

Introduction: mapping Indigenous intellectual property

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The *United Nations Declaration on the Rights of Indigenous Peoples 2007* provides a broad, holistic definition of Indigenous intellectual property.¹ The preamble took the view that ‘respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment’.² 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.³

Article 31 (2) stipulates: ‘In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.’⁴

Several 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 emphasises: ‘Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.’⁵ Article 11 notes 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’.⁶ Article 12 stipulates 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.⁷

¹ *United Nations Declaration on the Rights of Indigenous Peoples 2007*, Adopted by General Assembly Resolution 61/295 on 13 September 2007.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

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Furthermore, Article 13 addresses 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 own indigenous decision-making institutions’.⁸ Article 19 observes 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’.⁹

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’.¹⁰ Article 23 emphasises: ‘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.’¹¹ 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’.¹²

Further provisions address the relationship between Indigenous peoples, the environment, and access to genetic resources. Article 28 emphasises 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 or damaged without their free, prior and informed consent.¹³

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’.¹⁴ Article 45 declares: ‘Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.’¹⁵

The *United Nations Declaration on the Rights of Indigenous Peoples* 2007 provides a conceptual framework by which to consider Indigenous intellectual property, law

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

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. 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.¹⁶ 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 of legal disciplines and their relevance to Indigenous knowledge – including copyright law, designs law, trademark 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.¹⁷ In a study on emerging challenges on

¹⁶ 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.

¹⁷ Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65–95; Kathy Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?' (2009) 13(2) *Australian Indigenous Law Review* 35–58; and Kathy Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights', in Kathy Bowrey, Michael Handler and Dianne Nicol (ed.), *Emerging Challenges in Intellectual Property*, Oxford: Oxford University Press, 2011, 46–67.

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intellectual 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.¹⁸

Bowrey 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.'¹⁹

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.'²⁰ 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.'²¹

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'.²² 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.'²³

In her book, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, Jane E. Anderson provides a rigorous examination of the

¹⁸ Kathy Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights', in Kathy Bowrey, Michael Handler and Dianne Nicol (ed.), *Emerging Challenges in Intellectual Property*, Oxford: Oxford University Press, 2011, 46–67 at 46.

¹⁹ *Ibid.*, 47.

²⁰ *Ibid.*, 66.

²¹ *Ibid.*, 66.

²² *Ibid.*, 67.

²³ *Ibid.*, 67.

representations of Indigenous knowledge and culture in intellectual property law.²⁴ She has 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.’²⁵

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’.²⁶ 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’.²⁷ 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.’²⁸ 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.’²⁹

In *The Making of Modern Intellectual Property Law*, Brad Sherman and Lionel Bently have emphasised the need to consider contemporary battles over Indigenous knowledge in light of historical developments in intellectual property law.³⁰ 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.’³¹ Sherman and Bently further 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*.’³² They 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

²⁴ Jane E. Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2009.

²⁵ *Ibid.*, 14.

²⁶ *Ibid.*, 224.

²⁷ *Ibid.*, 224.

²⁸ *Ibid.*, 224.

²⁹ *Ibid.*, 224–225.

³⁰ Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge: Cambridge University Press, 1999.

³¹ *Ibid.*, 219.

³² *Ibid.*, 219.

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cultural expression, these needs are as urgent and pressing as they ever were.³³ Brad Sherman has further explored such issues with Leanne Wiseman.³⁴

In her book, *From Goods to a Good Life*, Madhavi Sunder explores questions of intellectual property, traditional knowledge and global justice.³⁵ She calls for ‘legal decision-makers to recognize contingency, bias, and unreasoned orthodoxy in the legal definitions that begin to appear natural’.³⁶ Sunder contends: “‘Traditional knowledge’ is continually being invented.”³⁷ 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.³⁸

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’.³⁹ 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.’⁴⁰ She observed that ‘tradition is cultivated, not discovered’.⁴¹ In her view, ‘The concept of traditional knowledge, too, is a modern invention.’⁴² Sunder maintains: ‘Forcing ourselves to see the modern aspects of traditional knowledge also helps us to view more critically our romantic notions of Western intellectual property as “new”.’⁴³

In a series of work, Peter Drahos has investigated the philosophical, legal and sociological debates about the protection of Indigenous intellectual property.⁴⁴ He has been particularly interested in the question of how best to design an international

³³ Ibid., 220.

³⁴ Brad Sherman and Leanne Wiseman, ‘Copyright Protection for Indigenous Creations: Issues for the Future’ (2008) 19 *Intellectual Property Journal* 191–220.

³⁵ Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice*, New Haven and London: Yale University Press, 2012.

³⁶ Ibid., 137.

³⁷ Ibid., 137.

³⁸ Ibid., 137–138.

³⁹ Ibid., 138.

⁴⁰ Ibid., 138.

⁴¹ Ibid., 139.

⁴² Ibid., 139.

⁴³ Ibid., 139.

⁴⁴ Peter Drahos and Susy Frankel (eds), *Indigenous Peoples’ Innovation: Intellectual Property Pathways to Development*, Canberra: ANU Press, August 2012, <http://press.anu.edu.au/titles/indigenous-peoples-innovation-ip-pathways-to-development/>

regime for the protection of Indigenous intellectual property.⁴⁵ 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 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.⁴⁶

Drahos is expanding upon his position, with empirical research and case studies on Indigenous intellectual property and knowledge.⁴⁷

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.⁴⁸ 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

⁴⁵ Peter Drahos, ‘Towards an International Framework for the Protection of Traditional Group Knowledge’, Report from UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework, Geneva, 4–6 February 2004.

⁴⁶ Peter Drahos and Susy Frankel, ‘Indigenous Peoples’ Innovation and Intellectual Property: The Issues’ in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples’ Innovation: Intellectual Property Pathways to Development*, Canberra: ANU Press, August 2012, <http://press.anu.edu.au/titles/indigenous-peoples-innovation-ip-pathways-to-development/>

⁴⁷ Peter Drahos, *Intellectual Property, Indigenous People and their Knowledge*, Cambridge: Cambridge University Press, 2014.

⁴⁸ Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation*, New Brunswick (NJ): Rutgers University Press, 1997.

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science, law, and (of course) cultural studies. In each of these realms a body of literature has developed.⁴⁹

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.⁵⁰ Such work led him to further investigate the philosophical questions underlying the legal issues affecting both traditional⁵¹ and urban Indigenous people.⁵² Gray was awarded The Australian/ Vogel Literary Award for his novel *The Artist is a Thief*.⁵³ He was inspired to write the book after being sent out to a community on a possible copyright claim as part of his job in the law faculty of Northern Territory University.⁵⁴ Gray has provided a critical discussion of cultural protocols.⁵⁵ He has also explored matters of bioprospecting in relation to Indigenous biological resources⁵⁶ and investigated the introduction of a label of authenticity into Australia.⁵⁷ In addition, Gray has examined the teaching of Indigenous intellectual property.⁵⁸

He has also published a number of articles about other legal issues affecting Indigenous people, exploring such topics as native title, customary law, alternative dispute resolution and criminal law.⁵⁹

⁴⁹ Ibid., 20–21.

⁵⁰ Stephen Gray, 'Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post-Mabo' (1993) 3 (63) *Aboriginal Law Bulletin* 10; Stephen Gray, 'Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?' in J. Neville Turner and Paul Williams, *The Happy Couple: Law and Literature*, Sydney: Federation Press, 1994, at 241; and Stephen Gray, 'Enlightenment or Dreaming? Attempting to Reconcile Aboriginal Art and European Law' (1995) 2 *Arts and Entertainment Law Review* 18.

⁵¹ Stephen Gray, 'Squatting in Red Dust: Non-Aboriginal Law's Construction of the "Traditional" Aboriginal Artist' (1996) 14 (2) *Law in Context* 29–43.

⁵² Stephen Gray, 'Black Enough? Urban and Non-Traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art' (1996) 7 (3) *Culture and Policy* 29–44.

⁵³ Stephen Gray, *The Artist is a Thief*, Sydney: Allen and Unwin, 2001.

⁵⁴ Catherine Keenan, 'There's Faking It and Making It', *The Sydney Morning Herald*, 11 October 2000, 16; James Hall, 'Bigtime Plot Twist for Smalltime Storyteller', *The Australian*, 11 October 2000; Suellen Hinde, 'Big Win for NT Author', *Northern Territorian*, 21 October 2000.

⁵⁵ Stephen Gray, 'Imagination, Fraud and the Cultural Protocols Debate: A Question of Free Speech or Pornography?' (2004) 9 (3) *Media & Arts Law Review* 23–37.

⁵⁶ Stephen Gray, 'Vampires Round the Campfire: Indigenous Intellectual Property Rights and Patent Laws' (1997) 22 (2) *Alternative Law Journal* 60–63.

⁵⁷ Stephen Gray, 'X-Ray Wallabies and Mickey Mouse: The Commodification of the "Authentic" in Aboriginal Art' (2000) 159 *Overland* 124–126.

⁵⁸ Stephen Gray, 'Shaking the Skeleton of Principle: Teaching Indigenous Legal Issues in Intellectual Property Law' (2012) 4 *Ngija: Talk the Law* 5–15.

⁵⁹ Stephen Gray, *Brass Discs, Dog Tags and Finger Scanners: The Apology and Aboriginal Protection in the Northern Territory 1863–1972*, Darwin (NT): Charles Darwin University Press, 2011; Stephen Gray, *Criminal Laws: Northern Territory*, Sydney: Federation Press, 2004; Stephen Gray, *The Protectors: A Journey Through Whitefella Past*, Sydney: Allen & Unwin,

Australia has hosted a number of leading disputes over copyright law and Indigenous culture.⁶⁰ Colin Golvan has recounted his role as a barrister in a number of leading Australian cases on Indigenous intellectual property.⁶¹ He has 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’.⁶² Golvan reflected that ‘the key issue here is whether contemporary copyright provides adequate or appropriate protection for the modern expression of ancient art-forms’.⁶³

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 have been imagined in Australian painting.⁶⁴ 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 movement⁶⁵ and highlights the controversies which surrounded the creation of such extraordinary paintings. In her work on the artist Albert Namatjira, Alison French has highlighted outstanding issues over the copyright ownership of his artistic works.⁶⁶

In *Dollar Dreaming*, art critic Benjamin Genocchio explores the evolution of the market for Indigenous art in Australia.⁶⁷ 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.⁶⁸ His artwork has shown an engagement with the larger debate over cultural appropriation.

