

# New tracks:

**Indigenous knowledge and cultural expression  
and the Australian intellectual property system**



Response to:

*Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples*, conducted by IP Australia and Office for the Arts

31 May 2012

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***New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system***, Terri Janke and Peter Dawson, Terri Janke and Company Pty Ltd, Sydney, 2012

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Acknowledgements: This paper was prepared by Terri Janke and Company, IP Lawyers, and commissioned by the Australia Council for the Arts, Aboriginal and Torres Strait Islander Arts Board. The authors acknowledge Lydia Miller, Executive Director for her feedback on the draft paper and the assistance of Lucinda Edwards (Senior Solicitor) and Daniel Herborn (Graduate Lawyer), Terri Janke and Company.

Published by:  Terri Janke & Company Pty Ltd  
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**ISBN**  
978-0-9757044-4-8

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Art: Detail of Copyright Tracks, 2012, Terri Janke

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References: All websites references current as at the date of publication.

**Cultural notice:** **We wish to advise Indigenous people that this document refers to the names of deceased Indigenous people who took court action for infringements and breaches of their rights.**

## 1. Introduction

IP Australia and the Office for the Arts (Cth) brochure, *Finding the Way: a conversation with Aboriginal and Torres Strait Islander People* seeks feedback from Indigenous people to share stories and insights on future directions about Indigenous knowledge and intellectual property.

The Aboriginal and Torres Strait Islander Arts Board (ATSIAB) of the Australia Council for the Arts promotes the recognition of Indigenous cultural and intellectual property and the importance of Aboriginal and Torres Strait Islander people to control their cultural assets and knowledge. We are pleased to present this document with comments and suggestions to improve the current intellectual property law framework to better protect Indigenous knowledge and cultural expression.

Our submission will focus on the cultural expression and artistic applications of Indigenous Knowledge.<sup>1</sup> Our paper discusses:

1. The rationale for future directions for greater recognition of Indigenous knowledge and cultural expression.
2. The existing intellectual property framework in Australia.
3. Trade practices and misleading and deceptive conduct.
4. Contracts and enforceability.
5. Effectiveness of protocols – case study ATSIAB Art form protocols.
6. New law on the protection of Indigenous knowledge and cultural expression.
7. The establishment of a National Indigenous Cultural Authority.

There have been a number of significant reports that have canvassed this topic. See Appendix A for a list of main reviews and inquiries.

Case studies on traditional knowledge and cultural expression and the IP framework are included at Appendix B.

## 2. Rationale for future directions

### 2.1 The Declaration on the Rights of Indigenous Peoples

The United Nations *Declaration on the Rights of Indigenous Peoples* (DRIP) should be the basis for the Government when considering how best to protect Indigenous cultural and intellectual property rights. On 3 April 2009, the Australian Government formally supported the United Nations Declaration on the Rights of Indigenous Peoples. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, states that:

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<sup>1</sup> Patents and plant breeder's rights and the use of Indigenous knowledge in Australian research and industry are also important. As our focus is Indigenous arts, we have focussed our submission accordingly. For discussion on Indigenous knowledge and patents refer to Terri Janke, *Report on Current status of Indigenous Intellectual Property, A report commissioned by the Natural Resources Management Board*, April 2009, <[http://www.terrijanke.com.au/img/publications/pdf/7.NTIEK\\_Janke\\_ICIP\\_report\\_7April09\\_FINAL.pdf](http://www.terrijanke.com.au/img/publications/pdf/7.NTIEK_Janke_ICIP_report_7April09_FINAL.pdf)>.

It is using the Declaration that breathes life into it. As an international instrument, the Declaration provides a blueprint for Indigenous peoples and governments around the world, based on the principles of self-determination and participation, to respect the rights and roles of Indigenous peoples within society. It is the instrument that contains the minimum standards for the survival, dignity and well-being of Indigenous peoples all over the world.<sup>2</sup>

Articles 11 and 31 are particularly relevant:

#### Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This 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.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

#### Article 31

1. 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.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

## **2.2 The Australian Constitution**

The Australian Constitution enables the Commonwealth government to enact laws that specifically protect Indigenous cultural and intellectual property. Sections 51 (xviii) and (xxvi) of the Australian Constitution give the Commonwealth government power to make laws with respect to intellectual property and the power to make special laws for a particular race of people. The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples recommended replacing section 51 (xxvi) 'the race power' with a power that still allows the government to make laws with respect to Aboriginal and Torres Strait Islander peoples. Constitutional recognition of the continuing cultures, languages and heritage of

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<sup>2</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, quoted at < [http://www.hreoc.gov.au/declaration\\_indigenous/index.html](http://www.hreoc.gov.au/declaration_indigenous/index.html)>.

Aboriginal and Torres Strait Islander peoples would further support legislation to protect Indigenous cultural and intellectual property.

The Law Council of Australia's *Discussion Paper on Constitutional Reform* also notes that Indigenous cultural and intellectual property rights may be included in the Australian Constitution.<sup>3</sup>

## 2.3 Customary Law

Aboriginal customary law contains rights and responsibilities about who can claim, use, adapt and disseminate Aboriginal and Torres Strait Islander peoples' cultural expression and knowledge.

Any future directions for recognition of Indigenous knowledge and cultural expression should consider and implement some of the principles of Aboriginal customary law that relate to the protection of knowledge.

Aboriginal customary law preserves and protects knowledge in a number of ways, including the prohibition of changes to art symbols and designs, the complex rules surrounding who is taught the traditional knowledge of plants, animals and country and the social boundaries between communities and kinship systems.

There is a great diversity of Aboriginal cultures across Australia, each with particular cultural heritage and customary law, but there are consistent principles that govern the ownership and control of each group's Indigenous knowledge, including:<sup>4</sup>

- Communal ownership and attribution
  - Indigenous knowledge is collectively owned, socially based and evolving continuously
  - Many generations contribute to ongoing creation
  - Attribution as a group for this contribution is a cultural right.
- Continuing obligation under Indigenous laws to maintain cultural integrity
  - Generally well developed customary laws that govern rights to use and deal with Indigenous knowledge
  - Based on the protection, passing on, and maintenance of culture
  - Often an individual or group who acts as custodian of an item of heritage, acting as a trustee with a binding role to pass on the knowledge in the best interests of the community.

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<sup>3</sup> Law Council of Australia 2001 *Constitutional Change: Recognition or Substantive Rights? Transcripts of proceedings Exploring the Constitutional change process and its application to create meaningful change in Australia*, <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=DFC9E8FF-EB34-AB69-8659-BAC87B391D40&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=DFC9E8FF-EB34-AB69-8659-BAC87B391D40&siteName=lca)>

<sup>4</sup> Janke, T & Quiggin, R 2005 *Indigenous Knowledge and Customary Law*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 12, pp. 9–10, viewed on 26 April 2012, <<http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-12.pdf>>

- Consent and decision making procedures
  - Consent to share Indigenous knowledge must be given by the group as a collective
  - Such consent is given through specific decision making procedures unique to that particular item of heritage
  - Consent is not permanent and is ongoing.

Indigenous cultural and intellectual property includes Indigenous people's rights to their cultural heritage. This is a living heritage which encompasses not just objects, art and material culture, but Indigenous knowledge of stories, songs, dances and imagery that are handed down by Indigenous people, from generation to generation. This heritage comes from the land and seas, and associations to land and seas. Indigenous cultural and intellectual property is regarded as belonging to, or originating from a particular Indigenous group or its territory, and is therefore an important part of identity and continuing cultural practice.<sup>5</sup>

Tom Calma, during his term as Aboriginal and Torres Strait Islander Social Justice Commissioner, stressed that any new or amended intellectual property laws should ensure the nature of intellectual property rights is defined by, and accords with, the customary law of Indigenous Australians.<sup>6</sup> The challenge is to recognise the established and developing system of Aboriginal common law about the dissemination of Indigenous knowledge and cultural expression.<sup>7</sup>

## 2.4 Key benefits

Recognising and protecting Indigenous knowledge in the Australian intellectual property framework should aim to deliver three key benefits:

1. Indigenous Australians will be able to preserve their unique cultures and identities through the exercise of legally enforceable rights. The ability of Indigenous communities to control the use of their cultural knowledge is critical to survival and self-determination.
2. Indigenous Australians will be able to enter negotiations over the use of their knowledge with greater bargaining power and certainty over benefit sharing. The building of social capital and sustainable economic development through the use of Indigenous Knowledge is an essential step in 'closing the gap'.
3. All Australians will have an opportunity to proudly recognise Indigenous knowledge as a valuable resource, worthy of legislative protection, which links contemporary Australia to the oldest continuing cultures in the world.

