

# SHAKING THE SKELETON OF PRINCIPLE: TEACHING INDIGENOUS LEGAL ISSUES IN INTELLECTUAL PROPERTY LAW

STEPHEN GRAY\*

## Introduction

While the precise boundaries of the cultural products protected by intellectual property laws have always been subject to debate, students of the subject tend to learn a culturally specific and arguably potentially misleading set of concepts for identifying protectable material. Thus, students are told about the balance in intellectual property law between the interests of creators, competitors and the general public; about the free rider principle; and about the origins of modern intellectual property law in the European Enlightenment, with its privileging of the notion of originality and its emphatic emphasis upon the free circulation of ideas. Students might be told that the ‘content’ of intellectual property is largely ‘familiar’, but that it is ‘exceedingly difficult to define’. No abstract definition being possible, the lecturer might move on to a list of protected categories — copyright, designs, patents, and trademarks being those generally discussed at greatest length.<sup>1</sup>

This set of concepts is potentially misleading in part because it fails to recognise sufficiently the extent to which these principles — the ‘skeleton’ of intellectual property law, to adopt Brennan J’s characterisation of the capacity of the common law to adapt to changing circumstances in the decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo’*)<sup>2</sup> — are flexible in practice. In fact, students learn about this very flexibility as they progress with their course. When they learn about copyright protection for computer programs, for example, they learn that the ‘idea-expression dichotomy’ — according to which

---

\* Senior Lecturer, Faculty of Law, Monash University.

<sup>1</sup> Generally, the term ‘intellectual property’ refers at its broadest to the ‘various intangible subject matters protected under a loose collection of legal titles’. In Australia, the main intellectual property regimes are the *Copyright Act 1968* (Cth), the *Designs Act 2003* (Cth), the *Patents Act 1990* (Cth), and the *Trade Marks Act 1995* (Cth), as well as various *sui generis* statutory regimes: see for example discussion in Sam Ricketson, Megan Richardson and Mark Davison, *Intellectual Property: Cases, Materials and Commentary* (Lexis Nexis, 4<sup>th</sup> ed, 2009) 3-5.

<sup>2</sup> ‘However, recognition by our common law of the rights and interests in land of the Indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system’: *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29 (Brennan J). In *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513, Von Doussa J commented on an argument that a right of ownership arose in artistic works and copyright attaching to them as an aspect of native title. He suggested that ‘[t]he principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as ‘skeletal’ and stand in the road of acceptance of the foreshadowed argument’ (at 524).

copyright law will only protect the expression of an idea, not the idea in itself — is not as immutable as it first appears. In addition, the definition of ‘computer program’ in the *Copyright Act 1968* (Cth) was amended in 2000 with the clear purpose of protecting these literary works regardless of whether a court could characterise them as the ‘expression’ of an idea.<sup>3</sup> Moreover, the definition of ‘material form’ has been amended several times with the clear purpose of overcoming any difficulties computer software creators might face with the arguably non-material nature of electronic storage of information.<sup>4</sup> While students are likely to read about these changes, they are less likely to learn about the policy debates surrounding the changes, let alone have space to debate the broader implications of such changes for the ‘skeleton of principle’ of Australian copyright law.

In part, also, this traditional set of concepts is potentially misleading because it fails to appreciate sufficiently the very different ways many non-Western people, and particularly Indigenous people, perceive the notion of intellectual and cultural property. Most intellectual property courses contain little discussion of what the notion of ‘intellectual property’ might mean outside a Western legal context. A well-regarded and relatively recent definition of ‘Indigenous cultural and intellectual property’ includes ‘indigenous ancestral remains, sacred indigenous sites, and ‘cultural environmental resources’ such as minerals and species and even languages as far as they are relevant for ‘cultural identity, knowledge, skill and the teaching of culture’.<sup>5</sup> Such definitions contrast vividly with Western law’s more usual, and restrictive, categorisation of the notion of intellectual property.

