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INDIGENOUS KNOWLEDGE & INTELLECTUAL PROPERTY: NEGOTIATING *the* SPACES

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■ Abstract

Indigenous knowledge is an integral part of Indigenous cultural heritage. Knowledge about land, seas, places and associated songs, stories, social practices, and oral traditions are important assets for Indigenous communities. Transmitted from generation to generation, Indigenous knowledge is constantly reinterpreted by Indigenous people. Through the existence and transmission of this intangible cultural heritage, Indigenous people are able to associate with a communal identity. The recording and fixing of Indigenous knowledge creates intellectual property (IP), rights of ownership to the material which the written or recorded in documents, sound recordings or films. Intellectual property rights allow the rights owners to control reproductions of the fixed form. IP laws are individual based and economic in nature. A concern for Indigenous people is that the ownership of the intellectual property which is generated from such processes, if often, not owned by them. The IP laws impact on the rights of traditional and Indigenous communities to their cultural heritage. This paper will explore the international developments, case studies, published protocols and policy initiatives concerning the recording, dissemination, digitisation, and commercial use of Indigenous knowledge.

■ Introduction

In 2003, UNESCO adopted the *Convention for Safeguarding of Intangible Cultural Heritage* (hereafter 2003 Convention). Australia is not a signatory to the 2003 Convention, however, the recording, dissemination, digitisation and commercial use of Intangible Cultural Heritage (ICH) raises issues for Indigenous Australians. A concern for Indigenous people is that the intellectual property which is generated from such processes is often not owned by them. In the past 15 years, there have been a number of important cases and developments in protocols and policy that may provide some insight to other countries. This paper will explore the ownership of Intangible Cultural Heritage from an Australian intellectual property law perspective, with a particular focus on the ability of copyright law to protect Indigenous Traditional Cultural Expression (TCE).

■ Intangible Cultural Heritage and IP

What is Intangible Cultural Heritage?

Intangible Cultural Heritage, as defined by the UNESCO Convention (UNESCO, 2003), consists of non-physical characteristics, practices, representations, expressions as well as knowledge and skills that identify and define a group or civilisation (Regional Science Bureau for Asia & the Pacific Office of the UNESCO, 2005). This category includes the following cultural manifestations:

- oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- music, dance, drama and other performing arts;
- social practices, rituals and festive events;
- knowledge and practices concerning nature and the universe;
- foods and clothing; and
- traditional craftsmanship (Regional Science Bureau for Asia & the Pacific Office of the UNESCO, 2005).

Intangible Cultural Heritage, or ICH, is transmitted from generation to generation, and is constantly recreated by communities and groups in response to their environment, their interaction with nature, and

their historical conditions of existence. It provides people with a sense of identity and continuity. Its safeguarding promotes, sustains, and develops cultural diversity and human creativity (Regional Science Bureau for Asia & the Pacific Office of the UNESCO, 2005). Through the existence and transmission of this intangible cultural heritage, a group or community is able to associate with a communal identity (Regional Science Bureau for Asia & the Pacific Office of the UNESCO, 2005).

“Folklore” or “traditional cultural expression” is Intangible Cultural Heritage (hereafter ICH). It is described as being socially based. The ownership or custodianship is often collective. This is enshrined in the 1989 *Recommendation for the Safeguarding of Traditional Culture and Folklore*: “Folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses” (ACCU, 2005, p. 43). Traditional cultural expression (TCE) includes songs, stories, ceremonies, rituals, dance, and art including rock art, face and body painting, sand sculptures, and bark paintings.

What is intellectual property?

Intellectual property refers to the bundle of rights that the law grants to individuals for the protection of creative, intellectual, scientific, and industrial activity, such as ideas (also in material form) and inventions. Intellectual property rights are designed to inspire creative innovation by granting specific economic rights to inventive persons as a reward for sharing their contributions and to stimulate further inventive activities. Through international treaties such as the *Berne Convention for the Protection of Literary and Artistic Works* (WIPO, 1979), intellectual property rights are enforced internationally in countries that are signatories to such treaties. In Australia, intellectual property laws only protect Indigenous traditional cultural expression (hereafter TCE) where Indigenous people meet the requirements of the *Copyright Act 1968* (Cth) (Section 32).

Since 2000, the World Intellectual Property Organisation (WIPO) has convened an Inter-Governmental Committee on intellectual property and genetic resources, traditional knowledge and folklore. The WIPO IGC has developed two documents:

- Draft provisions for the protection of traditional cultural expressions (TCEs), and
- Draft provisions for the protection of traditional knowledge.