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<sup>5</sup> Janke, T and Quiggin R, 'Indigenous cultural and intellectual property: the main issues for the Indigenous art industry in 2006', written for the Aboriginal and Torres Strait Islander Arts Board, Australia Council, 10 May 2006, <[http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/terry\\_janke\\_icip.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/terry_janke_icip.pdf)>.

<sup>6</sup> Janke, T 1998 *Our Culture : Our Future*, Michael Frankel and Company, Sydney, 1999, commissioned by Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, p.183

<sup>7</sup> See the Julayinbul Statement on Indigenous Intellectual Property Rights. November 1993, cited in *ibid*, p. 310.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, notes that:

“We will not be able to continue to enjoy this precious knowledge and culture if we are not in a position to maintain and protect it. We must insist on an intellectual property regime that recognises and enforces the right of Aboriginal and Torres Strait Islander peoples to determine the nature and extent to which their cultural expression and heritage is used”.<sup>8</sup>

### 3. Existing Laws

There are no special laws for Indigenous cultural and intellectual property. Under section 51 (xviii) of the Australian Constitution, the Federal Government has the power to make laws with respect to intellectual property. Accordingly, all of Australia’s intellectual property laws are contained within Commonwealth legislation. These are the *Patents Act 1990* (Cth), *Copyright Act 1968* (Cth), *Trade Marks Act 1995* (Cth), *Designs Act 2003* (Cth), *Plant Breeders Rights Act 1994* (Cth) and *Circuit Layouts Act 1989* (Cth).

Indigenous cultural and intellectual property rights are exercised in this IP framework, along with trade practices and confidential information laws. In addition to existing law, contracts and cultural protocols are also used.

Our commentary focuses on the arts related legislation, namely the *Copyright Act 1968* (Cth) the *Designs Act 2003* (Cth) and *Trade Marks Act 1995* (Cth). This section discusses the current application of the IP law framework, and makes suggestion for improving the protection of Indigenous knowledge and cultural expression. We have also provided case studies at Appendix B to illustrate the deficiencies of IP laws.

#### 3.1 Copyright

The *Copyright Act 1968* (Cth) grants automatic rights to the creators and owners of works and other subject matter such as films and recordings. There is no need for registration of rights. Once relevant requirements are met, copyright will exist for a certain period of time. For instance, the copyright in an artistic work generally last for 70 years after the death of the artist. Once the copyright term ends, the work is freely available for use, adaptation and exploitation.

Whilst there are limited fair dealing exceptions, the *Copyright Act* allows the copyright owner to control the use and exploitation of their works, films and recordings. Where Indigenous people are the copyright owners of their works, they have the exclusive right to prohibit or do certain acts including publish, reproduce, communicate and adapt<sup>9</sup> their work. Further, where Indigenous people are the owners of copyright in films or sound recordings, they can control reproduction of the film and sound recording. This allows them to control their own individual creative works and outputs. Whilst it becomes more complex when the work, film or sound recording embodies or incorporates Indigenous cultural expression or Indigenous knowledge, copyright can be useful to protect Indigenous knowledge and cultural expression when Indigenous individuals and legal entities are the owners of copyright. The management

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<sup>8</sup> Australian Human Rights Commission, *Commissioner says enjoy the richness of Indigenous culture* (Tuesday 9 August 2011) <[http://www.hreoc.gov.au/about/media/news/2011/68\\_11.html](http://www.hreoc.gov.au/about/media/news/2011/68_11.html)>.

<sup>9</sup> For literary, dramatic and musical works.



of the copyright in many cases is used with observation of cultural protocols that may limit or set conditions on dissemination or adaptation. Obligations to clan groups and compliance with cultural protocols may not be able to be negotiated in licensing rights to third parties. Also, what if the copyright owner does not recognise any cultural limitation or protocols?

In *Bulun Bulun v R & T Textiles*,<sup>10</sup> the court recognised the copyright owner of a bark painting, an Indigenous artist, had a fiduciary obligation to his clan, to ensure that copyright work was used in a way that was consistent with customary obligations. Mr Bulun Bulun had met his obligations at customary law and as a fiduciary by bringing court action against the infringer of copyright in his painting, where the integral ritual knowledge embodied in that painting, was exposed to mass circulation, and was altered, and further, where there was no attribution.

Other copyright owners, such as filmmakers of documentaries and writers of books which incorporate Indigenous ritual knowledge must also consider the cultural obligations which might limit their rights to freely deal with their works and films.<sup>11</sup>

There may be an opportunity to amend the laws to recognise that cultural protocols and prior informed consent rights for cultural knowledge, which is incorporated in a work, film or recording. For instance, a filmmaker may own copyright in a film about Aboriginal ceremony and then deposit it in the archives. Third parties who want to access the film and re-purpose the footage in the future would legally need consent of the filmmaker. However, there should also be consent obtained from relevant Indigenous people, for the re-use of the cultural knowledge.

### 3.1.1 Originality

To obtain copyright protection, an original work must: be, among other things, original and in material form. The question of originality in new works are too similar to old works may serve to deny copyright in new works creating by Indigenous artist, who follow in tradition, and keep very close to the original design. However, Justice von Doussa in *Milpurrurru v Indofurn*<sup>12</sup> found that the Indigenous artists of pre-existing clan designs based on dreaming themes, did impart skill, labour and effort to create a new copyright work, the matter would depend on the particular facts of each case. These 'pre-existing designs' may need special protection. For instance, the wandjina or possum skin cloak designs by Victorian Koori ancestors, could be protected like design insignia.

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<sup>10</sup> *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513

<sup>11</sup> McCausland, S 1999, 'Protecting communal interests in Indigenous artworks after the Bulun Bulun Case', *Indigenous Law Bulletin*, July 1999, vol 4, issue 22, pp 4 – 6.

<sup>12</sup> *Milpurrurru v Indofurn* (1994) 54 FCR 240

### 3.1.2 Author unknown and ancient works

The *Copyright Act 1968* (Cth) also requires that there be an identifiable author of the work. This poses difficulties for communities seeking to protect ancient or very old artwork, out of copyright, where the specific author may not be known.

The time limit placed on copyright protection is also of particular concern as it does not protect Indigenous clan designs, stories, and rock art that first existed in material form thousands of years ago and remains part of the particular Indigenous culture in perpetuity. For example, the *Wandjina* and *mimi* figures that first appeared on ancient rock art are considered the property of the people of that region and their unauthorised reproduction causes deep offence but these artistic works do not fit within the copyright legislative scheme. The images were produced too long ago, the author cannot be identified and in any case passed away some time ago.<sup>13</sup> The irony is that the age and communal cultural significance of these works is what makes them so important to protect, and is also why they cannot be protected under current laws. The cultural significance of artworks such as these is unquantifiable; artworks depicting ancient symbols and figures are manifestations of a deep connection to country, spirituality, lore and tradition and indeed are inseparable parts of Indigenous identity.

Any 'time limit' will make copyright law significantly inadequate in protecting Indigenous knowledge. Legal protection against exploitation of Indigenous knowledge must exist in perpetuity in order to enshrine the sacred nature of such knowledge.