I do not mean to argue that the ‘skeleton of principle’ — in the context of copyright, most notably the material form requirement, the idea-expression

---

<sup>3</sup> The definition in s 10(1) *Copyright Act* (inserted in the year 2000) now defines a ‘computer program’ to mean ‘a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.’ Contrast this with the old (post-1984) definition, according to which a computer program was ‘an expression, in any language, code or notation, of a set of instructions, intended... to cause a device having digital information processing capabilities to perform a certain function’. The post-2000 definition is now clearly intended to protect the *function* and no longer only the ‘expression’ of an idea.

<sup>4</sup> The definition in s 10(1) *Copyright Act* now states that ‘material form’, in relation to a work or an adaptation of a work, includes ‘any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)’.

<sup>5</sup> See Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (AITSIS publications, 1998) 11-12. See also ATSIIC Submission to the Public Inquiry into Access to Biological Resources, ‘Indigenous Rights and Interests in Biological Resources and Biodiversity’ (March 2000), 9: ‘For Indigenous people, rights and interests in biological resources must include recognition of their rights in ownership, as well as rights regarding access... rights in biological resources are necessarily linked to rights in land. Any consideration of property rights in biological and genetic resources must also have thorough regard to the nature and extent of rights and interests in land: especially Indigenous rights and interests.’

dichotomy, and the originality requirement — should not be taught. Rather, I suggest that students' understanding of the policy foundations of these principles, as well as of their potential for change, might be challenged and enlivened by greater consideration of the debates surrounding Indigenous cultural and intellectual property rights. This is likely to lead students to ask why the legislature has been prepared to introduce such far-reaching changes to the law at the behest of the computer software industry, while being entirely unprepared to entertain changes at the behest of Indigenous peoples.<sup>6</sup> The 'skeleton of principle' is entirely rigid at some points, it seems, while in others, it has proved remarkably capable of bending with the political wind.

How might this material be introduced to students? One way to do this is to use case studies in which Indigenous people have — sometimes indirectly, and without always articulating it in these terms — challenged the foundations of Australian intellectual property law. These cases illustrate the historical and cultural contingency of the boundaries thrown by Western law around the notion of intellectual property. They highlight the political nature of the choice made at a certain important moment in Western European cultural history — coinciding roughly with the Enlightenment, and the notion of individual rights—to protect the 'original expression' of ideas by individual authors. This sets the scene for the challenges posed in various fields of IP protection — well beyond the field of Indigenous cultural or intellectual property rights — to these ideas today.

I will briefly consider several such case studies. They will mainly concern copyright law — although, it should be noted, Indigenous concerns have extended beyond the boundaries of copyright law into patents and trademarks, as well as trade practices, confidential information and moral rights.<sup>7</sup>

---

<sup>6</sup> A proposal to introduce a system of Indigenous communal moral rights was introduced by the then Federal Government in 2003: see the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*. The Bill was never tabled and ultimately lapsed: see, for example, Jane Anderson, 'Indigenous Communal Moral Rights: the Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8. For a more recent discussion of the policy failures of governments and academics on this issue, see Marie Hadley, 'Lack of political will or academic inertia?: the need for non-legal responses to the issue of Indigenous art and copyright', (2009) 34(3) *Alternative Law Journal*, 152. Further recent references on these issues include the following: Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices', (2006) 6 *Macquarie Law Journal* 80; Michael Davis, 'Indigenous Knowledge: Beyond Protection, Towards Dialogue' (2008) 37 *Australian Journal for Indigenous Education* 31; Jane Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing Ltd 2009); and Erin Mackay, 'Indigenous Traditional Knowledge, Copyright and Art: Shortcomings in Protection and an Alternative Approach' (2009) 32(1) *UNSW Law Journal* 1.

<sup>7</sup> See generally the 'Special issue: Intellectual Property and Indigenous Culture' (2000) 9(2) *Griffith Law Review*.