2011; and Stephen Gray and Jenny Blokland, *Criminal Laws: Northern Territory*, Sydney: Federation Press, 2012.

⁶⁰ *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrurru v. Indofurn Pty Ltd* (1994) 30 IPR 209; *King v. Milpurrurru* (1996) 34 IPR 11(Full Fed Cr); *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513; and *Tjampitjin, Tjupurulla, and Kemarre v. International Olympic Committee* (2003).

⁶¹ Colin Golvan, *Copyright Law and Practice*, Sydney: Federation Press, 2007.

⁶² *Ibid.*, 186.

⁶³ *Ibid.*, 186.

⁶⁴ Ian McLean, *White Aborigines: Identity Politics in Australian Art*, Cambridge: Cambridge University Press, 1998.

⁶⁵ Vivien Johnson, *Once Upon a Time in Papunya*, Sydney: University of New South Wales, 2010.

⁶⁶ Alison French, *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) *Incite* 6, http://works.bepress.com/matthew_rimmer/54/

⁶⁷ Benjamin Genocchio, *Dollar Dreaming: Inside the Aboriginal Art World*, Melbourne: Hardie Grant Books, 2008.

⁶⁸ Margo Neale, *Urban Dingo: The Art and Life of Lin Onus, 1948–1996*, Sydney: Museum of Contemporary Art, 2000.

The National Gallery of Australia's exhibition *Culture Warriors*, curated by Brenda Croft, provides a sense of the great diversity and innovation of contemporary Indigenous art in Australia.⁶⁹ Particularly striking is the work of Daniel Boyd, which investigates colonialism, appropriation and piracy.⁷⁰ The exhibition, *unDisclosed*, provided further exploration of the diverse voices of Aboriginal and Torres Strait Islander people in the visual arts.⁷¹

There have also been notable collaborations. After previously battling over matters of appropriation art,⁷² Michael Nelson Jagamara and Imants Tillers have reconciled and collaborated on a joint exhibition called *The Loaded Ground*.⁷³

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.⁷⁴ The organisation has shown a great ability to weave together dance, music and performances from a range of Indigenous communities over a long period of time.⁷⁵ In her book *Sightlines*, Helen Gilbert explored how race, gender and nation have been expressed in Australian theatre and performance.⁷⁶ 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.'⁷⁷ In *Unsettling Sights*, Corinn Columpar considers the representations of Aboriginality in cinema.⁷⁸ 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.⁷⁹

⁶⁹ Brenda Croft (ed.), *Culture Warriors: Australian Indigenous Art Triennial*, Canberra: National Gallery of Australia, 2009.

⁷⁰ Daniel Boyd, 'Governor No Beard', 2007, <http://nga.gov.au/Exhibition/NIAT07/Detail.cfm?MnuID=1&SubMnuID=1&BioArtistIRN=33432&IRN=163712> and Andrew Taylor, 'Daniel Boyd's Ancestral Home the Inspiration for his Award Winning Work', *The Sydney Morning Herald*, 16 April 2014, <http://www.smh.com.au/entertainment/art-and-design/daniel-boyds-ancestral-home-the-inspiration-for-his-award-winning-work-20140415-36pu9.html>

⁷¹ National Gallery of Australia, *UnDisclosed*, Canberra: National Gallery of Australia, 2012, <http://nga.gov.au/Exhibition/unDisclosed/Default.cfm?MNUID=5>

⁷² Matthew Rimmer, 'Four Stories About Copyright Law and Appropriation Art' (1998) 3 (4) *Media And Arts Law Review* 180–193.

⁷³ Michael Nelson Jagamara and Imants Tillers, *The Loaded Ground*, Canberra: ANU Drill Hall Gallery, 2012.

⁷⁴ Matthew Rimmer, 'Bangarra Dance Theatre: Copyright Law and Indigenous Culture' (2000) 9 (2) *Griffith Law Review* 274–302.

⁷⁵ Stephen Page and Greg Barrett, *Clan*, Sydney: Allen and Unwin, 2013.

⁷⁶ Helen Gilbert, *Sightlines: Race, Gender, and Nation in Contemporary Australian Theatre*, Ann Arbor: The University of Michigan Press, 1998.

⁷⁷ *Ibid.*, 51.

⁷⁸ Corinn Columpar, *Unsettling Sights: The Fourth World on Film*, Carbondale: South Illinois University Press, 2010.

⁷⁹ Hetti Perkins, *Art and Soul*, ABC and Hibiscus Films, 2010, <http://www.abc.net.au/arts/artandsoul/about/default.htm> and Richard Bell, *Colour Theory*, SBS and Madman, 2013 (Series

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.⁸⁰ He writes:

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.⁸¹

There has been a great deal of interest in questions about the management of intellectual property in respect of galleries, libraries and museums.⁸² There has also been much analysis of literary narratives and historical discourses about Indigenous people and communities.⁸³

Christoph Beat Graber and Mira Burri-Nenova have highlighted the challenges posed to Indigenous intellectual property by the emergence of digital technologies.⁸⁴ 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 environment, characterised by a plethora of content distribution platforms and networks.'⁸⁵ 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.⁸⁶

1) and 2014 (Series 2), <http://www.nitv.org.au/fx-program.cfm?pid=1529CC90-9C5C-F7FA-BCEC7CC04C1A486F>

⁸⁰ Philip Jones, *Ochre and Rust: Artefacts and Encounters on Australian Frontiers*, Adelaide: Wakefield Press, 2007.

⁸¹ Ibid.

⁸² Museums Australia, *Continuous Cultures, Ongoing Responsibilities: Principles and Guidelines for Australian Museums Working with Aboriginal and Torres Strait Islander Cultural Heritage*, Canberra: Museums Australia, 2005, http://www.nma.gov.au/__data/assets/pdf_file/0020/3296/ccor_final_feb_05.pdf; and Rina Elster Pantalony, *Managing Intellectual Property for Museums*, Geneva: World Intellectual Property Organization, 2013, http://www.wipo.int/edocs/pubdocs/en/copyright/1001/wipo_pub_1001.pdf

⁸³ Thomas King, *The Truth About Stories: A Native Narrative*, CBC: The Massey Lectures, 2003; and Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America*, Toronto: Anchor Canada, 2012.

⁸⁴ Christoph Beat Graber and Mirra Burri-Nenova, 'Preface', in Christoph Beat Graber and Mira Burri-Nenova, *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2008, xi.

⁸⁵ Ibid, xi.

⁸⁶ Ibid., xiii.

3. MARKETING

There has also been significant interest in the use of trademarks to protect Indigenous symbols, design and culture.⁸⁷

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.⁸⁸ She argued that trademark 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 trademarks, 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 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.⁸⁹

Zografos 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’.⁹⁰ 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’.⁹¹

There has been a significant use of certification trademarks, such as authenticity marks in Australia,⁹² the Toi Iho Maori Made Mark in New Zealand,⁹³ the Igloo Tag in Canada,⁹⁴ and even the Fair Trade Label.⁹⁵ There are examples of what Professor Margaret Chon would call ‘marks of rectitude’.⁹⁶ Chon suggests that ‘soft law

⁸⁷ Matthew Rimmer, ‘Australian Icons: Authenticity Marks and Identity Politics’ (2004) 3 *Indigenous Law Journal* (University of Toronto) 139–179.

⁸⁸ Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2010.

⁸⁹ *Ibid.*, 1.

⁹⁰ *Ibid.*, 224–225.

⁹¹ *Ibid.*, 225.

⁹² Matthew Rimmer, ‘Australian Icons: Authenticity Marks and Identity Politics’ (2004) 3 *Indigenous Law Journal* (University of Toronto), 139–179.

⁹³ Toi Iho Maori Made Mark, <http://www.toiho.com/>

⁹⁴ Authenticity and Igloo Tag, <http://www.northernimages.ca/Inuit-Art-General-Information/Authenticity-and-Igloo-Tag-for-Inuit-Eskimo-Art.aspx>

⁹⁵ Fair Trade International, <http://www.fairtrade.net/>

⁹⁶ Margaret Chon, ‘Marks of Rectitude’ (2009) 77 *Fordham Law Review* 2311–2351; and see also Margaret Chon, ‘Slow Logo: Brand Citizenship in Global Value Networks’ (2014) 47 (3) *UC Davis Law Review* 935–968.

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'.⁹⁷ She maintains that 'trademark law can and should facilitate meaningful marks of rectitude by harnessing consumer involvement and oversight'.⁹⁸ The success of certification trademarks often depends upon marketing strategy and business acumen.

In the United States, there has often been controversy over representations of Native Americans in trademark law. There has been intensive public and legal debate over offensive trademarks, such as the Washington Redskins.⁹⁹ The United States Congress has even debated bills over the disparagement of Native American persons under trademark law.¹⁰⁰ In 2014, 50 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.¹⁰¹ The letter, addressed to the Commissioner of the NFL, was framed in the following terms:

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.¹⁰²

⁹⁷ Margaret Chon, 'Marks of Rectitude' (2009) 77 *Fordham Law Review* 2311–2351 at 2351.