### 3.1.3 Requirement of material form

Copyright protects expressions and not the underlying idea. This requirement of material form precludes Indigenous people from being owners of their oral expressions of knowledge, ideas and clan owned stories. Oral storytellers and holders of knowledge are thus disadvantaged. Whilst there might be scope under performers' rights to control filming, the relating of the story in text, or writing versions of clan owned stories are not protected. Some countries have copyright laws that protect intangible forms, such as French copyright law. Most models for Indigenous traditional cultural expression and knowledge advocate for non-material form protection.<sup>14</sup>

Indigenous culture is largely based on oral tradition; knowledge is often transferred through the spoken word and survives in intangible form. Therefore a large body of orally transmitted knowledge, dreaming stories, songs, dances, techniques etc. are generally not protected by copyright. One of the advantages of maintaining oral transmission of knowledge is that uninitiated members of the community are only told stories and can hold stories only once they go through law.

The material form requirement disfavors Indigenous cultural practices of keeping certain information sacred or secret, and may undermine Aboriginal customary law's ability to use knowledge as a rite of passage.

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<sup>13</sup> Janke T & Quiggin R 2005 *Indigenous Knowledge and Customary Law*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 12.

<sup>14</sup> See *Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002*, Secretariat of the Pacific Community, < [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=184667](http://www.wipo.int/wipolex/en/text.jsp?file_id=184667)>

Another effect of the material form requirement is that it favours those who can reduce stories, knowledge and information into permanent forms such as writing, by giving them rights as the copyright owner. This means that a wide range of stakeholders including interviewers, interviewees, people documenting the knowledge and employers could all be the legal copyright owner. Many Indigenous communities are already documenting oral histories, languages and culture. If a community organisation with fiduciary obligations to the holders of traditional knowledge undertakes the documentation, Indigenous owners and custodians of culture can ensure their knowledge is only used for the benefit of the community in accordance with their protocols. It is also worth noting that works, films and sound recordings made under the direction and control of the Crown, unless there is a contract to the contrary, will vest copyright ownership in the Crown. This raises an issue for government funded projects where recording of Indigenous knowledge takes place. It Indigenous groups often complain to us about the intellectual property clauses of many government funding agreements. For instance, some agreements seek assignment of rights, and many require funding recipients to licence back to the government perpetual rights to use, adapt and sub-license any project material, which may include recordings, film and reports.

Indigenous people who are holders of traditional knowledge who are recorded do not own the copyright in the recording, or the underlying knowledge of their oral information. The law could recognise that the underlying rights of the knowledge holder as an authorship right. For a detailed discussion see Terri Janke, *Writing up Indigenous Research: authorship, copyright and Indigenous knowledge systems*<sup>15</sup>

### **3.1.4 Expression only protected**

A further problem of copyright protects the expression and not the underlying Indigenous knowledge. In this way, a painting receives copyright, only for that expression of an Indigenous design. Whilst the internal knowledge might be linked to land and seas, and reference information about geography, kinship or other customs, there is no legal right for Indigenous clan groups to exercise their cultural laws to limit rights to depict, own and disseminate those artistic styles to members of related clans and groups.

### **3.1.5 Performers rights**

Performers' rights allow performers to control the recording of their performance on film. These rights allow Aboriginal and Torres Strait Islander people scope to protect against filming and recording cultural exploitation of performance, though not of still photography, as the *Wik Apelech Dancers* case study notes.<sup>16</sup> Also, interviewees who disclose traditional knowledge for documentaries can also use these rights to protect their interests. It is common practice for performers' releases to include ICIP type clauses that recognise rights to be re-consulted for use of the film in a new context. However, there are some factors that impact on the ability of these rights being useful for Indigenous people who are filmed as performers:

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<sup>15</sup> Janke, T, *Writing up Indigenous Research: authorship, copyright and Indigenous knowledge systems*, Terri Janke and Company Pty Ltd, Sydney 2009. <[http://www.terrijanke.com.au/documents/WritingupIndigenousresearch\\_14Sep09.pdf](http://www.terrijanke.com.au/documents/WritingupIndigenousresearch_14Sep09.pdf)>

<sup>16</sup> Referenced in *Finding the Way* brochure. See Terri Janke, 'The protection of Indigenous Dance', Minding Culture, World Intellectual Property Organisation, 2003.

- Limited access to legal advice on performers' rights and review of releases. Many people may sign the release form without reading or knowing that they could negotiate, or there is unequal bargaining power in favour of the filmmaker to give unfettered rights to all footage.
- Consent can be implied and no written documents capture the agreement for use of the film footage.
- Unwillingness of the filmmaker, film funding agencies, film financiers and distributors to comply with cultural protocols.
- Archives and libraries of film content do not recognise Indigenous peoples rights to be consulted for re-contextualised use of films.

### 3.1.6 Moral Rights – Indigenous communal moral rights

Moral rights of attribution, against false attribution and integrity are granted to:

- authors of copyright in artistic, literary, musical, or dramatic work;
- filmmakers to their film; and
- performers, to their performances.

Moral rights are important rights for Indigenous artists and creators however, they currently only protect individual moral rights of authors, that is, creators of works, filmmakers and performers. Using the example of the ice skating use of Aboriginal dance, moral rights would not apply because there is no individual creator whose works are being treated derogatorily. There is no recognition of communal moral rights to Indigenous knowledge, or cultural expression.

Indigenous knowledge is more often held for the benefit of a community or group as a whole not an individual creator and there can be strict protocols governing the use of Indigenous knowledge directed at gaining community approval. Indigenous artists and creators often feel uncomfortable about identifying as the 'creator' of Indigenous knowledge, not wanting to undermine their community's traditions and customs.<sup>17</sup> A distinction exists, between their role as 'artist' having the right to depict story in art form and the communal right of the clan group as the cultural owner. There is some judicial 'recognition' of communal ownership,<sup>18</sup> but it has been held that notions of communal ownership cannot affect the outcome of a case or the award of a remedy for breach of Aboriginal copyright.<sup>19</sup> In 2003 the Commonwealth Government drafted proposed amendments to the *Copyright Act* in order to recognise Indigenous communal moral rights. The *Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth)*, however, was criticised as being so limited in the protection it offered that it was "very unlikely an infringement would ever arise" under the new provisions.<sup>20</sup> In any case, the bill did not ever progress to legislation.

In 2003, the draft Indigenous Communal Moral Rights Bill proposed amendments to the *Copyright Act 1968 (Cth)* for the introduction of moral rights for Indigenous communities in a work that is based on Aboriginal Tradition. The Bill never had the support of the then Howard

<sup>17</sup> Nicholls C 2000 'What is Authorship?' *Alternative Law Journal*, vol.25, no.4, pp.187–89.

<sup>18</sup> *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, 490.

<sup>19</sup> *Milpurrruru v Indofurn Pty Ltd* (1994) 30 IPR 209, 239 (von Doussa J).

<sup>20</sup> Anderson J 2004 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law', *University of New South Wales Law Journal*, vol. 27, no. 3, p.592

government, for proper debate and discussion. The drafters had attempted to address the fact that there is a communal right to safeguard the integrity, and to be attributed for, a copyright work and film.

Commentators such as Jane Anderson and Robynne Quiggin examined the bill in detail, with Jane Anderson noting that the requirements for the Indigenous Communal Moral Rights to exist, were circular and confusing, and therefore limited in its application. Moral rights of attribution and integrity for Indigenous communities are significant issues of future policy and legal redress.

### 3.1.7 No special protection of secret and sacred knowledge

Secret and sacred knowledge refers to knowledge that is controlled strictly under customary laws. It may be made available only to the initiated, used at a particular time or for a specific purpose. It may be information that can only be seen and heard by particular clan members (such as men or women or people with certain knowledge).