It is expected that the draft guidelines will shape future laws and policies relating to traditional cultural expressions and traditional knowledge (WIPO, 2004)

■ Copyright and traditional cultural expression

In Australia, the *Copyright Act 1968* (Cth) provides rights for copyright owners to control the use and dissemination of literary, dramatic, artistic and musical works, and certain listed subject matter including sound recordings, cinematograph films, television and sound broadcasts, and published editions. There are certain requirements that must be met before protection is granted.

Fixed folklore? The requirement of material form

Copyright protection exists in a work when subject matter is created in a material form (*Copyright Act, 1968* (Cth), Section, 10(1)). Copyright law protects the form of expression of ideas rather than the ideas themselves.

Many generations contribute to the creation of traditional cultural expression. A song, dance or story, or traditional design may have been created many generations ago. When a TCE is first reduced to material form – an oral story is put in writing; a creation being is etched on paper; body paintings are shifted on to canvas; an initiation song is recorded on tape or a sacred ceremony is filmed – copyright is created. This means that ephemeral and performance forms of TCE such as oral stories, songs and dances that are ceremonially performed and never before recorded will not be protected under Australian copyright law.

One way to protect these forms is to ensure they are recorded and stored in databases to provide material form and thus the evidence of the source of traditional intellectual property. However, some commentators state that the recording of TCE has the effect of freezing or stifling the living culture. The ephemeral, oral nature of TCE is fundamental in order for the next generation of cultural practitioners to interact with it, re-interpret it, and revitalise it within their context and contemporary situation. As well, the recording of such expressions can make them more accessible to others. In many Indigenous communities, the sacredness of songs or stories means that care must be taken to restrict access to any recorded forms.

In addition, Indigenous people have been concerned when non-Indigenous authors have written “traditional stories” – ones that have never been published – without their prior informed consent. The non-Indigenous author (of books, theatre, and film, for example) has claim to copyright in the version published without proper recognition of the source of the story.

In these circumstances, the requirement of material form places a considerable limitation on protecting oral works. Much Indigenous and other non-fixed forms of ICH will fall outside of the copyright protection requirements. The *Berne Convention for the Protection of Literary and Artistic Works* states

that the “expression literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” (WIPO, 1979, Article 2(1)). It is, however, a matter for each country whether they prescribe within its copyright laws, the requirement that a work be fixed in some material form (WIPO, 1979). In France, for example, works do not have to be fixed in a material form to be copyright protected (Legifrance, n. d.). So, the protection of the intangible and unfixed form is not restricted under the Berne Convention and there is scope for legislators to extend copyright protection to ICH.

Protection for limited time

There are other requirements of copyright law that work against the protection of Indigenous TCE. Copyright protects published literary, dramatic, musical, and artistic works for 70 years after the author’s death, and after this, the work, film or sound recording can be used without the need for consent, or payment of royalties (*Copyright Act 1968* (Cth), Section 33(2)). Importantly, protection is indefinite if not published. With subject matter other than works, films, and sound recordings copyright is protected for 70 years from the date of production.

TCEs have a long history often originating several generations prior to the current. Despite this antiquity, Indigenous people express a continuing cultural connection to TCEs. This connection may have been severed or threatened through past history of colonisation and disenfranchisement, so reclaiming, revitalising and strengthening TCE is important for Indigenous people’s identity.

Indigenous people argue that the right to culturally practice a clan’s TCEs should last forever, and should not stop after copyright ends (Janke, 1999, p. 59). The limited time frame of copyright protection does not adequately cater for TCEs, which are created as part of an on-going process of passing cultural knowledge to future generations. Indigenous rights to cultural works are in perpetuity and therefore cultural consent to use is always necessary, even if a work is no longer copyright protected.

Original works from the old and ancient

Another rule of copyright is that the work must be original (*Copyright Act 1968* (Cth), Section 32). It cannot be copied from another work in that the creator has put into the work the necessary degree of labour, skill and judgment to produce the work, giving it some quality or character, which the raw material did not possess. It is the nature of TCE and cultural practices that those of the cultural group do pre-existing clan designs to create their art; they do imitate ceremonies and retell stories as best as they can recollect, in

the manner handed down from their forebears. The copying or mimicking of styles and performance is a necessary means of learning cultural practices. This mode of transmission has led to speculation of whether an artist who reproduces a traditional or pre-existing design or story, is producing original work. This is because the cultural requirement of “painting” iconic themes in accordance with traditional limits the scope for interpretation and individuality (Department of Home Affairs and the Environment, 1981, see para 1403). It has been incumbent on Indigenous people seeking to protect their cultural property interests to prove original interpretation of pre-existing traditional designs (e.g., *Milpurrurru & Others v Indofurn Pty Ltd & Others*).