⁹⁸ *Ibid.*

⁹⁹ Christine Haight Farley, 'Stabilizing Morality in Trademark Law' (2014) 63 *American University Law Review* 1019–1050; Fred Hiatt, 'Moving Beyond the "Imaginary Indians" Perception', *The Washington Post*, 21 September 2014, http://www.washingtonpost.com/opinions/fred-hiatt-moving-beyond-the-imaginary-indians-perception/2014/09/21/ea1ee614-3f3b-11e4-9587-5dafd96295f0_story.html; Steve Vladek, 'The Washington Redskins, the Lanham Act, and Article III', *The Prawfs Blog*, 23 September 2014, <http://prawfsblawg.blogs.com/prawfsblawg/2014/09/the-washington-redskins-the-lanham-act-and-article-iii.html>; Alison Keyes, 'What a Lawsuit Against the Redskins Could Mean for the Brand', *National Public Radio*, 31 May 2013, <http://www.npr.org/blogs/codeswitch/2013/05/31/187636561/What-A-Lawsuit-Against-The-Redskins-Could-Mean-For-The-Brand>

¹⁰⁰ *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; Mike Jones, 'Members of Congress Urge Snyder to Change Redskins Name', *The Washington Post*, 28 May 2013; Gregg Rosenthal, 'Washington Redskins' Name Discussed in U.S. House', *National Football League*, 10 July 2013, <http://www.nfl.com/news/story/0ap1000000217181/article/washington-redskins-nickname-discussed-by-congress>; and Dan Steinberg, 'Eni Faleomavaega Discusses "Redskins" on House Floor', *The Washington Post*, 10 July 2013, <http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2013/07/10/eni-faleomavaega-discusses-redskins-on-house-floor/>

¹⁰¹ Michele Richinick, 'Dozens of Senators Call on NFL to Change Redskins Team Name', *MSNBC*, 22 May 2014, <http://www.msnbc.com/msnbc/senators-nfl-must-change-redskins-name>

¹⁰² United States Democrat Senators 'Letter to the National Football League Commissioner Roger Goodell', United States Senate, 21 May 2014, <http://www.changethemascot.org/wp-content/uploads/2014/05/letter-to-commissioner-goodell-on-washington.pdf>

The United States Senators observed that ‘this is a matter of tribal sovereignty – and Indian country has spoken clearly on this issue’.¹⁰³ The United States Senators observed that every national Tribal organisation has ‘passed resolutions in support of a name change as they find the Washington, D.C. football team name to be racially offensive’.¹⁰⁴ The United States Senators emphasised that there was an array of federal laws intended to protect and respect tribal culture and identity – including the *American Indian Religious Freedom Act*,¹⁰⁵ the *Native American Languages Act*,¹⁰⁶ the *Indian Arts and Crafts Act*¹⁰⁷ and the *Native American Graves Protection and Repatriation Act*.¹⁰⁸ The United States Senators lamented: ‘Yet every Sunday during football season, the Washington, D.C. football team mocks their culture.’¹⁰⁹ 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.’¹¹⁰

Furthermore, United States President Barack Obama has suggested that the owners of the team should change the name.¹¹¹ James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, has called also upon the owners of the Washington Redskins football team to recognise that the name of the team is a ‘hurtful reminder’ of the ‘long history of mistreatment of Native American people in the United States’.¹¹²

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

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ *American Indian Religious Freedom Act* 1978 (US) Public Law No. 95-341, 92 Stat. 469 (Aug. 11, 1978) (commonly abbreviated to AIRFA), codified at 42 U.S.C. § 1996.

¹⁰⁶ *Native American Languages Act* 1990 (US) Public Law 101-477.

¹⁰⁷ *Indian Arts and Crafts Act* of 1990 (US), Pub. L. No. 101-644, 104 Stat. 4662 (codified as amended at 25 U.S.C. §§ 305-10 (2000)).

¹⁰⁸ *Native American Graves Protection and Repatriation Act* 1990 (US) Public Law 101-601, 25 USC 3001 et seq., 104 Stat. 3048.

¹⁰⁹ United States Democrat Senators, ‘Letter to the National Football League Commissioner Roger Goodell’, United States Senate, 21 May 2014, <http://www.changethemascot.org/wp-content/uploads/2014/05/letter-to-commissioner-goodell-on-washington.pdf>

¹¹⁰ Ibid.

¹¹¹ Theresa Vargas and Annys Shin, ‘President Obama Says, “I’d Think about Changing” Name of Washington Redskins’, *The Washington Post*, 6 October 2013, http://www.washingtonpost.com/local/president-obama-says-id-think-about-changing-name-of-washington-redskins/2013/10/05/e170b914-2b70-11e3-8ade-a1f23cda135e_story.html

¹¹² Caitlin McGovern, ‘UN Indigenous Rights Expert Says “Redskins” Name A “Hurtful Reminder” of Past Mistreatment’, *IP Watch*, 11 April 2014, <http://www.ip-watch.org/2014/04/11/un-indigenous-rights-expert-says-redskins-name-a-hurtful-reminder-of-past-mistreatment/>

traditions of Native Americans.¹¹³ Meanwhile, opponents to the trademark ran advertisements against the Washington Redskins as part of the ‘Change the Mascot’ campaign.¹¹⁴

On 18 June 2014, the Trademark Trial and Appeal Board at the United States Patent and Trademark Office cancelled the trademarks.¹¹⁵ Amanda Blackhorse and other Native Americans sought to cancel trademark registrations relating to the term ‘Redskins’ for professional football-related services in a proceeding under Section 14 of the *Trademark Act* of 1946 (US), 15 U.S.C. 1064 (c) on the grounds that the marks disparaged persons and brought them into contempt and disrepute. The majority of the Trademark Trial and Appeal Board led by Karen Kuhlke decided ‘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)’.¹¹⁶ The Board emphasised that the National Congress of American Indians had passed a resolution, objecting to the trademarks in respect of the term ‘Redskins’:

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.¹¹⁷

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.’¹¹⁸

The Board’s Mark Bergsman dissented:

¹¹³ Associated Press, ‘Redskins Still Insisting Team Name is “Respectful” after Senators’ Call for Change’, *The Huffington Post*, 24 May 2014, http://www.huffingtonpost.com/2014/05/24/redskins-team-name-senators-change_n_5385588.html?&ncid=tweetInkushpmg00000067

¹¹⁴ John Keim, ‘Opponents to Run Anti-“Redskins” Ad’, ESPN.com, 10 June 2014, http://espn.go.com/nfl/story/_/id/11061396/opponents-run-anti-washington-redskins-ad-nba-finals

¹¹⁵ *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, <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=199>

¹¹⁶ *Ibid.*, 1.

¹¹⁷ *Ibid.*, 70.

¹¹⁸ *Ibid.*, 72.

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.¹¹⁹

The decision received wide attention.¹²⁰ 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.'¹²¹ 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.'¹²² 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.'¹²³

The decision of the Trademark Trial and Appeal Board was upheld in 2015 by the United States District Court of the Eastern District of Virginia.¹²⁴

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"'.¹²⁵

Consumer law has also been deployed to take action in respect of misleading and deceptive representations made about Indigenous art and culture.¹²⁶ 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.¹²⁷ Consumer and competition regulators have been able to provide important oversight in respect of the Indigenous art and craft markets.

¹¹⁹ Ibid., 84.

¹²⁰ Travis Waldron, 'In Landmark Decision, U.S. Patent and Trademark office Cancels Trademark for Redskins Football Team', *Think Progress*, 18 June 2014, <http://thinkprogress.org/sports/2014/06/18/3450333/in-landmark-decision-us-patent-office-cancels-trademark-for-redskins-football-team/> and Lauren Gambino, 'US Patent and Trademark Office Strips Washington Redskins of "Offensive" Trademarks', *The Guardian*, 19 June 2014, <http://www.theguardian.com/sport/2014/jun/18/washington-redskins-lose-trademark-team-us-patent-office>

¹²¹ Washington Redskins, 'Statement by Bob Raskopf, Trademark Attorney for the Washington Redskins', Press Release, 18 June 2014, <http://files.redskins.com/pdf/Statement-by-Bob-Raskopf-Trademark-Attorney-for-the-Washington-Redskins.pdf>

¹²² Ibid.

¹²³ Ibid.

¹²⁴ *Pro-Football, Inc. v Amanda Blackhorse*, et al., 2015 WL 4096277 (E.D.Va.,2015).

¹²⁵ Erik Stegman and Victoria Phillips, *Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth*, Center for American Progress, July 2014, <http://cdn.americanprogress.org/wp-content/uploads/2014/07/StegmanAIANmascots-reportv2.pdf>

¹²⁶ *Milpurrruru v. Indofurn Pty Ltd* (1994) 30 IPR 209.

¹²⁷ Australian Competition and Consumer Commission, 'Unconscionable Conduct in the Indigenous Art and Craft Sector', 15 December 2010, <http://www.accc.gov.au/publications/unconscionable-conduct-in-the-indigenous-art-craft-sector>; *Australian Competition and Consumer Commission v. Aboriginal Icons Pty Ltd* (2004); *Australian Competition and Consumer*

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.¹²⁸ 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.¹²⁹

In a book published in 1998, the Canadian scholar Rosemary Coombe considered the cultural life of intellectual property law.¹³⁰ She looked at how First Nations engaged in parody, satire and culture-jamming against government and corporate trademarks, logos, brands and insignia. In her subsequent work, Coombe has explored the intersections between trademark law, and geographical indications.¹³¹ She has also considered the relationship between copyright law and cultural heritage.¹³²

In Australia, there was constitutional conflict over Indigenous symbolic protests relating to the Bicentennial celebrations.¹³³ There was also an unsuccessful effort by the Aboriginal Tent Embassy to claim ownership of representations of the Kangaroo

Commission v. Nooravi [2008] FCA 2021 ('Doongal Aboriginal Art and Artefacts'); *Australian Competition and Consumer Commission v. Australian Dreamtime Creations Pty Ltd* [2009] FCA 1545; Australian Competition and Consumer Commission, 'Art Dealer Gives ACCC Undertaking for Misrepresentations about Indigenous Art', 11 December 2012, <http://www.accc.gov.au/media-release/art-dealer-gives-accc-undertaking-for-misrepresentations-about-indigenous-art>

¹²⁸ Daniel Gervais, 'Traditional Knowledge: Are We Closer to the Answers? The Potential Role of Geographical Indications' (2009) 15 (2) *ILSA Journal of International and Comparative Law* 551–567.

¹²⁹ Susy Frankel, 'The Mismatch of Geographical Indications and Innovative Traditional Knowledge' (2011) 29(3) *Prometheus* 253–267; and Shivani Singhal, 'Geographical Indications and Traditional Knowledge' (2008) 3 (11) *Journal of Intellectual Property Law and Practice* 732–738.