In 1977, as a result of the *Foster v Mountford*<sup>21</sup> case, a book containing secret sacred information to the Pitjantjatjara men was withdrawn from sale in the Northern Territory.<sup>22</sup> The information had been given to the author in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should it come into the hands of the uninitiated, women or children. The court issued an injunction to stop the sale of the book in the Northern Territory. The case illustrates that the publication of research should be discussed up front. Most Indigenous people would argue that sacred and secret material should not be published and disseminated widely. However, recording projects undertaken for research, may document these stories for cultural maintenance and non-commercial purposes. The recordings still however may be widely circulated, and once recorded placed within archives and libraries, where access may be beyond the control of Indigenous people. A recent article highlights the issues relating to the recording of sacred and secret knowledge is the *Songlines Project*.<sup>23</sup>

Copyright may be able to provide indirect protection by controlling access and use to the recorded form such as the written document, sound recording or film. Archival and library process can also address protocols for management and access. See the Australian Institute of Aboriginal and Torres Strait Islander Studies *Audio-Visual Code of Ethics*<sup>24</sup> and the *Guidelines for Ethical Research in Indigenous Studies*.<sup>25</sup>

A fundamental first step is the process of clearing consent for recording projects, which are often done in collaboration with research institutions. The principle of prior informed consent should be formally recognised with the ethics committees and research funding institutions.

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<sup>21</sup> *Foster v Mountford* 14 ALR 71, 1997.

<sup>22</sup> Mountford, Charles, *Nomads of the Australian Desert*, Rigby, Adelaide, 1976.

<sup>23</sup> Rintoul, S 2009, 'Songline at heart of secret men's business', *The Australian*, 19 May 2012. P. 1

<sup>24</sup> Australian Institute of Aboriginal and Torres Strait Islander Research, *Guidelines for Ethical Research in Indigenous Studies. Audio-Visual Archives Code of Ethics*, <<http://www.aiatsis.gov.au/ava/ethics.html>>.

<sup>25</sup> Australian Institute of Aboriginal and Torres Strait Islander Research, *Guidelines for Ethical Research in Indigenous Studies, 2011 (2<sup>nd</sup> edition)* <<http://www.aiatsis.gov.au/research/docs/ethics.pdf>>.

### 3.1.8 Summary - Copyright

Copyright gives rights to artists for their works and to makers for their films and sound recordings. Both economic rights and moral rights are used by Indigenous creators to protect their works. However, the criteria for copyright must be met. There are some issues for Indigenous cultural expression meeting the originality requirement, the material form requirement and some works may be very old that they are out of copyright protection, or the individual author is unknown.

Indigenous people who are holders of traditional knowledge who are recorded do not own the copyright in the recording, or the underlying knowledge of their oral information. The law could recognise Indigenous authorship rights to oral knowledge and expression.

Whilst copyright ownership can be assigned and shared, there is limited knowledge and legal assistance to Indigenous people. Further, many researchers or recordists do not cover this issue prior, or at the time of recording. Performer's rights can provide some protection for the performer to control recording. However, consent can be implied, and recording is often done without proper understanding of the rights transferred.

The main copyright issues that require attention are:

- Indigenous cultural works that are deemed in the public domain, where the author is unknown and are not in material form may fall outside the copyright system.
- Indigenous clan owned designs that have cultural significance require special attention, as does sacred and secret material.
- Understanding that copyright owners may have fiduciary relationships with Indigenous knowledge holders.
- Recognising Indigenous authorship of Indigenous knowledge and cultural expression when recording and writing up Indigenous knowledge.
- Cultural protocols – established systems for use and dealings of Indigenous knowledge and cultural expression.
- Use of contracts – assignments and licensing.
- Moral rights – attribution and integrity.

## 3.2 Trade Marks

Trade marks provide certain economic rights to Indigenous owners of registered trade marks which allow them to take action against rival traders who attempt to use of the same or similar marks. This can capture Indigenous words and symbols used in trade. Further, trade marks provide a means for Indigenous businesses to promote their products and services as authentic.

The *Trade Marks Act 1995* (Cth) defines a trade mark a ' sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by another person.<sup>26</sup> Once someone owns a trade mark they have exclusive the right to use it, authorise others to use it and obtain relief when unauthorised use is made of it. Unauthorised use is considered the use of sign that is identical or deceptively similar to the trademark without permission.<sup>27</sup>

To register a trade mark, an Indigenous person or business can apply to IP Australia's trade mark office, and the mark once examined, and advertised, will be registered for 10 years, and then every 10 years thereafter, on payment of a fee. In 2010, IP Australia released *Nanga Mai Arung Dream Shield: A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders*.<sup>28</sup> This has been well received and resulted in more Indigenous businesses using trade marks. However, there are some applications filed by Indigenous people which do not go through to registration after the first report is received from IP Australia. More information and guidance is need in selecting classes, and choosing distinctive names for registration.

### 3.2.1 Can Indigenous people trademark their expressions of knowledge?

The *Trade Marks Act* has scope for Indigenous registered owners to protect their names and symbols, at least in related classes of goods and services, used by others in the course of trade.

Trade marks can also be owned collectively. An Indigenous community organisation, individual or unincorporated association can register as the owner of a trademark in the name of a trustee or on behalf of beneficiaries.<sup>29</sup>

The Label of Authenticity is an example of a certification mark used to denote authentic products and services. The National Indigenous Arts Advocacy Association's Label of Authenticity is discussed in detail in ' Indigenous Arts Certification Mark' Case Study in *Minding Cultures*.<sup>30</sup>

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<sup>26</sup> *Trade Marks Act 1995* (Cth) s17

<sup>27</sup> *Trade Marks Act 1995* (Cth) s20

<sup>28</sup> IP Australia, *Nanga Mai Arung Dream Shield: A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders, Commonwealth of Australia, 2010*, <[http://www.ipaustralia.gov.au/uploaded-files/2973/Dream\\_Shield.pdf](http://www.ipaustralia.gov.au/uploaded-files/2973/Dream_Shield.pdf)>.

<sup>29</sup> Australian Government, *The Trade Marks Application Kit: An Easy Guide To Applying for Your Trade Mark*, (Canberra: IP Australia, 2000) 4. Cited in Janke T & Quiggin R 2005 *Indigenous Cultural and Intellectual Property and Customary Law*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 12.

<sup>30</sup> Janke, T 2003 *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions*, viewed on 26 April 2012, <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>>.

There has been steady use of trade marks registration system by Indigenous business, community organisations and government entities working in Indigenous affairs. Arts Centre and commercial galleries are also using the registered trade mark system. Used with copyright and contracts, Indigenous arts business operators allow arts operators to set commercial and cultural terms, as well as promote source and origin. See the case study, 'Marketing and Merchandising of Art: Desert Trade Mark and Copyright Licensing', in *Minding Culture*.<sup>31</sup>

### 3.2.2 Can Indigenous people oppose unauthorised trade marks?

There are many examples of organisations or people seeking trademarks on Indigenous words or symbols without consultation, prior informed consent or observance of customary law.<sup>32</sup> For example the word 'Monaro' is the name of a clan group but has been trademarked several times without consultation of the Monaro people. Similarly, attempts have been made to trademark the word 'Wandjina'.

The Registrar of Trade Marks may reject an application if the trade mark is not distinctive, likely to deceive or cause confusion, is scandalous or contrary to law. Third parties may also oppose the registration of a trade mark on these grounds that a trade mark is not distinctive, like to deceive and cause confusion, is scandalous or contrary to law.<sup>33</sup> Indigenous people may be able to challenge the registration of trademarks that are culturally offensive on the grounds that they are scandalous or contrary to customary law. However, this raises questions regarding the scope of the term 'law' in the *Trade Marks Act 1995* (Cth).

In 2003 a group of Aboriginal artists successfully opposed an attempt to trademark the slogan 'Utopia Batik' under s58 of the *Trade Marks Act 1995* (Cth) arguing that the word 'Utopia' should be available to all artists of the region.<sup>34</sup>

The process of challenging registration of culturally offensive trade marks is more straightforward in New Zealand, where provisions have been introduced that allow the Trade Mark Commissioner to deny registration on the grounds that the mark is offensive to Maoris.<sup>35</sup> The Act also establishes an advisory committee, comprised of people with knowledge of Maori protocols and culture, to advise the Commissioner on whether a mark would be offensive.<sup>36</sup> The implementation of similar provisions in Australia could be considered to assist in protecting against the registration of culturally offensive trade marks.