Creators are individuals

A further impediment to the protection of TCE is that the individual person or persons recording or writing down the form of the TCE will be recognised as the author and copyright owner. As Professor Michael Dodson has stated, “Western constructs of intellectual property focus on individual knowledge and creativity, rather than on communal trans-generational knowledge” (United Nations Economic and Social Council, 2007).

Spiritual beings are not “authors” of copyright works

Art, story, songs and other TCEs are manifestations of religious and spiritual beliefs. Chants from ceremonies and sacred images on rock walls are believed by Indigenous people, to be created by ancestral or spiritual beings. These spiritual creations are not protected under copyright because no human being created them.

For example, with regard to rock art, archaeologist George Chaloupka (1999) notes in the language of Indigenous clans of Arnhem Land,

Everybody is aware that the person carrying it out is only an agent of the Dreamings, which institutes all the aspects of their cultures. Creativity of one kind or another is expected of every person throughout his or her life. “Art” is an integral part of the Aborigines’ social and religious life, in which individual artists share and interpret the traditions of the group (p. 45).

This contrasts with Western forms of contemporary art where individual rather than the group experience is the underlying philosophy. For rock art figures or images, there may be no identifiable individual creator of a rock art image. Therefore, copyright is never asserted by any individual. Unauthorised reproductions of rock art find their way on postcards, websites and in books. Some uses, especially where the rock art

images are altered or shown to wider audiences than allowable under customary laws, are inappropriate and cause offence to the Indigenous custodians.

Films and sound recordings

Copyright also subsists in films and sound recordings. The maker of the film or the recording is usually recognised as the owner of copyright, as soon as the recording is embodied in an article, or for a film, after the completion of the film for the production of the first copy (*Copyright Act 1968* (Cth), Section 22(4)(a)). The interests of the traditional custodians of the content depicted in a film or sound recording are not protected by copyright.

Performers' rights and recordings of TCE

There is no performer's copyright and performers do not have a proprietary right in their performance. Under the Copyright Act certain provisions relate to performers rights. Performers' rights give performers the right to prevent certain unauthorised uses of recordings of their performances. From 1 January 2005, performers have a share ownership of copyright in sound recordings of their live performances with the recording companies, if they were not paid for their performance (Australian Copyright Council, 2005, p. 4). Changes were also made to include "folklore" in the definition of a "live performance" (*Copyright Act 1968* (Cth), Section 84). Depending on the facts, an Aboriginal person who performs "folklore" (without a fee) and another person records it, will have a part copyright interest in the recording of their performance.

Authors have exclusive rights

Once the requirements of copyright are met, the copyright owner has the exclusive to exploit the copyright in the work or subject matter. This includes the right to reproduce and authorise reproduction of the work or subject matter, and to deal with the copyright in a number of ways, depending on the nature of the work or subject matter, such as performing the work in public (*Copyright Act 1968* (Cth), Section 31(1)(a)(iii)), communicating the work to the public (Section 31(1)(a)(v)) and making an adaptation of the work (Section 31(1)(a)(v)). For TCEs recorded by outsiders, these copyright owners are freely able to exploit and control their documents, books, tapes, films and other copyright materials, without observation to any cultural restrictions (Janke, 1999, p. 54).

Who owns copyright?

In the *Copyright Act 1968*, the creator is referred to as "the author". The general rule is that the author

of a work is generally the first owner of copyright in that work (Section 35(2)). However, there are circumstances that will vary this and it is not unusual for the author and the owner of the copyright to be different entities. These exceptions include:

- Where a work is produced by an employee under a contract of employment, the employer will own the copyright (Section 35(6));
- Where the work is produced under the direction and control of the Crown (that is State or Commonwealth government);
- Where works are produced under commission and there may be a contract assigning copyright in the work to the commissioning body.
- Copyright can be assigned or exclusively licensed in writing (Section 96).

■ Moral rights for individuals not communities

Since 2000, Australian creators have enjoyed moral rights in their works and films. Sound recordings, however, are not included in the moral rights regime.

The *Copyright Act 1968* provides creators the unalienable rights as follows:

The right of attribution of authorship;

The right not to have authorship falsely attributed; and

the right of integrity of authorship (Section 189).

These rights, like copyright itself, belong to the individual creators who "create" the work or film, by making it, or fixing it in a material form (Section 190). Indigenous clan groups or communities do not have moral rights.