¹³⁰ Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. Durham, NC: Duke University Press, 1998.

¹³¹ Nicole Aylwin and Rosemary Coombe, 'Marks Indicating Conditions of Origin in Rights-Based Sustainable Development' (2014) 47 *University of California, Davis Law Review* 753–786; Rosemary Coombe, Sarah Ives and Daniel Huizenga, 'Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products' in Debora Halbert and Mathew David (eds), *The Sage Handbook of Intellectual Property*, London: Sage Publications, 2015; Rosemary Coombe, Sarah Ives and Daniel Huizenga, 'The Social Imaginary of GIs in Contested Environments: Politicized Heritage and the Racialized Landscapes of South African Rooibos Tea' in Debora Halbert and Mathew David (eds), *The Sage Handbook of Intellectual Property*, London: Sage Publications, 2015.

¹³² Rosemary Coombe and Joseph Turcotte, 'Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Intangible Cultural Heritage Law and Policy' in Christoph Beat Graber, Karolina Kuprecht and Jessica Christine Lai (eds), *International Trade in Indigenous Cultural Heritage*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2013, 211–236; and Rosemary Coombe, Darren Weshler and Martin Zeilinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online*, Toronto: University of Toronto Press, 2013.

¹³³ *Davis v. Commonwealth* (1988) 166 CLR 79.

and the Emu on the Australian Coat of Arms.¹³⁴ Significant conflict has been witnessed over the ownership of national iconography, such as Indigenous flags in Australia.¹³⁵

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.¹³⁶ 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’.¹³⁷ 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.’¹³⁸ Whitt highlights instances of resistance and recovery: ‘Indigenous responses to biocolonialism include efforts to transform the concept and practice of sovereignty.’¹³⁹

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 explores written and visual records of the Australian landscape.¹⁴⁰ 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.¹⁴¹ 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 Great Barrier Reef region.

¹³⁴ *Aboriginal Tent Embassy v. Commonwealth* (2002). See Belinda Goldsmith, ‘Kangaroo Coat of Arms to Court’, *News 24*, 29 January 2002, <http://www.news24.com/xArchive/Archive/Kangaroo-coat-of-arms-to-court-20020129>

¹³⁵ *Thomas v. Brown and Another* (1997) 37 IPR 207; *Flags 2000 Pty Ltd v. Smith* [2003] FCA 1067; and Asher Moses, ‘Oh Dear: Google Flagged over Logo Dispute’, *The Sydney Morning Herald*, 26 January 2010, <http://www.smh.com.au/technology/technology-news/oh-dear-google-flagged-over-logo-dispute-20100126-mvhd.html>

¹³⁶ Laurelyn Whitts, *Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Law and Knowledge*, Cambridge: Cambridge University Press, 2009.

¹³⁷ *Ibid.*, xiv.

¹³⁸ *Ibid.*, xv.

¹³⁹ *Ibid.*, xv.

¹⁴⁰ Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia*, Sydney: Allen & Unwin, 2012.

¹⁴¹ Iain McCalman, *The Reef: A Passionate History*, Melbourne: Penguin Books, 2013.

In the collection, *Biodiversity and the Law*, Charles McManis examines the relationship between intellectual property, biotechnology and traditional knowledge.¹⁴² He describes the volume as addressing ‘one of the great questions of our times – namely how to promote global economic development, while simultaneously preserving the local biological and cultural diversity of “this fragile earth, our island home”’.¹⁴³ 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* 2001.¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶ There has been much debate over plant breeders’ rights, patent law, farmers’ rights, and Indigenous knowledge.¹⁴⁷

In *Global Biopiracy*, Ikechi Mgbeoji considers the relationship between patents, plants and Indigenous knowledge.¹⁴⁸ 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.¹⁴⁹

¹⁴² Charles McManis (ed.), *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge*, London and Sterling (VA): Earthscan, 2007.

¹⁴³ Charles McManis, ‘Biodiversity, Biotechnology and Traditional Knowledge Protection: Law, Science and Practice’ in Charles McManis (ed.), *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge*, London and Sterling (VA): Earthscan, 2007, 1–34 at 1.

¹⁴⁴ *FAO International Treaty on Plant Genetic Resources for Food and Agriculture*, adopted 3 November 2001, S. Treaty Doc. No. 110-19, <http://www.fao.org/Ag/cgrfa/itpgr.htm> (entered into force 29 June 2004).

¹⁴⁵ Charles McManis, ‘Biodiversity, Biotechnology and Traditional Knowledge Protection: Law, Science and Practice’ in Charles McManis (ed.), *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge*, London and Sterling (VA): Earthscan, 2007, 1–34 at 2.

¹⁴⁶ Keith Aoki, *Seed Wars: Controversies and Cases on Plant Genetic Resources and Intellectual Property*, Durham, North Carolina: Carolina Academic Press, 2008.

¹⁴⁷ *International Convention for the Protection of New Varieties of Plants*, opened for signature 2 December 1961, 815 UNTS 89 (entered into force 24 April 1968), as revised on 10 November 1972, 23 October 1978 and 19 March 1991 (‘UPOV Convention’).

¹⁴⁸ Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge*, Vancouver and Toronto: UBC Press, 2006.

¹⁴⁹ *Ibid.*, 8.

In his view, '[t]he relationship between patent law and indigenous peoples knowledge is inherently predatory and harmful to the interests, worldviews, and self-determination of the Third World'.¹⁵⁰ Mgbeoji maintains: 'Biopiracy is a function of institutional and juridical structures operating within a complex milieu of notions of cultural superiority/inferiority.'¹⁵¹ 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.'¹⁵²

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 about the conflicts over national sovereignty, common heritage, genetic resources and traditional knowledge.¹⁵³ Dutfield has also explored intellectual property and the rise of the life science industries,¹⁵⁴ as well as investigating the development of global intellectual property law, and the rise of traditional knowledge as a possible right.¹⁵⁵

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.¹⁵⁶ 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* 2007¹⁵⁷ and the *Nagoya Protocol* 2010.¹⁵⁸ 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 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

¹⁵⁰ Ibid., 8.

¹⁵¹ Ibid., 200.

¹⁵² Ibid., 200.

¹⁵³ Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, London: Earthscan, 2004.

¹⁵⁴ Graham Dutfield, *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History*, Aldershot: Ashgate, 2003 (first edition); and Graham Dutfield, *Intellectual Property Rights and the Life Science Industries: Past, Present, and Future*, Singapore: World Scientific, 2009 (second edition).

¹⁵⁵ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2008.

¹⁵⁶ Tania Bubela and E. Richard Gold (eds), *Genetic Resources and Traditional Knowledge: Case Studies and Conflicting Interests*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2012.

¹⁵⁷ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, Adopted by General Assembly Resolution 61/295 on 13 September 2007.

¹⁵⁸ *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*'). Adopted 29 October 2010, opened for signature 2 February 2011 to 1 February 2012.

traditional knowledge (TK), and calls for sharing of the benefits derived from the exploitation of TK.¹⁵⁹

Bubela and Gold state 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’,¹⁶⁰ and go on to observe 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’.¹⁶¹

Evanson Kamau and Gerd Winter have undertaken extensive collective work in respect of genetic resources, traditional knowledge and international law.¹⁶² 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.¹⁶³ Winter observes that ‘a common pool may very generally be defined as resources that are provided by resource holders for common use by a group of people’.¹⁶⁴ 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.¹⁶⁵

Winter further 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.’¹⁶⁶

¹⁵⁹ Tania Bubela and E. Richard Gold, ‘Indigenous Rights and Traditional Knowledge’, in Tania Bubela and E. Richard Gold (eds), *Genetic Resources and Traditional Knowledge: Case Studies and Conflicting Interests*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2012, 1.

¹⁶⁰ *Ibid.*, 27.

¹⁶¹ *Ibid.*, 27.

¹⁶² Evanson Chege Kamau and Gerd Winter (eds), *Genetic Resources, Traditional Knowledge, and the Law: Solutions For Access and Benefit-Sharing*, London and Sterling (VA): Earthscan, 2009; and Evanson Chege Kamau and Gerd Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law*, London and New York: Routledge, 2013.

¹⁶³ Evanson Chege Kamau and Gerd Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law*, London and New York: Routledge, 2013.

¹⁶⁴ Gerd Winter, ‘Common Pools of Genetic Resources and Related Traditional and Modern Knowledge: An Overview’, Evanson Chege Kamau and Gerd Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law*, London and New York: Routledge, 2013, 1–25 at 4.

¹⁶⁵ *Ibid.*, 4.

¹⁶⁶ *Ibid.*, 5.

22 *Indigenous intellectual property*

In his work on the commons, David Bollier raises thoughtful questions about Indigenous commons.¹⁶⁷ 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 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 notes that 'corporate enclosures of traditional knowledge commons have prompted some innovative responses'.¹⁶⁸ He highlights the development of traditional knowledge libraries and databases to challenge patent applications that would privatise such 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.¹⁶⁹ In his book *Identity and Invention*, Shubha Ghosh highlights the problem of race-specific gene patents.¹⁷⁰ He comments: 'Race-specific patents are problematic because they incorporate a sociological category that is of dubious value and of possibly pernicious implications.'¹⁷¹ Ghosh observes: 'As a reward, race-specific patents create incentives for the wrong types of invention.'¹⁷² He contends that 'patent law needs to promote openness, freedom, and justice through greater access to the process of how patents are assessed and to greater dialogue about the meaning of race'.¹⁷³ Such concerns raise larger issues about traditional knowledge.¹⁷⁴

An ethical debate erupted over the Human Genome Diversity Project. A conflict between the Arizona State University and the Havasupai Tribe over genetic research

¹⁶⁷ David Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons*, Gabriola Island (BC): New Society Publishers, 2014.

¹⁶⁸ *Ibid.*, 131.