### 3.2.3 Authenticity, geographic indications and ethical branding

Trade marks, particularly certification trade marks, and geographical indication and ethical branding may be useful for Indigenous knowledge and cultural expression protection that is offered for commercial sale. In 2000, the National Indigenous Arts Advocacy Association

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<sup>31</sup> Janke, T 2003 *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions*, viewed on 26 April 2012, <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>>.

<sup>32</sup> T Janke 2003 *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions*, viewed on 26 April 2012, <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>>.

<sup>33</sup> *Trade Marks Act 1995* (Cth) division 2, part 4. Ibid. s52 (1).

<sup>34</sup> Trade Mark applications 802956 and 802957, Trade Mark Hearing 31 August 2003.

<sup>35</sup> *Trade Marks Act 2002* (NZ) s17(1)(c)

<sup>36</sup> *Ibid* ss.177-179



developed the Label of Authenticity, a certification mark aimed at identifying 100% produced Indigenous products. Whilst not used in the long term in Australia, the mark inspired the toi iho mark, which was recently reintroduced in New Zealand.

The toi iho mark is used to certify goods and artistic content which are Maori-made and of a high quality. In addition to being used for arts and crafts, the mark can apply to performance, music, drama and literature.<sup>37</sup>

In the past ten years consumers have become more discerning. Ethical branding such as Fairtrade<sup>38</sup> and green labelling are well known models that could be used as a basis to develop for application for Indigenous cultural material. Systems of certification should be developed, owned and controlled by Indigenous people.

### 3.2.4 The role of IP Australia

There is also scope for IP Australia to integrate processes within its administration of registered IP rights, including trade marks. Establishing a committee like the New Zealand Maori Trade Mark Advisory Committee, and similar checks and measures within the examination process would help non- culturally authorised registration of trade marks that are Indigenous language groups' names, famous Indigenous people or language words with specific cultural rules and connections.

### 3.2.5 Summary – Trade marks

Trade marks can be useful for branding and protecting words, art, logos and devices used by Indigenous people in the course of trade. More assistance for Indigenous businesses is needed to assist their choices at application, and to also respond to any adverse reports during the examination process.

Indigenous people can oppose trade mark registrations that are cultural words, logos and symbols of special significance. However, oppositions by Indigenous people are rare, and in many cases, the attempted registration of Indigenous cultural material as trade marks is unknown to Indigenous people. Indigenous liaison officers at IP Australia would assist. Consideration should be given to an Indigenous advisory committee similar to the New Zealand Maori Trade Mark Advisory Committee<sup>39</sup>. Further, a central register for sacred words of material or clan owned insignia is also recommended.

Certification marks may also be useful for Indigenous arts and knowledge. Any system of certification should be managed and controlled by Indigenous people.

The main trade mark issues that require attention are:

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<sup>37</sup> <<http://www.toiho.co.nz/trademark-seen-as-setting-high-standards-for-art/>>

<sup>38</sup> Fair Trade Association is a not for profit organisation promotes fair working conditions, local sustainability, and fair terms of trade for farmers and workers in the developing world. The registered trade mark is applied to coffee and chocolate where the product meets ethical standards developed by the Association. <<http://www.fta.org.au/>>; See also Michael Spencer, Jocelyn Hardie, *Indigenous Fair Trade in Australia: Scoping study*, Rural Industries Research and Development Corporation, Canberra, 2011. <<https://rirdc.infoservices.com.au/items/10-172>>.

<sup>39</sup> Intellectual Property Office New Zealand (IPONZ), <<http://www.iponz.govt.nz/cms/trade-marks/the-trade-mark-process/examination-step/maori-trade-marks-advisory-committee>>.

- Within the examination process of trade marks, there is a need for Indigenous review of trade mark applications using cultural expression.
- Indigenous clan owned designs and language words require consent, and a register for specific words and symbols should be established.
- Greater assistance and information about the process of registration is needed, including dealing with choices made at application, dealing with adverse reports.
- Establish ways for Indigenous people to know about the filing of trade marks with Indigenous elements (other than by way of the official journal) so that they can consider oppositions or enter into potential negotiations for authorised use.
- Certification mark offer opportunities for Indigenous people to promote authentic products and services.

### 3.3 Designs

The *Designs Act 2003* (Cth) protects registered designs which meet the following definition:

Design in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.<sup>40</sup>

Designs are only registrable if they are on a manufactured product and are new and distinctive in that they have not been previously used and are not substantially similar to other designs in the prior art base. There is no recognition of communally owned designs and there is a strong focus within the legislation on commercial production. Registration incurs costs and requires legal services, and protection only last for 5 – 10 years. See the case study ‘Industrial Designs and their application to Indigenous cultural material’ in *Minding Cultures*.<sup>41</sup>

The focus of the *Designs Act* is industrial designs and should not be confused with ‘designs’ or ‘styles’ of Aboriginal art. In 1994, there was a review of the previous *Designs Act 1906* (Cth). In 1995 the Australian Law Reform Commission released the *Designs Final Report No 74* reviewing the legislation, including issues relating to protecting Indigenous designs. In the report, there was some discussion about the protection for Indigenous pre-existing clan designs that were passed on through the generations, belonging to a particular group. The report recommended that the issue be covered in Aboriginal cultural heritage at which time, which was being conducted at the time, but with the 1996 change in government was discontinued.

There is no ability to protect ‘Indigenous clan owned designs’ under the *Designs Act*, in the way Indigenous people would want to control use, according to customs and cultural practice. However, Indigenous people, who are jewellery, fashion and furniture designers, have registered their independent creative designs, some drawing on cultural imagery. Alison Page, Diamond Dreaming, for example, has been advised to consider registering her designs for jewellery.<sup>42</sup>

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<sup>40</sup> *The Designs Act 2003* (Cth) s5

<sup>41</sup> Janke, T 2003 *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions*, viewed on 26 April 2012, <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>>.

<sup>42</sup> See IP Australia, *Dream Shield*, pp. 26 - 27.

### 3.3.1 Summary – Designs

The *Designs Act 2003* does not protect Indigenous clan designs in the way that Indigenous people seek to have their cultural designs and insignia protected. However, registered industrial design rights provide limited commercial rights to registered design owners.

The main design issues that require attention are:

- A separate system for recognition of Aboriginal and Torres Strait Islander cultural designs should be considered.
- This sui generis system should inform applications for registration of design for commercial applications of Indigenous cultural materials.

## 4. Trade Practices – Australian Consumer Law

This section discusses trade practices under the Australian Consumer Law. Though not intellectual property, it is relevant to discuss in light of the sale and marketing of Indigenous arts and cultural products and services.

### 4.1 Misleading and deceptive conduct

The *Competition and Consumer Act 2010 (Cth)* (replacing the *Trade Practices Act 1974*) makes it an offence to engage in misleading and deceptive marketing. This may give some scope to restrict the sale and marketing of Aboriginal and Torres Strait Islander works and services that are not authentic. The Australian Consumer and Competition Commission (ACCC) have in the past used its powers to prevent misleading or deceptive conduct by prosecuting those who falsely market products as ‘Aboriginal-made’ or ‘authentic Aboriginal merchandise’.<sup>43</sup> As Indigenous people and discerning consumers become aware of products falsely claiming Indigenous attribution they may draw this to the attention of the Commission.

The sale of fake arts and crafts can affect the authentic sale of Indigenous arts and craft. Labelling and protocols have been some responses aimed to benefit Indigenous arts producers. These responses are ethical and voluntary. For instance, the Indigenous Art Code sets standards for the ethical dealings with Indigenous artists.<sup>44</sup> The Indigenous Art Code provides that ‘Dealer members must not make false and misleading representations or engage in conduct which constitutes misleading or deceptive conduct or conduct that is likely to mislead or deceive, when dealing with a person in connection with an artwork.’ The Code then lists exemplary scenarios where misleading and deceptive conduct may occur including statements about authenticity or provenance, place of origin and whether the artwork was produced by an Indigenous artist.<sup>45</sup> Galleries and art dealers have the option to subscribe to the system. This means that only a number of galleries and dealers sign on. This can create issues in future, if there is no perceived benefit for those that do subscribe and no

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<sup>43</sup> *ACCC v Australian Icon Products Pty Ltd* (Federal Court Proceedings Q33 of 2003); *ACCC v Australian Aboriginal Art Pty Ltd, Henry Peter De Jonge, Bruce Leslie Read* (Federal Court Proceedings Q131 of 2003). [All settled by consent]

<sup>44</sup> Indigenous Art Code Ltd, *Indigenous Art Code: A code to promote fair and ethical trade in works of art by Indigenous artists*, <<http://www.indigenousartcode.org/>>.