Moral rights cannot be assigned or sold and remain with the author even where the copyright does not belong to the author. For instance, employees hold moral rights in created work, even if copyright vests with the employer. An important thing to note however is that moral rights acts of infringement can be consented to, and in some industries' contracts are presented to creators, that take a wide consent of moral rights.

Rights of attribution/against false attribution

The Indigenous artist of a painting, for example, has the right to be named as the author (creator) of the work. This is the author's right of attribution of authorship in respect of his or her work (*Copyright Act 1968* (Cth), Section 193). This right is seen as important to Indigenous people who claim belonging to their artwork, images and knowledge being linked to their belonging to land. However, if the painting

includes traditional cultural expression, should the clans have rights of attribution as well? Similar acts of false attribution exist in relation to artistic works and cinematograph films respectively (Sections 195AE & 195AF).

Rights of integrity

The moral right of integrity provides creators with a right to bring an action if their work is subjected to derogatory treatment. "Derogatory treatment" refers to anything that results in the material distortion of, mutilation of, or material alteration to the work (Sections 195AJ(a) & 195AK(a)) or film (Section 195AL) that is prejudicial to the author's honour or reputation or "an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs" (Sections 195AK(b)). It also includes doing anything else in relation to the work (Sections 195AK(c) & 195AL(b)) or film, which is prejudicial to the author's reputation.

The right of integrity is important for Indigenous artists. Preserving the overall integrity of the work and the underlying story or ritual knowledge is an extremely important to proper representation of Indigenous art and film. Greater access to work, once it is in digital form increases the ways in which artistic works and films can be distorted, mutilated and altered. The right of integrity including the right to bring an action for infringement is useful to protect the integrity of Indigenous work.

The right of integrity is not infringed if the alleged derogatory treatment can be proved to have been reasonable in all the circumstances (*Copyright Act 1968* (Cth), Section 195AS), or if the author consented to the treatment (Section 195AW & Section 195AWA). Indigenous creators should be cautious when considering commercial agreements and contracts of employment that seek wide consents to their moral rights. However, even if consent was not given, the fact of employment (Section 195AS(2)(e)(f)(g) & Section 195AS(3)(f)(g)(h)) and industry practice may be taken into account when deciding whether the derogatory treatment was reasonable in all the circumstances (Section 195AS).

One of the deficiencies in the moral rights provisions is, that like copyright protection, there are time limits to assert rights to integrity (Section 195AM(1) & 195AM(2)). For works of important cultural significance, Indigenous peoples assert cultural rights including attribution and reproduction of cultural material in perpetuity. Keeping the cultural integrity of heritage for Indigenous people who collectively wish to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future is critical to prevent distortion and mutilation of TCE.

The rise in demand for Indigenous visual arts has led to wide-scale commercial copying of Indigenous motifs and artworks. Indigenous art has been copied onto carpets (*Milpururru & Others v Indofurn Pty Ltd & Others*), dresses, fabric (*Bulun Bulun & Anor v R & T Textiles Pty Ltd*) and t-shirts (*Bulun Bulun v Nejlam*) without the knowledge or permission of the Indigenous artists, or the artist's community. In many instances, the designs are altered. Indigenous Australians complain that such use is inappropriate, derogatory, and culturally offensive. Australian moral rights laws provide rights to individual artists to protect their works against derogatory treatment – but the work must be a protected copyright work, and an individual artist must assert these rights.

Proposals for Indigenous communal moral rights

The Commonwealth Government has drafted proposed amendments of the *Copyright Act 1968* (Cth) for Indigenous Communal Moral Rights. The current proposed model introduces Indigenous communal moral rights (ICMR) to exist alongside individual moral rights. It is proposed that the ICMRs will be exercisable independently of the individual author's moral rights. ICMRs will exist in works and films drawn from a traditional base, if before the first dealing of the work or film, there is a voluntary agreement between the creator of the work or film, and the Indigenous community. There must also be acknowledgement of the Indigenous community's association with the work (Draft Copyright Amendment (Indigenous communal moral rights) Bill, 2003, Clauses 195AZZL & 195AZZM). Further, all interest holders in the work (i.e., copyright owners) need to have consented to the ICMRs existing in the work or film.

An Indigenous community that has Indigenous communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative in respect of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to decision making processes (Janke, 2004). Another limitation of the proposed Bill is that ICMRs would exist for the term of the copyright period. As discussed above, Indigenous people see their rights to TCE to extend much longer, in perpetuity, for continuing cultural practice. The Bill is not yet law, however, the government intends to introduce it for consideration shortly.