¹⁶⁹ Matthew Rimmer, *Intellectual Property and Biotechnology: Biological Inventions*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2008; Matthew Rimmer and Alison McLennan (eds), *Intellectual Property and Emerging Technologies: The New Biology*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2012; Eddy Ventose, *Patenting Medical and Genetic Diagnostic Methods*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2013; and see the recent litigation over gene patents in Australia, *Cancer Voices Australia v. Myriad Genetics Inc.* [2013] FCA 65, *D'Arcy v. Myriad Genetics Inc* [2014] FCAFC 115, and *D'Arcy v. Myriad Genetics Inc* [2015] HCA 35 (7 October 2015) and the United States, *Association for Molecular Pathology v. Myriad Genetics Inc.* 133 S Ct 2107 (2013).

¹⁷⁰ Shubha Ghosh, *Identity and Invention: The Culture and Ethics of Personalized Medicine Patenting*, Cambridge: Cambridge University Press, 2012.

¹⁷¹ *Ibid.*, 63.

¹⁷² *Ibid.*, 63.

¹⁷³ *Ibid.*, 167.

¹⁷⁴ Shubha Ghosh, 'Reflections on the Traditional Knowledge Debate' (2003-2004) 11 *Cardozo Journal of International and Comparative Law* 497–510; and Shubha Ghosh, 'Globalization, Patents, and Traditional Knowledge' (2004) 17 *Columbia Journal of Asian Law* 73–120.

was eventually settled.¹⁷⁵ Large-scale population genetic projects such as the Genographic Project have raised complex legal and ethical issues about Indigenous intellectual property, traditional knowledge and cultural heritage.¹⁷⁶

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*.¹⁷⁷ 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 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.¹⁷⁸

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-Foglar reflects: 'In a global context where ethnic and regional identities are reaffirmed almost everywhere, cultural identity appears as a refuge threatened by hard science.'¹⁷⁹

There have also been significant controversies over the repatriation of Indigenous ancestral remains from museums and collecting institutions.¹⁸⁰

5. LAW REFORM AND SOCIAL JUSTICE

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.¹⁸¹ Somewhat tentatively, Brown contended:

¹⁷⁵ Amy Harmon, 'Indian Tribe Wins Fight to Limit Research of its DNA', *The New York Times*, 21 April 2010, <http://www.nytimes.com/2010/04/22/us/22dna.html?pagewanted=all>

¹⁷⁶ Matthew Rimmer, 'The Genographic Project: Traditional Knowledge and Population Genetics' (2007) 11 (2) *Australian Indigenous Law Review* 33–55.

¹⁷⁷ Susanne Berthier-Foglar, Sheila Collingwood-Whittick and Sandrine Tolazzi (eds), *Biomapping Indigenous Peoples: Towards an Understanding of the Issues*, Amsterdam and New York: Rodopi, 2012.

¹⁷⁸ Susanne Berthier-Foglar, 'Human Genomics and the Indigenous', in Susanne Berthier-Foglar, Sheila Collingwood-Whittick and Sandrine Tolazzi (eds), *Biomapping Indigenous Peoples: Towards an Understanding of the Issues*, Amsterdam and New York: Rodopi, 2012, 3–28 at 3–4.

¹⁷⁹ Susanne Berthier-Foglar, 'Preface', in Susanne Berthier-Foglar, Sheila Collingwood-Whittick and Sandrine Tolazzi (eds), *Biomapping Indigenous Peoples: Towards an Understanding of the Issues*, Amsterdam and New York: Rodopi, 2012, ix.

¹⁸⁰ Matthew Rimmer, 'Travelling Bones: The Repatriation of Indigenous Remains', in Susanne Berthier-Foglar, Sheila Collingwood-Whittick and Sandrine Tolazzi (eds), *Biomapping Indigenous Peoples: Towards an Understanding of the Issues*, Amsterdam and New York: Rodopi, 2012, 369–390.

¹⁸¹ Michael F. Brown, *Who Owns Native Culture?* Cambridge (MA) and London: Harvard University Press, 2003.

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.¹⁸²

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.’¹⁸³ 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 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.¹⁸⁴ 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.¹⁸⁵ Thus, she advocated that the Government pass special legislation to deal with Indigenous cultural property because of its uniqueness. Alternatively, 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.¹⁸⁶ In 1999, the Federal Government provided funding to the Association to establish a national authenticity label, through the Aboriginal and Torres

¹⁸² Ibid., 10.

¹⁸³ Ibid., 242.

¹⁸⁴ Attorney General’s Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, October 1994.

¹⁸⁵ ‘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 breeders’ rights, circuit layout protection, database protection and traditional knowledge.

¹⁸⁶ *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth); for a commentary see Jane Anderson, ‘Indigenous Communal Moral Rights: The Utility of an Ineffective Law’ (2004) 5 (30) *Indigenous Law Bulletin* 15, <http://www.austlii.edu.au/au/journals/ILB/2004/15.html>

Strait Islander Commission (ATSIC)¹⁸⁷ and the Australia Council.¹⁸⁸ However, the authenticity marks scheme collapsed, without much success.¹⁸⁹ The Federal Government has launched a regime for access to genetic resources.¹⁹⁰ A right of resale has also been introduced in Australia – which may be of benefit to Indigenous communities.¹⁹¹ 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.¹⁹²

In New Zealand, there have been dramatic developments in Indigenous intellectual property, with the Wai 262 decision handed down under the *Treaty of Waitangi* 1840.¹⁹³ In her book *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience*,¹⁹⁴ Jessica Christine Lai provides a thoughtful reflection upon the significance of the ruling:

The *Treaty of Waitangi* 1840 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. Vitality, 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.¹⁹⁵

¹⁸⁷ 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/> [archived]. The Conservative Federal Government proposed the abolition of the Commission in 2004.

¹⁸⁸ The Australia Council is the principal arts funding body in Australia: <http://www.australiacouncil.gov.au/>

¹⁸⁹ Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' (2004) 3 *Indigenous Law Journal* (University of Toronto) 139–179.

¹⁹⁰ Matthew Rimmer, 'Blame It On Rio: Biodiscovery, Native Title, and Traditional Knowledge' (2003) 7 *The Southern Cross University Law Review* 1–49.

¹⁹¹ *Resale Royalty Right for Visual Artists Act* 2009 (Cth). There has been debate, though, over whether the regime will continue under the Coalition Government: Raymond Gill, 'The Art of Money: Resale Royalties Feed Struggling Artists or "Rich Widows"?' *Crikey*, 9 April 2014, <http://dailyreview.crikey.com.au/the-art-of-money-resale-royalties-feed-struggling-artists-or-rich-widows/>

¹⁹² The Australian Government, *Indigenous Knowledge Consultation*, 2013, http://www.ipaustralia.gov.au/about-us/public-consultations/Indigenous_Knowledge_Consultation/

¹⁹³ The *Treaty of Waitangi* 1840, <http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi> and Claudia Orange, *The Treaty of Waitangi*, first published 1987, Bridget Williams Books 2011. The Wai 262 claim: Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (2011) [*Ko Aotearoa Tēnei*].

¹⁹⁴ Jessica Christine Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* Cham: Springer, 2014.

¹⁹⁵ *Ibid.*, 323.

Lai concluded that: 'As with all things Treaty-related, bringing the knowledge systems together will always be a question of partnership, proportionality and balance.'¹⁹⁶ 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*.'¹⁹⁷

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 of intellectual property and cultural heritage are being defined in New Zealand and Vanuatu.¹⁹⁸ 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.¹⁹⁹

Geismar 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.'²⁰⁰

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.²⁰¹ In particular, she has considered the position of Pacific Rim countries in the face of 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.²⁰² She has also explored whether the

¹⁹⁶ *Ibid.*, 323.

¹⁹⁷ *Ibid.*, 301.

¹⁹⁸ Haidy Geismar, *Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property*, Durham and London: Duke University Press, 2013.

¹⁹⁹ *Ibid.*, 215.

²⁰⁰ *Ibid.*, 215.

²⁰¹ Miranda Forsyth, 'Intellectual Property Pacific Islands', <http://www.ippacificislands.org/index.html>

²⁰² Miranda Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu*, Canberra, Australia: ANU ePress, 2009.

traditional knowledge and Indigenous intellectual property of Pacific Rim countries have been adequately protected from the risk of exploitation by third parties.²⁰³ In addition, she has highlighted how intellectual property raises larger public policy questions in the Pacific Rim about access to medicines and public health, food security,²⁰⁴ 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.²⁰⁵ Professor Danielle Conway from the University of Hawai'i has written about the need to safeguard Hawai'ian traditional knowledge and cultural heritage.²⁰⁶ She stresses that 'protection of Hawai'ian traditional knowledge and cultural heritage has to emanate from a sui generis system originating with Native Hawai'ians'.²⁰⁷ She has also discussed how Indigenous communities could benefit from the licensing of Indigenous intellectual property.²⁰⁸ She notes that 'Indigenous peoples have identified licensing as a reliable interim mechanism to promote, conserve, and benefit from the value of their article 31 indigenous assets and resources'.²⁰⁹ Danielle Conway has also addressed 'Indigenizing Intellectual Property Law'.²¹⁰ 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 refine Indigenous rights for the survival of Indigenous identity in a constantly evolving, globalizing, and resource hungry society'.²¹¹

Professor Debora Halbert – a political scientist at the University of Hawai'i – has also undertaken a great deal of work on the politics of intellectual property.²¹² In her

²⁰³ Miranda Forsyth, 'Lifting the Lid on "the Community": Who has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' (2012) 19 *International Journal of Cultural Property* 1–31; Miranda Forsyth, 'How Can Traditional Knowledge Best be Regulated? Comparing a Proprietary Approach with a Regulatory Toolbox Approach' (2013) 25 (1) *The Contemporary Pacific* 1–31; and Miranda Forsyth, 'The Traditional Knowledge Movement in the Pacific Island Countries: The Challenge of Localism' (2011) 29 (3) *Prometheus* 269–286.

²⁰⁴ Miranda Forsyth and Sue Farran, 'Intellectual Property and Food Security in Least Developed Countries', (2013) 34 (3) *Third World Quarterly* 516–533.