<sup>45</sup> Clause 2.2 of the Indigenous Art Code, *ibid*.

repercussions for galleries that continue to mislead and deceive. Greater marketing to art buyers is required so buyers are encouraged to buy from Art Code dealers and galleries. At the launch of the Code, the then Minister for the Arts, Senator Garrett noted that after two years the Government would review the impact, and consider whether the Code should be mandatory.<sup>46</sup> Further consideration should be given to compliance.

## 4.2 Indian Arts and Craft Act (2000)

In the United States, the *Indian Arts and Crafts Act* (2000) makes it an offence to sell goods in a way that falsely suggests that the goods are Indian-produced. Under the *Indian Arts and Crafts Act*, parties can apply for damages and or injunctive relief, including having offending objects removed from sale. The *Indian Arts and Crafts Act* aims to “promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship”.<sup>47</sup> In addition to ensuring that Indian tribes and individuals benefit from the sales of products reflecting their cultural heritage, the *Indian Arts and Crafts Act* allows them to control how (and if) such products are produced and sold.

There is scope for a similar type of law for Australia which could extend to arts and craft, but also to products and services.

## 4.3 Summary – Trade Practices

Commonwealth trade practices laws can be used to stop misleading and deceptive conduct. There are examples of where the Australian Consumer and Competition Commission has taken action against misleading representation made by galleries about the ‘Aboriginality’ of the work for sale. The role of the state fair trading departments could also assist in the same way and provide dispute resolution via tribunals.

The Indigenous Art Code promotes ethical practices by galleries and dealers, however, the impact of the Code should be assessed and further consideration given to whether the Code should be made mandatory.

A separate law dealing with misrepresentations and the sale of false Indigenous arts and craft could also be an option. For instance, in the United States, the *Indian Arts and Crafts Act of 1990* makes illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian Tribe or Indian arts and crafts organisation, resident within the United States.<sup>48</sup>

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<sup>46</sup>Anonymous, Doorstop interview, ‘Cultural Ministers Council Endorsement Of Indigenous Art Code Of Conduct: Interview’ Monday, 12 October 2009,

<[http://indigenousspeoplesissues.com/index.php?option=com\\_content&view=article&id=2321:cultural-ministers-council-endorsement-of-indigenous-art-code-of-conduct-interview&catid=24&Itemid=57](http://indigenousspeoplesissues.com/index.php?option=com_content&view=article&id=2321:cultural-ministers-council-endorsement-of-indigenous-art-code-of-conduct-interview&catid=24&Itemid=57)>

<sup>47</sup> *Indian Arts and Crafts Act* (2000) s305a

<sup>48</sup>Indigenous Arts and Craft Board, US Department of Interior, <<http://www.iacb.doi.gov/act.html>>.

## 5. Contracts

Indigenous artists have sought to maintain and protect their cultural rights to their works and to require users of cultural content to follow cultural protocols, by using contracts. As they engage in sale, promotion and recording of their knowledge and cultural expression, there is a growing number of individual artists and knowledge holders who are using written contracts with terms that address community consultation, or clan consent for future uses. Contracts can also address clan attribution and benefit sharing.

Some means of using contract for Indigenous rights recognition have included:

- The film industry has included Indigenous cultural and intellectual property terms in contracts – see Screen Australia agreements, performers' releases and location agreements.
- Publishing agreements have included their letters used by Magabala Books, and co-authorship to Indigenous subjects or 'oral' informants.<sup>49</sup>
- Licensing agreements for art have included reference to respecting the material subject licence, to agreed protocols, including the Artform Protocols.

The Arts Law Centre of Australia provides excellent services for general advice through its Artists in the Black program, and can assist with negotiation and enforcement of contractual rights.

To the extent that contracts are useful to protect Indigenous knowledge rights, there is still the unequal bargaining position of Indigenous artists and Indigenous people. Including such terms within agreements is a point of negotiation. Without the backing of law, the recognition of cultural rights and consulting community can be overlooked in commercial agreements.

Further, contracts only bind parties to the agreement. Other people who use cultural content without permission cannot be stopped by Indigenous people who are not copyright owners. This weakens the position of Indigenous people to negotiate specific rights under agreement.

### 5.1 Summary – Contracts

Contracts can provide recognition of cultural interests at least by binding the parties to the agreement. The use of such terms in contracts is good practice and has led to greater recognition of these issues within the industry. Bodies like the Australia Council and Screen Australia have included cultural terms in their funding agreements.

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<sup>49</sup> Janke, T 2009 *More Than Words – Writing, Indigenous Culture & Copyright in Australia*, Australian Society of Authors, viewed 26 April 2012, <[http://www.asauthors.org/lib/ASA\\_Papers/ASA\\_Writing\\_About\\_Indigenous\\_Australia.pdf](http://www.asauthors.org/lib/ASA_Papers/ASA_Writing_About_Indigenous_Australia.pdf)>

## 6. Protocols

Protocols refer to the acceptable practices under customary law and related developed industry practice, for using Indigenous knowledge. Indigenous cultural protocols operate at a local community level depending on the aspect of knowledge or cultural material. Some protocols are shared with other cultural groups, others are specific. There are general principles that are common to Indigenous groups.

Protocols are flexible because they can be adapted to recognise the diversity and complexity of the many different Indigenous cultures in Australia. Ways of dealing with cultural material may differ from community to community and in different industries. There are many Indigenous organisations, government departments and research institutions with published protocols for dealing with Indigenous knowledge. The content of protocols range from dealing with general principles at a high level, to specific details for dealing with Indigenous people, and their knowledge.

Protocols can promote ethical practice by encouraging consultation and benefit sharing however they can also state specific obligations under Aboriginal customary law. In this respect, protocols are used as a measure to protect Indigenous knowledge where it is not formally recognised by the Australian legal system.<sup>50</sup>

### 6.1 Indigenous protocols in industry and government

A number of government cultural agencies and statutory authorities have developed protocols, including the ABC, SBS, and Screen Australia, the Ministry for the Arts (NSW) and the National Film and Sound Archives. Research institutions including the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Desert Knowledge CRC have also developed protocols. Industry organisations such as National Association for the Visual Arts<sup>51</sup> and the Australian Society of Authors have also developed protocols.

Protocols can be effective. Firstly they promote cultural understanding to great number of people.<sup>52</sup> Secondly, they encourage compliance. This might be a condition of the funding agreement itself or set criteria as the standard of practice expected from recipients of government funded projects or research.<sup>53</sup> But if it is not a government funded project, getting people to comply with protocols can be difficult.

Protocols do not give rise to a universal legally enforceable right in favour of the Indigenous knowledge holders. For this reason, enforcement or non-compliance remains an issue.

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<sup>50</sup> Gray, S 2004 'Imagination, Fraud and the Cultural Protocols Debate: A Question of Free Speech or Pornography?' *Media & Arts Law Review* 2004, Vol. 9, number 3, pp.23-35

<sup>51</sup> Mellor, D with a legal section by Janke, T, 2001, *Valuing Art, Respecting Culture: Protocols for working with the Australian Indigenous visual arts and craft sector*, NAVA, <<http://www.visualarts.net.au/advicecentre/valuing-art-respecting-culture>>.

<sup>52</sup> Chapman, L 2003 'Copyright and Aboriginal art— Balancing Western law and Aboriginal culture,' *Asia Pacific Journal of Arts and Cultural Management*, Vol. 1 Issue 1, p.15.