■ Copyright and the responsibility of the TCE artist

The exclusive rights granted to copyright owners to use, adapt and reproduce their works without conditions is at odds with the Indigenous cultural heritage material. In many Indigenous clans, there

are laws that are based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. An individual or group of individuals may be empowered to act as the caretaker of a particular item of heritage. The traditional custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole.

Bulun Bulun v R & T Textiles

The Federal court case of *Bulun Bulun & Anor v R & T Textiles Pty Ltd* examined this issue. Johnny Bulun Bulun was the artist and copyright owner of the bark painting *At the Waterhole*. The painting embodied traditional ritual knowledge of the Ganalbingu people. Johnny Bulun Bulun's use of ritual knowledge to produce the artworks was given to him under Ganalbingu customary law, based on the trust and confidence that those giving permission had in the artist. R & T Textiles Ltd had imported and sold within Australia, fabric which copied parts of *At the Waterhole*. Once issued with the statement of claim, the textile company was quick to negotiate a settlement. However, the case still went to court to consider the issues relating to the clan interests in the copyright work.

Justice Von Doussa found that there was no native title right to the painting. He also considered that there was no equitable interest in the work and neither was the work one of joint ownership because there was no evidence that anyone other than Johnny Bulun Bulun had created the bark painting (Brown, 2003). Justice von Doussa also did not consider that the artist had created the work as part of an implied legal trust that would make his clan equal owners of the work. The witnesses and affidavit evidence showed that on many occasions paintings which incorporate to a greater or lesser degree parts of ritual knowledge of the Ganalbingu people are reproduced by Ganalbingu artists for commercial sale for the benefit of the artists concerned.

Justice Von Doussa found that there was a fiduciary relationship between the artist and the clan. Customary laws impacted on the rights of the artist to deal with the work embodying the ritual knowledge in a way that he had to discuss and negotiate use of the traditional knowledge with relevant persons in authority within his clan. Evidence given by Djardie Ashley discussed how the Ganalbingu laws dealt with the consent procedures. Mr Ashley noted that in some circumstances, such as the reproduction of a painting in an art book, the artist might not need to consult with the group widely. In other circumstances, such as its mass-reproduction as merchandise, Mr Bulun Bulun may be required to consult widely. Mr Ashley further noted:

the question in each case depends on the use and the manner or the mode of production. But in the case of a use which is one that requires direct consultation, rather than one for which approval has already been given for a class of uses, all of the traditional owners must agree, there must be total consensus. Bulun Bulun could not act alone to permit the reproduction of *At the waterhole* in the manner that it was done (*Bulun Bulun & Anor v R & T Textiles Pty Ltd*, 1998, p. 520).

This relationship imposed the obligation on Johnny Bulun Bulun not to:

exploit the artistic work in a way that is contrary to the law and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work (*Bulun Bulun & Anor v R & T Textiles Pty Ltd*, 1998, p. 531).

If the artist had been unable or unwilling to take copyright action, equity would have allowed the clan leader to take action to stop the infringement.

Fiduciary duty – potential extent

It is this fiduciary obligation imposed on the copyright owner artist that has sparked much interest by Indigenous people. Where a third party has appropriated an image or an aspect of traditional ritual knowledge embodied in a copyright work is it possible to extend this legal principle to provide that it may be possible for the clan now to bring an action based in equity to stop the unauthorised use?

Sally McCausland considers the potential repercussions of the judgment and whether this type of obligation may extend in certain circumstances where notice of the "Bulun Bulun equity" is given to outsiders. For example, a third party licensee of an Indigenous artwork, who is on notice of a custodian's interest may be open to claims by an Indigenous clan that they owe a fiduciary duty to safeguard the integrity of the work when dealing with the copyright work (McCausland, 1999). She further surmises whether the Bulun Bulun equity applies to other copyright works incorporating "traditional ritual knowledge":

It is possible that any person who has acquired copyright in a work embodying traditional ritual knowledge with notice is a fiduciary under Australian law. If so, the person would be bound to act in accordance with the fiduciary duty (that is, respect customary law concerning reproduction and adaptation of the work). If a person breaches the fiduciary duty, the situation might be analogous to the breach of confidence

case of *Foster v Mountford*, in which the Federal Court granted an order to stay sales of a book containing traditional knowledge of the Pitjantjatjara people (1999, p. 5).