²⁰⁵ The Bernice Pauahi Bishop Museum, <http://www.bishopmuseum.org/>

²⁰⁶ Danielle Conway, 'Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Recognizing the Right to Self-Determination and Preventing the Commodification of Culture' (2005) 48 *Howard Law Journal* 737–762.

²⁰⁷ *Ibid.*, 762.

²⁰⁸ Danielle Conway, 'Promoting Indigenous Innovation, Enterprise, and Entrepreneurship through the Licensing of Article 31 Indigenous Assets and Resources' (2011) 64 *SMU Law Review* 1095–1126.

²⁰⁹ *Ibid.*, 1125.

²¹⁰ Danielle Conway, 'Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources' (2008) *Texas Wesleyan Law Review* 207–256.

²¹¹ *Ibid.*, 256.

²¹² Debora Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership*, Westport (CT): Praeger, 1999; Debora Halbert, *Resisting Intellectual Property*, London and New York: Routledge, 2005; and Debora Halbert, *The State of Copyright: The*

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:

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.²¹³

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’.²¹⁴ 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.²¹⁵

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 2014.²¹⁶ 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, trademark 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 concerning intellectual property, cultural heritage, and Indigenous rights, particularly in respect of museums and cultural institutions.²¹⁷ The Anchorage Museum – in collaboration with

Complex Relationships of Cultural Creation in a Globalized World, London and New York: Routledge, 2014.

²¹³ Debora Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World*, London and New York: Routledge, 2014, 144.

²¹⁴ *Ibid.*, 144.

²¹⁵ *Ibid.*, 144.

²¹⁶ The American Washington University College of Law, ‘Traditional Knowledge, Intellectual Property, and Federal Policy’, 21 March 2014, <http://www.pijip.org/events/cb2014/>

²¹⁷ Smithsonian National Museum of the American Indian, <http://www.nmai.si.edu/>

the Smithsonian Institution – has provided hundreds of indigenous Alaska artefacts for ‘hands-on study by Alaska native elders, artists, and scholars’.²¹⁸

In his work as an author and editor, Christoph Antons has surveyed traditional knowledge, traditional cultural expressions, and intellectual property in the Asia-Pacific region.²¹⁹ He has investigated the relationship between traditional knowledge, intellectual property, and cultural heritage in Southeast Asia.²²⁰ 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.²²¹ He has particularly engaged in significant empirical research in respect of Indonesia, and the protection of Indigenous intellectual property.²²²

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.²²³ 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 knowledge.’²²⁴ In his fieldwork, Daniel Robinson has focused in particular upon Thailand, and more broadly, South East Asia.²²⁵

²¹⁸ Anchorage Museum, ‘Smithsonian Arctic Studies Center’, <https://www.anchorage-museum.org/about-us/museum-spaces/smithsonian-arctic-studies-center/>

²¹⁹ Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Austin, Boston, Chicago, New York and the Netherlands: Kluwer International, 2009.

²²⁰ Christoph Antons, ‘At the Crossroads: The Relationship Between Heritage and Intellectual Property in Traditional Knowledge Protection in Southeast Asia’ (2013) 29 (1) *Law in Context* 74–94.

²²¹ Christoph Antons, ‘Geographies of Knowledge: Cultural Diffusion and the Regulation of Heritage and Traditional Knowledge/Cultural Expressions in Southeast Asia’ (2012) 4 (1) *WIPO Journal* 83–91; and Christoph Antons, ‘Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions’ (2012) 47 (4) *Modern Asian Studies* 1403–1433.

²²² Christoph Antons, *Intellectual Property Law in Indonesia*, The Hague, London and Boston: Kluwer Law International, 2000; and Christoph Antons (ed.), *Law and Development in East and Southeast Asia*, London and New York: Taylor & Francis, 2003.

²²³ Daniel Robinson, *Confronting Biopiracy: Cases, Challenges and International Debates*, London: Routledge/Earthscan (UK), 2010.

²²⁴ *Ibid.*, xiii.

²²⁵ Jakkrit Kuanpoth and Daniel Robinson, ‘Geographical Indications Protection: The Case of Thailand and Jasmine Rice’ (2009) 3 *Intellectual Property Quarterly* 288–310; Daniel Robinson and Jakkrit Kuanpoth, ‘The Traditional Medicines Predicament: A Case Study of Thailand’ (2009) 11 (5/6) *Journal of World Intellectual Property* 375–403; and Daniel Robinson, ‘Legal Geographies of Intellectual Property, “Traditional” Knowledge and Biodiversity: Experiencing Conventions, Laws, Customary Law, and Karma in Thailand’ (2013) 51 *Geographical Research* 375–386.

Vandana Shiva is a prominent figure in debates over intellectual property, farmers' rights, and Indigenous knowledge in India.²²⁶ 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.²²⁷ Her fear is that intellectual property law facilitates the problem of biopiracy: 'Paradoxically, then, a legal system aimed at preventing "intellectual piracy" is itself based on legitimizing piracy.'²²⁸ Shiva has maintained that 'this diversity of knowledge needs to be recognised and respected, and a pluralistic IPR regime needs to be evolved which makes it possible to recognise and respect indigenous knowledge, and protect the indigenous knowledge systems and practices and livelihoods based on it'.²²⁹ 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 catastrophe and human brutalization we face into an opportunity to reclaim our humanity and our future.'²³⁰

In the European Union, there has been debate over the application of the *European Biotechnology Directive* in respect of controversies over traditional knowledge.²³¹ There has also been a push for the implementation of the *Nagoya Protocol*,²³² and there has been much discussion as to how the regime will impact upon Indigenous rights.²³³ There has also been 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.²³⁴ Professor Silke von Lewinski is one of the leading European researchers in Indigenous

²²⁶ Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge*, Boston (MA): South End Press, 1999.

²²⁷ Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, London and New York: Zed Books, 2002.

²²⁸ *Ibid.*, 18.

²²⁹ *Ibid.*, 51.

²³⁰ Vandana Shiva, *Soil Not Oil: Climate Change, Peak Oil and Food Insecurity*, London and New York: Zed Books, 2008, 8.

²³¹ *European Parliament Directive 98/44/EC of the European Parliament and of the Council on the Legal Protection of Biotechnological Inventions* [1998] OJ (L 213) 13, art 6(1) ('*European Biotechnology Directive*').

²³² European Parliament, 'Biopiracy: Protecting Genetic Resources in Developing Countries', *European Parliament News*, 14 January 2013, <http://www.europarl.europa.eu/news/en/news-room/content/20121203STO04309/html/Biopiracy-protecting-genetic-resources-in-developing-countries> and *European Parliament Legislative Resolution of 11 March 2014 on the Proposal for a Regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0193>

²³³ Catherine Saez, 'EU Legislation on Nagoya Protocol Becomes Effective: What Effect on Indigenous Peoples' Rights', *Intellectual Property Watch*, 14 October 2014, <http://www.ip-watch.org/2014/10/14/eu-legislation-on-nagoya-protocol-becomes-effective-will-it-hurt-indigenous-peoples-rights/>

²³⁴ Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge*, Aldershot: Ashgate Publishing, 2005.

intellectual property. She has edited a significant collection on *Indigenous Heritage and Intellectual Property*.²³⁵

There has been significant debate about access to knowledge,²³⁶ medicines,²³⁷ and clean technologies,²³⁸ as well as the protection of Indigenous intellectual property,²³⁹ 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.²⁴⁰

In South Africa, there has been an extensive debate over the *Intellectual Property Laws Amendment Act 2013 (SA)*.²⁴¹ In February 2014, Minister of Trade and Industry Rob Davies emphasised 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.²⁴²

Linda Daniels noted for *Intellectual Property Watch* that the legislation remained hotly contested in South Africa.²⁴³ 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

²³⁵ Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Heritage: Genetic Resources, Traditional Knowledge, and Folklore*, New York and The Hague: Kluwer Law International, 2008.

²³⁶ On access to knowledge, see Chris Armstrong, Jeremy de Beer, Dick Kawooya, Achal Prabhala and Tobias Schonwetter (eds), *Access to Knowledge in Africa: The Role of Copyright*, Claremont: UCT Press, 2010, http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf; and Jeremy de Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter (eds), *Innovation & Intellectual Property: Collaborative Dynamics in Africa*, Claremont: UCT Press, 2013.

²³⁷ Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Incentives for Global Public Health: Patent Law and Access to Medicines*, Cambridge: Cambridge University Press, 2010.

²³⁸ Matthew Rimmer, *Intellectual Property and Climate Change: Inventing Clean Technologies*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, September 2011.

²³⁹ *African Group Proposal on the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*, WIPO/GRTKF/IC/13/9 18 September 2008, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109232

²⁴⁰ *Ibid.*

²⁴¹ *Intellectual Property Laws Amendment Act 2013 (SA)*, http://www.ip-watch.org/weblog/wp-content/uploads/2014/02/SA-TK-Act-37148_gon996_act28-2013.pdf

²⁴² Department of Trade and Industry, Republic of South Africa, 'President Jacob Zuma signs the Intellectual Property Amendment Bill into Law', 9 February 2014, <http://www.dti.gov.za/editmedia.jsp?id=2989>

²⁴³ Linda Daniels, 'South African Traditional Knowledge Protection Bill Amends IP Laws', *Intellectual Property Watch*, 19 February 2014, <http://www.ip-watch.org/2014/02/19/south-african-traditional-knowledge-protection-bill-amends-ip-laws/>

knowledge instead of others.²⁴⁴ 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 of Indigenous intellectual property.²⁴⁵ The operation of the new regime for the 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* 2010, 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.’²⁴⁶ The global governance of Indigenous intellectual property has been a fraught affair.²⁴⁷

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

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 fora where those who will be most directly affected have no representation.²⁴⁸

²⁴⁴ Ibid.

²⁴⁵ Owen Dean, ‘Unveiling the Wolf’, Stellenbosch University, 11 February 2014, <http://blogs.sun.ac.za/iplaw/2014/02/11/unveiling-the-wolf/>

²⁴⁶ Kathy Bowrey, ‘Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights’, in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property*, Oxford: Oxford University Press, 2011, 46–67 at 56.

²⁴⁷ Chidi Oguamanam, *Intellectual Property in Global Governance*, London and New York: Routledge, 2012.

