending

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on the outcome of the Cooperation section.” The Cooperation section proposes that all parties to the TPP implement relevant international agreements, protocols and conventions. Currently, there is disagreement in the leaked text as the US and Australia opposes implementing international agreements as a regulatory framework that would offer legal guidelines to TPP Intellectual Property rules. It would be fair to suggest that this same opposition would be found in the other TPP chapters as well.310

Saiki lamented the lack of a clear agreement upon the need to protect free prior, informed consent: ‘What’s clear in the leaked documents is that the TPP has the potential of limiting free, prior and informed consent (FPIC) via a stifling dispute resolution process.’311 The critic noted ‘that the drafters of the TPP have gone out of their way to exclude “free” from free, prior and informed consent and would seek to rather obtain prior and informed consent to access indigenous peoples genetic resources and traditional knowledge associated with the genetic resources.’312

Ariel Bogle has wondered whether the Trans-Pacific Partnership will make the problem of biopiracy worse in the Pacific Rim.313

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310 Ibid.
311 Ibid.
312 Ibid.