### **Case study 1: Bromley the Culturally Insensitive Bear: Intellectual property and Indigenous cultural values**

In the late 1990s, children's authors Alan and Patricia Campbell published a book called *Bromley the Bear*, about a teddy bear who climbed Uluru. Bromley enlisted the help of a snake and a bad-tempered, cantankerous camel — Cranky Clive — in order to make the climb. When Bromley finally got to the top, feeling rather brave, he walked off to explore, hoping to find something big. What he found was trouble. In real life, too, the authors struck trouble. The book incorporated photographs of Uluru they say were taken in 1986, before the current park plan of management was put into effect. Since then, and in response to the concerns of the traditional owners, Parks Australia has 'got tough' on people who breach the rules regarding inappropriate photography.<sup>8</sup> Campbell was told to withdraw the book from sale or face the threat of prosecution. He refused, saying the images were taken with permission and before the new laws and practices were introduced.

The controversy attracted considerable publicity, with large articles in the *Weekend Australian* and in newspapers around the world. One commercial photographer was quoted as describing the situation as out of control: 'No one owns copyright on creation and I think it's very scary if we go down that road. If we don't head this off, it will affect tourism and a lot of people's ability to have freedom in these places. It has become so political now that it is almost impossible now to use Uluru to promote Australia.'<sup>9</sup> Parks Australia allegedly suggested that Mr Campbell rewrite the book and call it 'Bromley Visits Uluru and has a Cultural Experience.' Campbell himself vowed to defy 'bureaucracy's campaign'. He was reported as saying 'Bromley is my contribution to children around the world. He is our little son and they are trying to kill him'.

---

<sup>8</sup> Regulations passed under the *Environment Protection (Biodiversity Conservation) Act* ('EPBC') in 2000 provide that the Director of National Parks may prohibit or restrict the capturing of images. This may be done generally or to a class of persons, at all times or for a specified period, and in all or part of the reserve (see sub-regulation 12.24(3) EPBC Regulations 2000). Sub-regulation 12.24(1) prohibits capture of an image in or of a Commonwealth reserve in contravention of a prohibition or restriction imposed by the Director. Regulation 12.38 prohibits use of a captured image of a Commonwealth reserve to derive commercial gain. Pursuant to these regulations, two Parks Australia staff were employed to monitor photography at the site and consider requests by companies wanting to use the rock for advertising. This was an attempt to increase public understanding of and compliance with the traditional beliefs of the Anangu, who live in the Mutitjulu community at the base of the rock.

<sup>9</sup> Chris Barclay, 'The Australian' (14 March 2003). The 'Raving Atheist' web-site listed the controversy on its 'Godidiot of the week: PC Watch' column, alongside a school in West Yorkshire which banned Babe and the Three Little Pigs from the primary school classroom on the ground they would offend Muslims, referring to the possibility that the publishers might 'succumb to the PC crowd and rewrite the book.'

Clearly from a European perspective, ‘copyright’ does not exist in creation. Equally clearly there is something at stake here — a cultural property right which the authors have infringed, unknowing as their original transgression may have been. Should the law step in; and on what basis? Discussion on this question might begin by noting the fundamental epistemological clash here — a clash of differing ways of viewing knowledge and culture.<sup>10</sup> It might highlight the fact that Western intellectual property law — in common with contract and other branches of the law — privileges ‘freedom’ and ‘originality’ of expression over other values, such as tradition or communal rights.

### Case study 2: Not so Deadly, Unna?

In 2002, Indigenous people from the community at Point Pearce, near the South Australian town of Port Victoria, objected to a film commissioned by SBS Independent, ultimately called *Australian Rules*. The film was based on a first novel by non-Indigenous writer Phillip Gwynne. Gwynne, who had spent seven years living at Port Victoria as a boy, fictionalised or adapted certain real events for his novel, *Deadly, Unna*. The most contentious of these was an incident in 1977, five years after Gwynne had left Port Victoria, in which a publican shot two Aboriginal boys who had allegedly been trying to break into his hotel. Gwynne’s version changed certain elements of this story in a way which suited his fictional purpose of capturing the ‘essence of a town that was redneck and racist’.<sup>11</sup> The controversy led SBS Independent to prepare an Indigenous Protocol for film-makers who wish to make films dealing with Indigenous material. These protocols require, at the very least, consultation with an affected or represented Indigenous community — and arguably, although there is considerably ambiguity on this point, an Indigenous right of veto.<sup>12</sup>

While funding bodies have accepted the notion of cultural protocols, at least in principle, individual creators have been far less welcoming. Paul Goldman, the

---

<sup>10</sup> In a European way of looking at the issue, culture is a thing that can be negotiated over. Under the framework established by the EPBC, for example, Indigenous people are regarded as ‘stakeholders’ in respect of their rights in land and knowledge, one of many actors in negotiation over the use of resources of Commonwealth land. Indigenous people, of course, are also prepared to negotiate, but their conceptualisation of the framework within which negotiation should occur is different. Traditional people are custodians for country, and they are required to negotiate with ‘country’ as much as with the Europeans who want to make use of it. That relationship with ‘country’ is in a sense philosophically prior.