McCausland speculates that a third party fiduciary duty might arise where traditional custodians allow access to a film maker to take interviews with community members. If the film maker is given notice of the custodians' interest in traditional ritual knowledge communicated in the interviews, the film maker may owe a fiduciary duty to the custodians when dealing with copyright in the filmed interviews. She says that "a custodians' interest notice incorporated in the access permit would help to establish this duty" (1999, p. 5). In other areas too, where outsiders come into communities to record TCE, an Indigenous community could use written agreements to express state the fiduciary obligations of third parties when they access traditional ritual knowledge. For example, where a researcher wants access to traditional ritual knowledge for a particular project, the community could enter into a written agreement with that person, requiring her to consult on an ongoing basis about the project. It could also require her to display a custodians' interest notice on any copyright material created. McCausland further states, "the community could even require copyright in the project to be jointly owned or held on trust for its benefit" (1999, p. 5).

In my opinion, this line of thought has implication for scholars, authors, film makers, sound recordists, compilers, researchers, and other recorders of Aboriginal traditional knowledge and TCE where copyright is created. Michael F. Brown notes the legal potential for this precedent to be applicable to other groups, traditionally based, non-Indigenous groups. He asks the question: "Can the emergent notion of communal intellectual property be limited to Aboriginal communities, or will it inevitable spill over ... to other self-defined tribal or ethnic groups" (2003, p. 66)?

■ Case studies – dealing with copyright forms of TCEs

Rock art on T-shirts case study

Copyright rewards the person who imparts skill and labour into existing material to create an original work. When the raw material is TCE or work in the public domain this can result in a new copyright vesting in the diligent author. In the "Unauthorised Reproduction of Rock Art Case Study", the skill and labour of a researcher in redrawing rock art images was arguably at law enough to create a new original copyright work in the resulting photographs and illustrations (Janke, 2002a). This matter settled before commencement of court action, however, it provides a good basis to

examine the ownership of copyright over intangible cultural heritage.

In 1997, Riptide Churinga, a Sydney based t-shirt manufacturer produced a range of t-shirts with Mimi rock art figures. The t-shirts were discovered on sale to the surprise of a descendant of the Badmardi clan and Dr Vivien Johnson an Aboriginal art lecturer. The use of the Mimi figures was guarded carefully under customary law and is still significant to Indigenous cultural beliefs. Stories, information surrounding the sites, the sites themselves, and the right to touch up or depict images like those embodied in rock form should, in theory for cultural heritage purposes, belong to the owners of the cultural images therein. The rock art is estimated to be about 4,000 years old and therefore not the subject of copyright (Janke, 2002a). How could they stop the t-shirt maker from transgressing their laws?

In the 1970s, Eric Brandl was funded by the Australian Institute of Aboriginal Studies (now the Australian Institute of Aboriginal and Torres Strait Islander Studies) to visit and record certain rock art sites in the Northern Territory. His methods of recording involved photographing the various rock art sites which were in a very difficult place to get to in the Deaf Adder Creek region. He then returned to his office, where he projected the images onto a wall on of paper. He then traced the works out with his hand in Indian ink.

These drawings and photographs of the Mimi Rock Art were then published by the Australian Institute of Studies in 1973 (Brandl, 1973). There was copyright in the book, the photograph and the drawings. In line with the originality principles of copyright, that such skill and labour applied to the original rock art would give a copyright interest in the derived sketches. It was obvious that the Riptide Churinga had taken directly from the book to produce its t-shirts.

AIATSIS, the Brandl Estate, and the Badmardi clan were able to demand that the t-shirt company stop production of the t-shirt. They entered into a settlement in which damage and delivery of unsold items were included. There was also a national public apology posted in *The Australian*, a national newspaper.

The case illustrates that copyright owners had the rights, and by virtue of this the "cultural owners" were able to enlist them to commence action, even though the "cultural owners" had no copyright ownership rights. Anderson (2005) notes,

had the images of the Mimi reproduced on tee-shirts been copied straight from the rock art itself, there would have been no grounds for complaint by AIATSIS, the Brandl Estate or the Badmardi clan, for the material would be classified as being in the public domain and therefore open to use. The problem of protecting rock art has existed as a pertinent complaint about the biases of copyright (p. 23).

Writing traditional stories

Under copyright laws, if an individual storyteller writes down an oral story, the individual is recognised as the owner of that version of the story at least. What if that story is sacred and not suitable for wide circulation? A story or ceremony may be closed to wider access and only allowed to be seen by the initiated, as was the case in *Foster v Mountford*. The right to maintain the secrecy of Indigenous knowledge and other cultural practices is also important.

What if the storyteller is not from the traditional owner group? What are the rights of the story owners to stop the publication? For cultural maintenance purposes, Indigenous people want to control recording of TCEs by outsiders. In many instances where outsiders have come to research or record oral stories, the recorder became the owner of the copyright in that written form. A large amount of recorded TCE is in written reports, books, fieldnotes, and language dictionaries taken by a range of outsider people including linguists, anthropologists and university researchers.