²⁴⁸ *The Bellagio Declaration*, reproduced in James Boyle, *Shamans, Software, and Spleens: The Construction of The Information Society*, Cambridge (MA) and London: Harvard University Press, 1996, 193.

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’.²⁴⁹ *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.’²⁵⁰ *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 works; the protection of works of cultural heritage; and the protection of the biological and ecological “know-how” of traditional peoples’.²⁵¹

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.²⁵² Melissa Castan provides an excellent account of the ensuing debate over the regime.²⁵³ 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.²⁵⁴

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

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* 2007.²⁵⁵ Jennifer Hartley, Paul Joffe and Jennifer Preston have contended that the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 is a powerful symbol of triumph and hope:

²⁴⁹ Ibid., 193.

²⁵⁰ Ibid., 193.

²⁵¹ Ibid., 194.

²⁵² *United Nations Declaration on the Rights of Indigenous Peoples* 2007, Adopted by General Assembly Resolution 61/295 on 13 September 2007.

²⁵³ Melissa Castan, ‘DRIP Feed: The Slow Reconstruction of Self-determination for Indigenous Peoples’, in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law*, Cheltenham, (UK) and Northampton (MA): Edward Elgar Publishing, 2010, 492–511.

²⁵⁴ Ibid., 492.

²⁵⁵ Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, Saskatoon (SK): Purich Publishing Limited, 2010.

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.²⁵⁶

In particular, the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 provides a framework for the protection of Indigenous intellectual property.

In 2013, the United Nations Secretary-General Ban Ki-Moon emphasised that the Declaration should inform future developments in international law.²⁵⁷ He highlighted 'the importance of honouring treaties, agreements and other constructive arrangements between States, their citizens and Indigenous peoples'.²⁵⁸ He also stressed that: 'Such consensual arrangements enable better understanding of [Indigenous people's] 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.'²⁵⁹ 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 also 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.'²⁶⁰ 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.'²⁶¹ 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'.²⁶²

²⁵⁶ Jackie Hartley, Paul Joffe and Jennifer Preston, 'From Development to Implementation: An Ongoing Journey', in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, Saskatoon (SK): Purich Publishing Limited, 2010, 12–16 at 12.

²⁵⁷ Ban Ki-Moon, 'Post-2015 Agenda Must Incorporate Rights, Perspectives, Needs of Indigenous Peoples', International Day of the World's Indigenous Peoples, 9 August 2013, <http://www.un.org/News/Press/docs/2013/sgsm15203.doc.htm>

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² 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.²⁶³

Gurry also stated 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.²⁶⁴

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'.²⁶⁵

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' greater protection under international intellectual property regimes.²⁶⁶ However, there remain deep divisions between member states over whether there should be a binding instrument, and, if so, what its contents should be.²⁶⁷ The World Intellectual Property Organization has also developed a database of laws and regulations on traditional cultural expressions and traditional knowledge throughout the world.²⁶⁸

²⁶³ Francis Gurry, 'Message from WIPO Director General on the Occasion of the International Day of the World's Indigenous Peoples', World Intellectual Property Organization, Geneva: 9 August 2013, http://www.wipo.int/tk/en/news/tk/2013/news_0003.html

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Catherine Saez, 'Interviews: What Protection of Traditional Knowledge Means to Indigenous Peoples', *Intellectual Property Watch*, 20 August 2013, <http://www.ip-watch.org/2013/08/20/interviews-what-protection-of-traditional-knowledge-means-to-indigenous-peoples/>

²⁶⁷ Catherine Saez, 'WIPO TK Committee Chair Adjourns Session Abruptly, Demands Clear Positions', *Intellectual Property Watch*, 24 March 2014, <http://www.ip-watch.org/2014/03/24/wipo-tk-committee-chair-adjourns-session-abruptly-demands-clear-positions/>; and Catherine Saez, 'Revised Text on TK Protection on its Way to WIPO Assembly', *Intellectual Property Watch*, 30 March 2014, <http://www.ip-watch.org/2014/03/30/revised-text-on-tk-protection-on-its-way-to-wipo-assembly/>

²⁶⁸ World Intellectual Property Organization, Traditional Knowledge & Traditional Cultural Expressions Laws, <http://www.wipo.int/tk/en/databases/tklaws/>

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* 1994.²⁶⁹ 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’.²⁷⁰ He further observes that there has 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).²⁷¹

Taubman suggests that:

These 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.²⁷²

Moreover, he comments 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: ‘For many traditional communities and indigenous peoples, it is artificial or even offensive to split these aspects of their holistic intellectual and cultural heritage into separate categories.’²⁷³

Antony Taubman comments 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 says that it could involve ‘more effective use of existing mechanisms to protect communities’ interests’.²⁷⁴ He gives examples such as protecting traditional knowledge-based products through geographical indications, trademarks and certification and collective marks; protecting traditional cultural expressions through copyright and

²⁶⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (*Agreement on Trade-related Aspects of Intellectual Property Rights* – *TRIPS Agreement* 1994). For a summary of the debate, see Justin Malbon, Charles Lawson, and Mark Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property: A Commentary*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2014, 390–402

²⁷⁰ Antony Taubman, *A Practical Guide to Working with TRIPS*, Oxford: Oxford University Press, 2011, 185.

²⁷¹ *Ibid.*, 185.

²⁷² *Ibid.*, 185.

²⁷³ *Ibid.*, 185.

²⁷⁴ *Ibid.*, 189.

performers' rights; and providing grounds for opposition to contentious patents, which claim inventions based on traditional knowledge and genetic resources. Second, he notes that another range of policy responses involved 'adapting the existing principles of intellectual property law and extending their effect to respect more effectively community interests'.²⁷⁵ He emphasises that examples include 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 involves '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'.²⁷⁶ The TRIPS Council has debated these possibilities.

Professor Daniel Gervais has promoted a TRIPS-compatible approach to intellectual property and traditional knowledge.²⁷⁷ 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*.²⁷⁸

The *Convention on Biological Diversity* 1992 has provided for significant recognition of traditional knowledge.²⁷⁹ Article 8 (j) of the *Convention on Biological Diversity* 1992 stipulates:

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 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 the extent to which such aspirations about the protection of Indigenous knowledge have been realised. The interests of Indigenous

²⁷⁵ Ibid., 189.

²⁷⁶ Ibid., 189.

²⁷⁷ Daniel Gervais, 'Traditional Knowledge and Intellectual Property: A TRIPS-Compatible Approach' (2005) *Michigan State Law Review* 137–166.

²⁷⁸ *Agenda 21: Programme of Action for Sustainable Development*, A/CONF 151/26, I, II, III, Rio de Janeiro, 3–14 June 1992 ('Agenda 21'); *The Future We Want*, UN Doc A/RES/66/288 (11 September 2012); Pamela Chasek and Lynn Wagner (eds), *The Roads from Rio: Lessons Learned from Twenty Years of Multilateral Environmental Negotiations*, New York and London: Routledge, 2012; and Felix Dodds, Jorge Laguna-Celis and Liz Thompson, *From Rio+20 to a New Development Agenda: Building a Bridge to a Sustainable Future*, New York and London: Routledge, 2014.

²⁷⁹ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 U.N.T.S. 79 (entered into force 29 December 1993).

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.²⁸⁰

There are also larger issues about the position of Indigenous communities under the *United Nations Framework Convention on Climate Change* 1992.²⁸¹ Randall Abate and Elizabeth Ann Kronk have edited a collection on *Climate Change and Indigenous Peoples: The Search for Legal Remedies*.²⁸² 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.²⁸³

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.'²⁸⁴

²⁸⁰ *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').

²⁸¹ *United Nations Framework Convention on Climate Change* 1992, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); *Kyoto Protocol to the United Nations Framework Convention on Climate Change* 1997, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) ('*Kyoto Protocol*'); *Durban Decisions* 2011, CP.17, http://unfccc.int/meetings/durban_nov_2011/meeting/6245/php/view/decisions.php; *Copenhagen Accord* 2009, UN Doc. FCCC/KP/CMP/2009/L.9 (December 18, 2009); *Cancún Agreements* 2010, *Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, CP.16, http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf; and *Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Fifteenth Session, -/CMP.6*, http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_kp.pdf; *Doha Climate Gateway* 2012, COP. 18/CM 18, https://unfccc.int/key_steps/doha_climate_gateway/items/7389.php; and the *Warsaw Opportunity* 2013, CP. 19, http://unfccc.int/meetings/warsaw_nov_2013/meeting/7649.php

²⁸² Randall Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2013.

²⁸³ Randall Abate and Elizabeth Ann Kronk, 'Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and its Impacts on Indigenous Peoples', in Randall Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2013, 1–18 at 18.

²⁸⁴ *Ibid.*, 18.

Naomi Klein is 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’.²⁸⁵ Naomi Klein, though, recognises that 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’.²⁸⁶ 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’.²⁸⁷ 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.²⁸⁸

Activist, Martin Lukacs, had hoped that ‘implementing Indigenous rights on the ground, starting with the *United Nations Declaration on the Rights of Indigenous Peoples* 2007, could tilt the balance of stewardship over a vast geography: giving Indigenous peoples much more control, and corporations much less’.²⁸⁹ He suggests that in Canada, ‘[s]ustained 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’.²⁹⁰ Naomi Klein highlights a number of collaborative efforts at activism – such as the ‘Honour the Treaties’ tour with Neil Young,²⁹¹ and the Cowboy and Indian Alliance.²⁹²

In the 2013 *Declaration on Climate Justice*, Mary Robinson emphasised: ‘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

²⁸⁵ Naomi Klein, *This Changes Everything: Capitalism vs The Climate*, New York: Simon & Schuster, 2014, 370.

²⁸⁶ *Ibid.*, 378.

²⁸⁷ *Ibid.*, 370.

²⁸⁸ *Ibid.*, 377.

²⁸⁹ *Ibid.*, 383.

²⁹⁰ *Ibid.*, 383.

²⁹¹ *Ibid.*, 383.