<sup>11</sup> The white protagonist Blacky’s Aboriginal mate Dumby Red, who was shot dead in the film, was in fact still alive at the time the film was made. In the film the shooter was not a publican, but Blacky’s dad. After the real shootings, a coroner was told one of the youths had a .22 rifle; in the film the youths are not armed. Gwynne stated that, ‘[w]hen the truth didn’t serve my purpose, I made it up. I wanted to capture the essence of a town that was redneck and racist. I included the names and aspects of reality. But it was naïve of me not to disguise it enough.’ See Peter Ellingsen, ‘Australian Rules’, *The Age* (12 August 2002).

<sup>12</sup> See Stephen Gray, ‘Imagination, fraud and the cultural protocols debate: a question of free speech or pornography?’ (2004) 9(1) *Media and Arts Law Review* 23.

director of *Australian Rules*, has claimed that ‘[u]ltimately, you’re talking about censorship. Cultural protocols would mean there would have been a good chance the film would not have been made’. Producer Mark Lazarus similarly rejected the idea of cultural protocols, in particular the idea that the pub shooting should not have been re-created unless the parents of both dead boys agreed. As a result of the controversy, he has stated that he would not make a film involving Indigenous communities again, stating that ‘[l]ife is too short to make Aboriginal films.’ Phillip Gwynne himself stated that he would never write about Aboriginal people again: ‘It sounds a bit gutless, but I’ve been thinking a lot about it, and this consultation thing means books by committees.’<sup>13</sup>

### **Theft of voice or culture and intellectual property laws**

These are examples of recurrent, albeit to some extent media-fuelled, scandals about what might broadly be called theft of voice, or of culture. Others include the ‘Wanda Koolmatrie’ affair, in which a Sydney taxi driver named Leon Carmen won an award for Aboriginal writers under that name. He had written a book about the adventures of a young Indigenous woman called ‘My Own Sweet Time’.<sup>14</sup> In another case, a wealthy station-owner from the Kimberley, Elizabeth Durack, submitted paintings for an Aboriginal art contest under the name Eddie Burrup. When accused, Durack claimed to be “following the advice of Matisse, who said artists should only speak through his or her brush”.<sup>15</sup> In a slightly different vein have been aspersions cast over the authenticity of the paintings of Kathleen Petyarre and Clifford Possum, and over the Aboriginal identities of the writers Archie Weller and Mudrooroo (Colin Johnson).

By way of comparison with a non-Indigenous context, students might consider the Darville/Demidenko affair, in which young writer Helen Darville adopted the moniker Helen Demidenko to win several major literary awards with a book called *The Hand that Signed the Paper*,<sup>16</sup> touching on sensitive aspects of Ukrainian and Jewish experience in World War II. Both the judges and the general public, it seems, took her for an authentic Ukrainian — an impression later reinforced by Darville/Demidenko’s habit of appearing in public in Ukrainian national costume. The debate publicly highlighted the appropriation of ethnic minority culture by a member of the dominant culture. It also appears to have served as a warning for publishers against entering this hotly contested area in future.

---

<sup>13</sup> Peter Ellingsen, ‘Australian rules’, *The Age* (12 August 2002).

<sup>14</sup> Wanda Koolmatrie, *My Own Sweet Time* (Magabala Books, 1994).

<sup>15</sup> Susan McCulloch, ‘Blacks blast Durack’s art of illusion’, *The Australian*, 8 March 1997. For a more recent account of this episode see Brenda Niall, *True North: the story of Mary and Elizabeth Durack* (Text Publishing, 2012).