<sup>53</sup> Bowrey, K 2006, 'Alternative intellectual property? Indigenous protocols, copyleft and new juridifications of customary practices', *Macquarie Law Journal*, Vol. 6, pp. 65-95.

Ideally, industry protocols and community-specific protocols would be backed up by a robust legal framework protects the general rights of Indigenous communities to control the use of their knowledge; exercise free, prior and informed consent; and receive shared benefits from the commercial exploitation of such knowledge.

Protocols are not a replacement for legislative protection. Protocols provide direction on culturally appropriate ways to manage micro-level relationships in specific circumstances. Legal protections exist at the macro-level by setting out binding rights and obligations on all parties dealing with Indigenous knowledge and cultural expression.

## 6.2 ATSIAB Artform Protocols

The Australia Council for the Arts recognises the fundamental role of the Aboriginal and Torres Strait Islander Arts Board (ATSIAB) as its leading authority in Aboriginal and Torres Strait Islander arts. ATSIAB assists Aboriginal and Torres Strait Islander people to claim, control and enhance their cultural inheritance. The ATSIAB supports the development and promotion of traditional arts practices, as well as the generation of new forms of artistic expression among Aboriginal and Torres Strait Islander people in urban and regional areas, and in all art forms. The ATSIAB regards Aboriginal and Torres Strait Islander cultures as living forces, each with its own strength and energy, and not just remnants of the past. It aims to make these cultures part of the contemporary experiences of Aboriginal and Torres Strait Islander people and a source of pride for all Australians.

The Aboriginal and Torres Strait Islander Arts Board advocates for the greater protection of Indigenous cultural and intellectual property rights. ATSIAB funded the National Indigenous Arts Advocacy Association to take the landmark case, *Milpurruru v Indofurn*<sup>54</sup> and to develop the Label of Authenticity.

ATSIAB produced the *Artform Protocols for Aboriginal and Torres Strait Islander Arts* and in recent years has hosted a National Indigenous Reference Group who supported the establishment of a National Indigenous Arts Cultural Authority.

The *Artform Protocols for Aboriginal and Torres Strait Islander Arts* cover music, visual arts, literature, performing arts and media arts. The ATSIAB protocols have been recognised as valuable in that they introduce Aboriginal and Torres Strait Islander voices to the range of resources available to those who produce art.<sup>55</sup> The ATSIAB Artform protocols state:

Protocols are appropriate ways of communicating and working with others. They encourage ethical conduct and promote interaction based on good faith and mutual respect. Indigenous cultures place importance on the observation of cultural protocols for working with Indigenous material and interacting with Indigenous people and communities.<sup>56</sup>

Recipients of Australia Council funding must comply with the protocols and are asked to sign written funding agreement that set this as a condition of grant. If a grant recipient did not

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<sup>54</sup> *Milpurruru v. Indofurn Pty. Ltd* (1995) 30 IPR 209

<sup>55</sup> Mackay E 2009 'Indigenous Traditional Knowledge, Copyright and Art', *UNSW Law Journal*, vol. 32, no. 1, p.20

<sup>56</sup> < [http://www.australiacouncil.gov.au/\\_\\_data/assets/pdf\\_file/0004/32368/Visual\\_arts\\_protocol\\_guide.pdf](http://www.australiacouncil.gov.au/__data/assets/pdf_file/0004/32368/Visual_arts_protocol_guide.pdf) > p.3

follow protocol, the Australia Council could take action for breach of contract. To date there has been no legal action taken by the Australia Council for non-compliance. In any event, the tough competition for arts funding provides a strong impetus for the cultural institutions and project managers to follow protocols. Not following them could prevent receipt of future funding.<sup>57</sup>

Feedback from arts practitioners is that the guidelines are comprehensive and useful for both artists and organisations working to protect Indigenous knowledge and cultural expression. They have been used by Indigenous arts practitioners and non-Indigenous practitioners alike. In this respect, the protocols raise awareness of the rights of Indigenous people in areas where there previously been limited recognition of such rights.

Further, they educate arts and cultural workers (both Indigenous and non-Indigenous) about their responsibilities in dealing with Indigenous cultural content.<sup>58</sup>

A limitation noted by Margaret Raven is that the ATSIAB Artform protocols and potentially all written protocols, tend to assert their own authority, and take compliance for granted. Raven makes the point, 'important cultural interactions and social relationships that underpin artistic and cultural practice can become detached from protocols.'<sup>59</sup> The written protocols should not be seen as taking the place of consultation with Indigenous communities. The ATSIAB protocols state the principles for following protocols and advocates consent and direct consultation. The protocols for each project, that is the local cultural protocols, should also be identified from discussions and negotiated pathways with Indigenous collaborators.

The protocols have been widely circulated and have had significant impact in arts practices. They allow for adaptation for specific industries and regions. For instance, Arts Tasmania used the protocols framework to develop their state specific protocols, *Respecting Cultures*. Furthermore, Canadian arts practitioners are considering similar models.<sup>60</sup>

### 6.3 Summary - Protocols

Protocols are a flexible means of establishing a framework for protection that can be adapted to particular projects, subject matter, regions or institutions.

Protocols that are supported or endorsed by industry bodies can improve their chance of firstly being known, and secondly, by setting industry standards.

Protocols can be enforced by way of contract.

There is scope for local Indigenous representative groups to develop their own protocols using the framework of written protocols and contracts. This can be used as part of a prior

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<sup>57</sup> Harrison J 2009 "Indig-curious : what are the challenges for non-Aboriginal theatre practitioners in accessing and interpreting Indigenous themes?" , submitted to Creative Arts Industry, QUT [Thesis], p. 5.

<sup>58</sup> Chapman K, 'Copyright and Aboriginal art – Balancing Western law and Aboriginal culture,' *Asia Pacific Journal of the Arts and Cultural Management*, Vol 1, Issue 1, December 2003, pp. 15 – 21, at 15.

<sup>59</sup> Raven M 2010 'Protocols: Devices for translating moralities, controlling knowledge, defining actors in Indigenous research, and critical ethical reflection', *Australian Aboriginal Studies*, No. 2, pp. 33-47.

<sup>60</sup> Anderson, Dr J and Younging, Dr G, 'Canadian Public Art Funders Professional Development Meeting on Aboriginal Arts Discussion Paper on Protocols - March 2010, <[http://www.andersonip.info/PDF/AndersonYounging\\_PROTOCOLS.pdf?referer=http%3A%2F%2Fworks.bepress.com%2Fjane\\_anderson%2F11%2F](http://www.andersonip.info/PDF/AndersonYounging_PROTOCOLS.pdf?referer=http%3A%2F%2Fworks.bepress.com%2Fjane_anderson%2F11%2F)>



informed consent process that is proactively managed by Indigenous people. There is need for education and awareness so that Indigenous cultural leaders, knowledge holders have adequate information.

## 7. New Laws

The current intellectual property framework has some fundamental issues for protecting Aboriginal and Torres Strait Islander knowledge and cultural expression. For this reason, many Indigenous people and reports about this issue have called for a new standalone law to provide rights to Indigenous people over their cultural knowledge.<sup>61</sup> For a detailed discussion see Chapter 19, of *Our Culture, Our Future* entitled 'Specific Legislation'.<sup>62</sup>

The law should aim at providing rights that are not currently protected under intellectual property. Some potential features:

- Rights to Indigenous people to control and manage their Indigenous Knowledge as it is recorded, used, commercialised.
- The powers to initiate legal proceedings and seek remedies for contravention of the rights contained within the legislation.
- Criminal sanctions for certain uses of Indigenous Knowledge, particularly for secret and sacred material.
- Create a register of protocols or codes of conduct developed by Indigenous communities, and provide a mechanism for compliance.
- Prohibit misrepresentations, wilful distortion and destruction of cultural material.
- Allow remuneration for commercial uses.
- Establish a central coordination body (a National Indigenous Cultural Authority) to educate the community about Indigenous cultural and intellectual property rights, administer the legislation, mediate and assist in negotiations, collect license fees, investigate alleged breaches and institute proceedings against offending parties.
- Prohibit the use of Indigenous knowledge without adequate documentation of the free, prior and informed consent of the Indigenous owners to an arrangement which contains the sharing of ownership, control, use and benefits.
- Prohibit the use of secret/sacred Indigenous knowledge other than in a customary context by customary users.
- Provide for the communal moral right of attribution

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<sup>61</sup> Law Reform Commission of Western Australia, 2005, *Indigenous Knowledge and Customary Law*, Background Paper No 12 (2005) 328.