²⁹² *Ibid.*, 318–323.

before.²⁹³ 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’.²⁹⁴

There has also been discussion of Indigenous intellectual property in the context of international labour law.²⁹⁵

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.²⁹⁶ She acknowledges 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’.²⁹⁷ 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.²⁹⁸

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.’²⁹⁹ She laments that this ‘opportunity seems to have been, and continues to be missed’.³⁰⁰ 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 over the protection of traditional knowledge in multilateral fora other than the WTO, such as WIPO.’³⁰¹

The *World Conference on Indigenous Peoples 2014* also highlighted the importance of Indigenous intellectual property, informed consent and benefit-sharing.³⁰² The outcome document noted: ‘We recognize that the traditional knowledge, innovations

²⁹³ Mary Robinson Foundation on Climate Justice, *Declaration on Climate Justice*, September 2013, <http://www.mrfcj.org/news/2013/declaration-climate-justice.html>

²⁹⁴ *Ibid.*

²⁹⁵ *International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries*, Adoption: Geneva, 76th ILC session (27 Jun 1989) (ILO Convention 169) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312252

²⁹⁶ Susy Frankel, ‘Attempts to Protect Indigenous Culture Through Free Trade Agreements’, in Christoph Graber, Karolina Kuprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2012, 118–143.

²⁹⁷ *Ibid.*, 142.

²⁹⁸ *Ibid.*, 142.

²⁹⁹ *Ibid.*, 142.

³⁰⁰ *Ibid.*, 142.

³⁰¹ *Ibid.*, 142–143.

³⁰² *World Conference on Indigenous Peoples 2014*, <http://www.un.org/en/ga/69/meetings/indigenous/#&panel1-1>

and practices of indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity.³⁰³ The outcome document stressed: ‘We acknowledge the importance of the participation of indigenous peoples, wherever possible, in the benefits of their knowledge, innovations and practices.’³⁰⁴

There has been a great deal of controversy over the *Trans-Pacific Partnership*.³⁰⁵ 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.³⁰⁶ 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 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 emphasised 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* –

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Wellington: Bridget Williams Books Inc., 2010; Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2013; C.L. Lim, Deborah Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement*, Cambridge: Cambridge University Press, 2012; and Jane Kelsey, *Hidden Agendas: What We Need to Know about the Trans-Pacific Partnership Agreement (TPPA)*, Wellington: Bridget Williams Books Limited, 2013.

³⁰⁶ WikiLeaks, ‘Secret Trans-Pacific Partnership Agreement: The IP Chapter’, 13 November 2013, <https://wikileaks.org/tpp/> and WikiLeaks, ‘Updated Secret Trans-Pacific Partnership Agreement: IP Chapter’, 16 October 2014, <https://wikileaks.org/tpp-ip2/>; WikiLeaks, ‘TPP Treaty: Intellectual Property Rights Chapter’, 5 October 2015, <https://wikileaks.org/tpp-ip3/>

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*.³⁰⁷ Saiki 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 a placeholder, to be reconsidered depending 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.³⁰⁸

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.'³⁰⁹ 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'.³¹⁰

Ariel Bogle has wondered whether the *Trans-Pacific Partnership* will make the problem of biopiracy worse in the Pacific Rim.³¹¹ The final text of the Intellectual Property chapter of the *Trans-Pacific Partnership* only has weak language on co-operation in respect of Indigenous intellectual property and traditional knowledge. Maori communities have mounted a challenge to the *Trans-Pacific Partnership* under the *Treaty of Waitangi* 1840.³¹²

OUTLINE OF THE BOOK

In light of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007, this volume considers the international struggle to provide for proper, just protection of Indigenous intellectual property. Leading scholars from throughout the world explore and map legal and policy controversies over Indigenous knowledge in the fields of

³⁰⁷ Arnie Saiki, 'What's in the Leaked TPP Chapter? Indigenous Peoples, Intellectual Property, and the Secret Negotiations over the TPP', *Hawaii Independent*, 21 November 2014, <http://hawaiiindependent.net/story/whats-in-the-leaked-tpp-chapter>

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ariel Bogle, 'TPP Trade Agreement Could Make Biopiracy Worse', *Slate*, 6 December 2013, http://www.slate.com/blogs/future_tense/2013/12/06/tpp_trade_agreement_could_make_bio_piracy_problem_worse.html

³¹² TPP Legal, 'Waitangi Tribunal Claim', 23 August 2015, <https://tpplegal.wordpress.com/2015/08/23/waitangi-tribunal-claim/>

international law, copyright law, trademark law, patent law, trade secrets law and cultural heritage. This collection examines national developments in Indigenous intellectual property in the United States, Canada, South Africa, the European Union, Australia, New Zealand and Indonesia. As well as examining the historical origins of conflicts over Indigenous knowledge, the volume examines new challenges to Indigenous intellectual property from emerging developments in information technology, biotechnology and climate change.

Part One of the collection considers international legal debate in respect of Indigenous intellectual property. The scholarly chapters attest to the fragmented state of international law.

In Chapter 1, Mauro Barelli from City University London explores the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 as a human rights framework for Indigenous intellectual property. In Chapter 2, Professor Tania Voon of the University of Melbourne examines the World Trade Organization, the *TRIPS Agreement* 1994, and the protection of traditional knowledge. In Chapter 3, Dr Sara Bannerman from McMaster University explores the debate in the World Intellectual Property Organization over the protection of traditional knowledge, traditional cultural expressions and genetic resources. In Chapter 4, Dr Matthew Rimmer considers the World Indigenous Network established at the Rio+20 meeting. He charts the interconnections between intellectual property, Indigenous knowledge and sustainable development.

Part Two of the collection examines the role of copyright law in the protection of Indigenous art and culture. In Chapter 5, Dr Stephen Gray of Monash University provides a magnificent history of early Australian battles in respect of Indigenous intellectual property. His chapter, 'Government man, government painting?' considers the controversy sparked by David Malangi and the 1966 one-dollar note. In Chapter 6, Martin Hardie provides an account of key copyright battles over Indigenous art in the 1990s from his personal perspective as a solicitor. In Chapter 7, solicitor Terri Janke considers the question of Indigenous film-making in her piece, 'Avatar dreaming: Indigenous cultural protocols and making films using Indigenous content'. As a case study, she explores the blockbuster James Cameron film, *Avatar*, and the legal battles over the ownership of the film, as well as the cultural disputes over the representation of Indigenous people and communities in the film. In Chapter 8, Robert Dearn and Matthew Rimmer relate the history of the Australian resale right for visual artists, and its impact upon Indigenous artists and communities.

Part Three of the collection explores the role of trademark law and related rights in respect of the protection of Indigenous culture. In Chapter 9, Professor Maree Sainsbury of the University of Canberra focuses upon Indigenous cultural expression and registered designs. In Chapter 10, Professor Rebecca Tushnet from Georgetown University provides a critical examination of the *Indian Arts and Crafts Act* of 1990 (US) in the United States. She highlights the strengths and limitations of analogies with trademark law. In Chapter 11, Sarah Rosanowski, a New Zealand lawyer, provides a survey of the protection of traditional cultural expressions within the New Zealand intellectual property framework. She offers as a case study the controversy of the use and misuse of the *Ka Mate* haka. In Chapter 12, Professor William van Caenegem of Bond University provides a critical evaluation of geographical indications and Indigenous intellectual property. A comparative scholar of both European and Australian law,

van Caenegem examines the unique features of appellations of origin, geographical indications and protected designations of origin.

Part Four of the collection examines patent law, science and Indigenous knowledge. In particular, it highlights the legal and ethical dimensions of scientific communities in agriculture, medicine and the environment engaging with Indigenous communities. In Chapter 13, Chidi Oguamanam from the University of Ottawa explores battles over Indigenous intellectual property and the patent system. In Chapter 14, Achmad Gusman Siswandi considers the *Nagoya Protocol* 2010 and its implications for informed consent, access to genetic resources and benefit-sharing. He focuses upon Indonesia – a country rich in marine and terrestrial biodiversity. In Chapter 15, Angela Daly from Swinburne University considers the battles over legislating on biopiracy in the European Union. In Chapter 16, Dr Matthew Rimmer examines the conflicts over intellectual property, Indigenous knowledge and climate change in a number of international institutions – including the World Trade Organization, the World Intellectual Property Organization, and the international climate forums.

Part Five of the Research Handbook considers the politics of identity and reputation. In Chapter 17, Dr Sarah Holcombe explores the application of confidential information in the field of anthropology to Indigenous knowledge. There is a history of legal conflict in respect of confidential information.³¹³ Holcombe highlights the complexities of the protection of confidential information in a digital era. In Chapter 18, Dr Judith Bannister of Adelaide University charts the protection of Indigenous cultural heritage in Australia. She highlights the relationship between intangible and tangible cultural property. In Chapter 19, Bruce Arnold of the University of Canberra considers the importance of privacy. He explores issues of dignity, trust and identity in the context of Indigenous intellectual property. Chapter 20 by Associate Professor David Rolph of the University of Sydney considers racial discrimination laws as a means of protecting collective reputation and identity.

Part Six of the collection explores a number of regional developments in Indigenous intellectual property. In Chapter 21, Dr Fleur Adcock of the National Centre for Indigenous Studies provides a critical analysis of the Wai 262 report on Māori Indigenous intellectual property and environmental resources. In Chapter 22, Professor Jeremy de Beer of the University of Ottawa and Daniel Dylan highlight traditional knowledge challenges in Canada. In Chapter 23, Dr Caroline Ncube of the University of Cape Town investigates the intellectual property of traditional knowledge and access to knowledge in South Africa. The final chapter by Dr Brendan Tobin of Griffith University looks at traditional sovereignty. In particular, the work highlights the fundamental role of customary law in the protection of traditional knowledge.

In its rich diversity and complexity, this collection maps and charts the past, present and future of Indigenous intellectual property. The volume will provide further impetus for law reform in this field to promote the greater recognition and protection of Indigenous intellectual property.

³¹³ *Foster v. Mountford* (1976) 29 FLR 233; and *Pitjantjatjara Council Inc and Peter Nguningu v. Lowe* (1982).