<sup>16</sup> For a detailed discussion of the Darville/Demidenko episode see Andrew Riemer, *The Demidenko Debate* (Allen & Unwin, 1996). See also Kateryna Olijnyk Longley, ‘Fabricating Otherness: Demidenko and Exoticism’ (1997) 42(1) *Westerly*, 29.

The fundamental cultural and political conflict involved in such cases is best illustrated, perhaps, in a comment by Keeshing-Tobias in North America:

Critics of non-native writers who borrow from the native experience have been dismissed as advocates of censorship and accused of trying to shackle artistic imagination, but their objections are prompted by something much more.

*Where the Spirit Lives* may be a bad film. *Bone Bird* by Calgary novelist Darlene Barry Quaipe may oversimplify native spirituality. W.P Kinsella's Hobbema stories may be insulting. But the real problem is that they amount to culture theft, the theft of voice...

Stories, you see, are not just entertainment. Stories are power. They reflect the deepest, most intimate perceptions, relationships and attitudes of a people. Stories show how a people, a culture, thinks. Such wonderful offerings are seldom reproduced by outsiders.<sup>17</sup>

It is fairly clear that a traditional intellectual property lawyer would not regard most of these examples as infringements of intellectual property. Theft of voice, or culture, in the broad sense referred to in Keeshing-Tobias' comment, or for that matter in the complaints of those offended by *Australian Rules* or *Bromley the Bear*, is not an infringement of any identifiable author's copyright. A community does not 'own' legal rights in the story of one of its members' tragic death. Nor is there any legal recourse against an author who adopts an Aboriginal 'voice', as Tom Kenneally did in *The Chant of Jimmie Blacksmith* — or even misrepresent and distort Indigenous culture, as Marlo Morgan did in *Mutant Message Down Under*.<sup>18</sup>

### **Indigenous intellectual property and the courts**

These cases illustrate the conceptual and practical gulf between Indigenous understandings of intellectual and cultural property and that reflected in its traditional Western framework. They lead naturally into a more specific discussion of those cases in which intellectual property claims by Indigenous people have been entertained by the courts.

---

<sup>17</sup> Quoted in Bruce Ziff and Pratima V. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (1997); Darrell Posey and Graham Dutfield, 'Beyond Intellectual Property: toward traditional resource rights for indigenous peoples and local communities', International Development Research Centre, Canada, 1996.

<sup>18</sup> See Marlo Morgan, *Mutant Message Down Under* (Harper Collins, 1994) and Gareth Griffiths, 'Mixed Up Messages Down Under: the Marlo Morgan 'Hoax': A Textual Travesty of Aboriginal Culture', in Emmanuel S. Nelson (ed), *Connections: Essays on Black Literatures* (Aboriginal Studies Press, 1988), 82. See also generally Larissa Behrendt, 'In Your Dreams: Cultural Appropriation, Popular Culture and Colonialism' (1998) 4(1) *Law, Text, Culture*, special edition ('in the wake of *terra nullius*').

Best-known amongst these is still *Milpurrurru v Indofurn* (1994) 54 FCR 240, in which Von Doussa J accepted that a number of traditional Indigenous artists had copyright in their paintings, which had been substantially reproduced by the defendant in carpets imported from Vietnam. In doing so, he rejected a lengthy argument that the artworks were not ‘original’ within the terms of the *Copyright Act 1968* (Cth), since they were based on traditional designs which had been handed down according to traditional law within the relevant clans. He accepted that the offending carpets substantially reproduced the plaintiffs’ artworks, even though they were not identical, in part because there was evidence of copying in the form of an instruction by the defendant to the carpet-weavers to produce something ‘less busy’ than the original.

The most legally significant aspect of the decision was probably Von Doussa J’s acceptance that ‘the assessment of damages under s 115(2) may include compensation for personal suffering, for example for insulting behaviour... and for humiliation’.<sup>19</sup> The assessment of such loss could take into account ‘the cultural environment in which the artists reside and conduct their daily affairs’.