The Australia Council has developed protocols for writing Indigenous Australian literature, which aim to recognise Indigenous ownership of traditional stories. The protocols state that if writing up traditional stories involves the verbatim transcription of an oral story from specific informants, then permission, attribution and ownership of material should always be recognised (Janke, 2002b).

Music

When TCEs are recorded on tape or CD by outsiders, such as ethnomusicologists, there is also the copyright in the sound recording that is created. This copyright will generally belong to the maker of the recording. In the past, sound recordings of oral stories and performances have been taken by outsiders of the cultural group. These tapes and recordings are taken away from the cultural setting. How this tape or CD is used becomes the control of the outsider. Who can use, reproduce or adapt and use the content contained in the tape? Who has the right to stop the unauthorised use of a "traditional song"?

In his article "pygmy POP", Steven Feld (1996) notes that the sound recordings on which the Deep Forest music was based were several ethnographic recordings of traditional music from Africa, and a CD, *Polyphony of the deep rain forest*. Deep Forest gained use of the recordings with permission from the relevant archives and copyright owners, but did not gain consent of the traditional song performers or owners. In fact, copyright was not recognised as belonging to the traditional song performers. In a Western legal sense, the originality of the traditional song may have been questionable because presumably the performers did not write the song. However, the rights of the song

performers, the traditional people who are the origins of the TCE, remain vital for their cultural identity.

Films

Leigh and Saunders report on film and Indigenous people states that the first film about Indigenous Australians was made by A. C. Haddon, a visiting academic from England. It was made on Mer (Murray Island) in the Torres Strait in 1898 (Leigh & Saunders, 1995). Since then, the cameras have captured a lot of Indigenous content. This includes ethnographic accounts of culture; sacred ceremonial practices; personal histories and knowledge of Indigenous people about land, animals, plants and events (Janke, 2003).

As a result the film archives have inherited a lot of films that are of significant Indigenous content. Issues now confront the archives about how to manage this material and to whom this material should be made available. Often the depositors or the copyright owners are not the Indigenous people – the owners of the cultural expression embodied in the film. This is because the filmmaker is recognised as the owner of copyright in the film *Copyright Act 1968* (Cth), Section 98(2)). Or, where films are made for another person and fees are paid, then the copyright in the film belongs to the person who commissioned it (*Copyright Act 1968* (Cth), Section 98(3)). This is a concern for Indigenous people whose stories and knowledge have been recorded in the past without proper consent (Janke & Quiggin, 2006).

An interesting story told by Anderson (2005) details the issues. Anderson accompanied her friend Joe, an Indigenous man from the Gupapyyngu clan on a visit to the National Film and Sound Archives in Canberra. They came across a film which recorded Joe's father teaching the Djawa in the 1950s. Now 50 years on, Joe was able to view the film, his father, and for the first time, himself as a child. Joe, like other Indigenous Australians, is reclaiming this material, to take back to his community to establish their own archive. However, like other Indigenous Australians, there are concerns about the uses of film footage of such ceremonies. The copyright owners and depositors have rights to control access legally but the Indigenous cultural owners do not. Indigenous people seek to have a say how these important materials are used, and who gets access to them.

Archives like the National Film and Sound Archive have developed policies protocols for the access and reproducing of its Indigenous film materials. The National Film and Sound Archive (NFSA) holds a large collection of Indigenous content in the form of films, photographs, videotape, audio tape and other forms of media. According to Mary Miliano, Archivist in the Indigenous collection, there are over 16,000 titles at NFSA that have Indigenous content or reference. This

is 3% of the title held by NSFA including sound and radio, image, multi-media and documentation titles (M. Milano, personal communication, August 14, 2006).

The collection comprises “ethnographic material” – materials that depict traditional cultural ceremonies or practices as “actuality” from a scientific viewpoint. There are also commercial forms of media containing Indigenous performances, which have been produced and compiled with those being filmed consenting to the use of the material at least for the purpose it was originally filmed. NSFA’s Indigenous materials policy sets out procedures for acquiring, handling, disposing of and providing access to materials with Indigenous content.

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) Audiovisual Archives developed a Code of Ethics, *Collections management policy manual* in 2005 (AIATSIS, 2005). The Code is a statement of professional conduct and values which seek to clarify mandatory standards of practice within the AIATSIS Audiovisual Archive. The Code addresses personal conduct relating to archived materials, care of collections and access to secret and sacred materials. It also recognises the rights of Indigenous communities and individuals by requiring that they consent to publication of archival material. For example, the Australian Institute for Aboriginal and Torres Strait Islander Studies’ Audiovisual Code of Ethics states that “copies of material will be provided for publication purposes if the requestor has consulted with the relevant Indigenous community or individual(s) and has received written permission to proceed, even in such cases where the copyright

owner has approved publication” (AIATSIS, 2005, Clause 10.3.2, para. b).