The case is a very useful discussion of the operation of traditional principles of copyright, particularly the concepts of ‘originality’ and ‘substantial part’. However, it is far from being the ‘Mabo’ of copyright law, as has occasionally been claimed. Its most far-reaching extension of the law is its modest recognition that the ‘cultural harm’ suffered by Aboriginal plaintiffs may be taken into account in the assessment of damages for infringement of copyright.

Other significant cases in this area include *Bulun Bulun v Nejlam Pty Ltd*,<sup>20</sup> in which a T-shirt manufacturer reproduced several of the plaintiff’s paintings on T-shirts. The case was settled out of court and approximately \$150,000 was paid to artists as compensation for damages and for costs.<sup>21</sup> Less successful was an Arnhem Land artist, Terry Yumbulul, who brought proceedings against the Reserve Bank of Australia and an agent, Anthony Wallis, in relation to the reproduction of his ceremonial ‘Morning Star Pole’ on the plastic commemorative 1988 ten dollar note.<sup>22</sup> He was unable to overcome the fact

---

<sup>19</sup> *Milpurrurru v Indofurn* (1994) 54 FCR 240, 277.

<sup>20</sup> Unreported, Federal Court, 1989. See, for a discussion written by the plaintiff’s lawyer in this case, Colin Golvan, ‘Aboriginal Art and Copyright: the Case for Johnny Bulun Bulun’ (1989) 10 *European Intellectual Property Review* 346.

<sup>21</sup> The major painting concerned was ‘Sacred Waterholes Surrounded by Totemic Animals of the Artist’s Clan’, painted in 1981. One version of this T-shirt also incorporated a number of minor design features taken from works of other artists, again without permission. In 1989 Bulun Bulun brought an action for infringement of copyright and breaches of the *Trade Practices Act 1974* (Cth) in the Federal Court in Darwin. The manufacturers and two Darwin tourist shops gave undertakings to the Court agreeing to cease manufacturing and selling the T-shirts, and to deliver up all remaining stocks.

<sup>22</sup> *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481. See, for a discussion, Colin Golvan, *An Introduction to Intellectual Property Law* (1992) 51-53; see also Stephen Gray,



that he had signed a licence agreement permitting the reproduction of his work, even though he argued that he had received inadequate or incorrect advice, was unaware of the nature and effect of the document he had signed, and was unaware that the ultimate user of his work was to be the Reserve Bank.<sup>23</sup>

These cases illustrate the rigid nature of the rules of intellectual property law as applied to Indigenous people. A comparison of these cases with the ‘theft of voice’ case studies, discussed above, also highlights the gulf between Indigenous aspirations and non-Indigenous legal realities in this area. It would seem that intellectual property law has not so far developed a coherent principle or set of amendments for the protection of indigenous knowledge. Instead, both in copyright and patent law, the most useful tools for the protection of indigenous knowledge and resources have developed outside the traditional realm of intellectual property law, deriving particularly from contract.<sup>24</sup>

### **Conclusion: teaching Indigenous legal issues within intellectual property law**

At certain political and legal moments since *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, there has been considerable political and ethical impetus to redress the injustices suffered by Australian Indigenous people. On occasion, there has been a willingness to prefer flexible interpretations of legal doctrine, provided always that this did not ‘fracture the skeleton of principle’ of Australian law.<sup>25</sup>

However, this willingness has not generally extended to intellectual property law. It is arguable that this narrow approach has the potential to supersede intellectual property law, relegating it once again to a dusty corner of the law library: not so much a fracturing of the skeleton of principle as its slow dissolution in the acid bath of reality. It is possible that intellectual property law’s traditional reluctance to consider ethical or qualitative questions, once a

---

‘Aboriginal Designs and Copyright: Can the Australian Common law expand to meet Aboriginal Demands?’ (1992) 66 *Law Institute Journal* 46.

<sup>23</sup> For related cases, see also *Foster v Mountford* (1976) 14 ALR 71 (breach of confidence action arising from unauthorised release of Aboriginal secrets); *Dixon v Davies* (1982) 17 NTR 31 (damages awarded for loss of cultural fulfilment), and *Johnny Bulun Bulun v R & T Textiles* (1998) 41 IPR 513.

<sup>24</sup> See for example, the development of ‘cultural protocols’; and in patent law see John Voumard, *Access to Biological Resources in Commonwealth Areas*, Commonwealth Public Inquiry (July 2000).

<sup>25</sup> *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 36 (Brennan J) and *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513 (Von Doussa J). For an example of a flexible interpretation of the concept of native title, see *Yanner v Eaton* (1999) 201 CLR 351, in which the right to hunt crocodiles was recognised as a ‘nature and incident’ of the applicant’s native title rights.

part of its strength,<sup>26</sup> is now its greatest weakness, for such issues will simply be decided elsewhere.

There would be force in this suggestion but for one thing. Indigenous people almost without exception consider their traditional resources and knowledge to be ‘property’,<sup>27</sup> and are suspicious of any possible reconfiguration of such interests as part of a legislative contractual regime. Ethically, therefore, the way forward lies within the realm of intellectual property, even if this involves some blurring or flexible interpretation of the traditional boundaries between intellectual property and other forms of law.<sup>28</sup>

In discussion, therefore, students might be encouraged to ask why it is that the law has maintained a dogmatic fear of fracturing a ‘skeletal principle’ of intellectual property law in considering claims by Indigenous people. This cautious approach contrasts vividly with the law’s ability to throw up flexible interpretations in other areas, particularly new computer programs and new technology,<sup>29</sup> where the traditional line between ‘idea’ and ‘expression’, or between ‘function’ and ‘form’, as well as the ‘material form’ requirement, has been blurred.

One case which offers some intriguing — if perhaps practically unlikely — possibilities is the native title claim in *Western Australia v Ward* (2002) 191 ALR 1. In this case Kirby J in dissent argued that ‘the right to protect cultural knowledge is, in my view, sufficiently connected to the area to be a right ‘in relation to’ land or waters for the purpose of s 223(1) of the NTA [the Native Title Act]’. His Honour accepted that the connection between a native title right and the land and waters the subject of the right need not be physical, and that cultural knowledge in a traditional context is inextricably linked to the land. While recognising that such a right would be ‘akin to a new species of intellectual property’, his Honour accepted ‘that the established laws of intellectual property are ill-equipped to provide full protection of the kind sought in this case’. He noted further that the burden of proving that the recognition of such a right would fracture a ‘skeletal principle’ of Australian

---

<sup>26</sup> Sherman and Bently comment that ‘[o]ne of the defining features of patent law, at least until its encounter with biotechnology, was that it was treated as if it was hermetically sealed, closed off from external considerations. Modern patent law is characterised not only by its highly technical and specialised nature but also by its startling and marked isolation from matters cultural, political and ethical.’ See Brad Sherman and Lionel Bently, ‘The Question of Patenting Life’ in Lionel Bently and Spyros Maniatis (eds), *Intellectual Property and Ethics: Perspectives on Intellectual Property* (Sweet and Maxwell, 1998), 111. From the middle of the nineteenth century the same applied to copyright law: see Sherman and Bently, 118-9.

<sup>27</sup> See generally, above n 2.

<sup>28</sup> See Marie Hadley, above n 6.

<sup>29</sup> Note for example the definition of ‘computer program’ under the *Digital Agenda* amendments, allowing protection for the ‘functional’ aspects of a program: see further discussion of this issue above.

law lay upon the party seeking to deny its existence. He considered that no evidence had been shown on the facts that this would occur. Finally, he noted the possible availability of ‘a constitutional argument for the protection of the right to cultural knowledge’ based upon the prohibition on laws affecting the free exercise of religion in s 116 of the *Australian Constitution*.<sup>30</sup>

While the majority judges did not accept this argument, this line of reasoning does suggest the potential for other branches of the law to influence the development of intellectual property laws as they affect Indigenous people. If Indigenous creators had the political power of, say, computer software creators, the impetus might exist to perform some chiropractic work on the skeleton of principle so that it aligns more closely with Indigenous demands. Students familiar with the history of Indigenous challenges to traditional intellectual property principles might learn, thereby, how to become more vigorous in their own future work.

---

<sup>30</sup> *Western Australia v Ward* (2002) 191 ALR 1, 162-3 (Kirby J).