Indigenous languages

The past work of non-Indigenous linguists has generated a large amount of materials including sound recordings, films, field notes, and dictionaries.

Who owns languages becomes a problem when you consider the issues in Australia for revival of languages with limited speakers. Linguists may by virtue of their own skill, labour and effort, become the copyright owners of dictionaries and tapes that become important when the living speakers they consulted with to gain their information die.

Aboriginal Language Centres (ALCs) now charged with the charter of language maintenance and revitalisation have to negotiate access to use and adapt dictionaries produced by past linguists working in the area, who produced written dictionaries from the oral information provided by then living speakers of a now extinct language. Now, these living speakers have passed on, and the dictionary has copyright which belongs to the linguist. In some cases, these linguists live overseas, and are retired. Others themselves have passed on, and hence, the negotiations of copyright that ALCs now have to engage with the linguist’s descendants, or the relevant universities just to get copies of the materials, and to reproduce them for the purposes of language maintenance.

In light of the lessons from the past and the growing knowledge Indigenous people now have of copyright laws, ALCs are now employing their own linguists,

Table 1: Non-Indigenous laws vs. Indigenous customary law.

Non-Indigenous Laws	Indigenous Customary Law
Emphasis on material form.	Generally orally transmitted.
Limited in time eg: copyright for 70 years after the death of the artist; patent rights are 20 years.	Emphasis on preservation and maintenance of culture.
Individually based – created by individuals.	Socially based – created through the generations via the transmission process.
Intellectual property rights are owned by individual creators or their employers and research companies.	Communally owned but often custodians are authorised to use and disseminate.
Intellectual property can be freely transmitted and assigned – usually for economic returns – for a set time, in any medium and in any territory.	Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.
Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned.	There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.
Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression.	An holistic approach, by which all aspects of cultural heritage are inter-related.
Emphasis on economic rights.	Emphasis on preservation and maintenance of culture.
No special protection of sacred secret material or gender restrictions.	Specific laws on gender and sacred secret material.

and the copyright of any resulting works are owned by them by virtue of the employee/employer ownership provisions of copyright law. They are also entering into written contracts which assign copyright to the relevant organisations owned and operated on behalf of the speaker community. This approach makes use of section 196 of the *Copyright Act 1968*, which provides that copyright can be assigned in writing. There are terms which require deposit of materials, proper attribution of language speakers and clan groups, and comply with any restrictions on use.

■ Conclusion: Redressing the imbalance

The focus of Western intellectual property laws is to provide economic incentives for the production of intellectual and creative effort. Customary laws and Indigenous people's rights to TCEs and ICH promote cultural maintenance, custodian's obligations, integrity, and the source of TCEs. There are some fundamental shortfalls with copyright protecting Indigenous people's rights to the TCEs. These are summarised in Table 1.

The introduction of moral rights laws into Australia in 2000, has allowed for the protection of the integrity of a copyright work, as well as the right of attribution, however, these rights belong to individual creators. There are proposals to recognise Indigenous communal moral rights by amending the *Copyright Act 1968* (Cth) but there is a requirement that there be a voluntary agreement between the copyright owner and the Indigenous community before these rights arise. This will therefore have limited application.

In Australia, Indigenous people are making use of three main areas:

1. Use of contracts to ensure ownership of copyright vests with Indigenous people, or that some rights relating to TCE protection are provided for;
2. Access conditions of archives – putting requirements that users of content must get consent of TCE owners; and
3. Protocols for respecting Indigenous people's rights to culture. A range of protocols has been developed in visual arts, song, music, writing, new media and film.

The success of these measures has relied on the willingness of those who interact and use Indigenous culture to agree to contract terms, and to abide by protocols. There is no legal foundation for recognising TCE rights. For this reason, there is a need for the Australian law to legitimate Indigenous rights to TCE, in the same way copyright give authority to the rights of copyright owners, by requiring their prior informed consent before use. The prior and informed consent of the traditional owners of TCEs should be required to reproduce, publish, perform, display,

make available on line and electronically transmit, traditional knowledge or expressions of culture. To balance this right, any TCE regime should also look at valid exceptions, and processes for respectful use of TCEs. In this way, the "ownership" of Indigenous intangibles heritage will find its base with Indigenous communities, who are the past and future of this cultural heritage.

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