<sup>62</sup> Janke, T 1998 *Our Culture : Our Future*, Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, pp.179 - 194

- Protect Indigenous knowledge that has not been expressed in material form.
- Recognise and protect rights in perpetuity.
- Protect Indigenous knowledge that is not novel or original under existing legislation such as traditional ecological knowledge that has not been converted in to some new form.

The World Intellectual Property Organization (WIPO) website has a number of model laws for protection of Indigenous knowledge and cultural expression, including the Pacific Model for the Protection of Expressions of Culture.<sup>63</sup>

The international developments in WIPO's Inter-Governmental Committee on Traditional Knowledge at the Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) should also be closely watched. The Draft Provisions for Traditional Knowledge and Traditional Cultural Expression could be part of a future international legal instrument, and there is a need for Indigenous Australians to feed into negotiations, and consider future options for implementation within Australian law.

## 8. National Indigenous Cultural Authority

A National Indigenous Cultural Authority could administer prior informed consent rights to cultural material.<sup>64</sup> A National Indigenous Cultural Authority, to promote Indigenous cultural and intellectual property rights and to develop standards for appropriate use including royalties, cultural integrity and attribution. An independent National Indigenous Cultural Authority could manage rights clearances by keeping a comprehensive database of rights holders and cultural material, so that those who want to negotiate or seek appropriate use can do so, by contacting the relevant parties.

*Beyond Guarding Ground* proposes that the National Indigenous Cultural Authority (NICA) could develop a strong trade mark and branding system to endorse projects, goods and services facilitated by the NICA process of prior informed consent.<sup>65</sup>

The National Indigenous Cultural Authority could draw on existing Indigenous protocols and set standards for consent procedures, attribution and integrity. In this respect, the model acknowledges the role of community ownership and control within that culture.

The ATSIAB's Indigenous Reference Group (IRG) supported early work towards development of a National Indigenous Arts Cultural Authority, to focus on the arts and cultural uses of Indigenous Knowledge. The IRG supported the concept of a National

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<sup>63</sup> World Intellectual Property Organisation, See various model laws at WIPO's website, <<http://www.wipo.int/wipolex/en/details.jsp?id=6712>>.

<sup>64</sup> Janke T, 2009, *Beyond Guarding Ground, a vision for a National Indigenous Cultural Authority*, Terri Janke and Company, Sydney, <[http://www.australiacouncil.gov.au/resources/reports\\_and\\_publications/subjects/policy/beyondguardingground/Beyond\\_guarding\\_ground.pdf](http://www.australiacouncil.gov.au/resources/reports_and_publications/subjects/policy/beyondguardingground/Beyond_guarding_ground.pdf)>.

<sup>65</sup> Janke, T. 2009 *Beyond Guarding Ground: a proposal for a National Indigenous Cultural Authority*, p.23

Indigenous Cultural Authority and generally considered a flexible model to provide Indigenous local and regional autonomy.

The Arts Law Centre of Australia responded to *Beyond Guarding Ground* noting that whilst the paper argues for a NICA to administer a system of rights that can benefit Indigenous knowledge holders, 'there is no legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional cultural knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of ICIP capable of enforcement by the Australian legal system.'<sup>66</sup> For this reason, the Arts Law Centre recommended that sui generis law form the basis for an Indigenous cultural knowledge rights management system. This should be canvassed by the government in its discussion paper with appropriate time given for Indigenous people to provide feedback.

## 9. Conclusion

Indigenous people have used intellectual property such as copyright, designs and trade marks to protect their cultural interests. These are used together with protocols and contracts to promote and enforce rights, beyond general copyright law.

These intellectual property laws do not adequately protect Indigenous knowledge and cultural expression. Indigenous people view expression and knowledge as holistic and interrelated, continuing and evolving. Australian intellectual property laws are based on material form, time limits, individual authorship and ownership, commercial gain and categories of law such as copyright, designs and trade marks.

Indigenous customary laws for Indigenous knowledge and its manifestation in cultural expressions such as dance, song, story and art, are based on oral transmission, preservation in perpetuity, communal ownership, custodianship, rites of passage (initiation) and holistic notions of interconnected knowledge.

Indigenous people's ability to protect and practice their Indigenous knowledge and cultural expression according to their cultural laws is limited in the existing IP framework. Legal change is needed to provide better recognition of their rights. The lack of protection has been the subject of a number of Australian enquiries and publications including the Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies commissioned report, *Our Culture: Our Future*.<sup>67</sup>

With or without new law, there is a need for a National Indigenous Cultural Authority to administer the framework for prior informed consent rights to cultural material. A National Indigenous Cultural Authority could be front door through which users can come through and be assisted to identify Indigenous rights holders to negotiate and uses of cultural material, and benefit sharing.<sup>68</sup>

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<sup>66</sup> Ayres, R 2009, Executive Director, Arts Law Centre, Emailed document to Terri Janke, '*Beyond Guarding Ground: Response of Arts Law Centre of Australia*,' 19 October 2009

<sup>67</sup> Janke T 1998 *Our Culture : Our Future*, Michael Frankel and Company, under commission by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1999.

<sup>68</sup> Janke T, 2009, *Beyond Guarding Ground, a vision for a National Indigenous Cultural Authority*, Terri Janke and Company, Sydney,

In summary, of the three key benefits set out above, the National Indigenous Cultural Authority could:

- Connect users with knowledge holders allowing for consent to be given at local, regional levels, but drawing on a national support base.
- Set standards for negotiations and contracts – use, moral rights, and dispute resolution.
- Promote authorised use by way of a trade mark. This is about wider recognition of the value and providing benefits to discerning consumers. This could be a system of geographical indications or a strong trade mark like the Label of Authenticity.

There should be greater coordination of domestic and international approaches. This enquiry needs to coordinate with the government's contributions at the WIPO-convened IGC on Traditional Knowledge. After 12 years, international texts on protection of Traditional Cultural Expression and Traditional Knowledge may soon be put to the General WIPO Assembly. The Australian Government should ensure that Indigenous people are consulted, and participate in the process.

Indigenous people and key organisations should be involved in future direction. An Indigenous steering committee established to oversee the government's implementation of its obligations under Article 31 of the *Declaration of the Rights of Indigenous Peoples*. This is an important right for Indigenous people. It provides a cultural and economic basis for Indigenous people to practice, revitalise and strengthen their cultural practices, as well allowing negotiated appropriate use.

The role of intellectual property and its impact on the recognition of Aboriginal and Torres Strait Islander peoples' cultural knowledge must be examined, assessed against its ability to deliver, and new tracks set for the future.

## Appendix A - Government Reviews and Inquiries<sup>69</sup>

Reform to better protect Indigenous knowledge is long overdue. An increased awareness over exploitation of Indigenous cultures and art began to emerge over 40 years ago. Since then, there have been numerous calls for reform and growing concern over the capacity of intellectual property laws to protect Indigenous people. These have included:

- In 1975, Wandjuk Marika, then Chair of the Aboriginal Arts Board, called for better protection for Aboriginal arts, including sacred works, under copyright.
- The establishment of the Working Party on the Protection of 'Aboriginal Folklore' and their report in 1981. The report recommended an 'Aboriginal Folklore Act' to protect cultural expressions and encourage equitable use of Aboriginal creative efforts, the reform of existing laws, criminal sanctions for the unauthorised use of secret/sacred material and the establishment of a Commission or Board.<sup>70</sup>
- In 1986, the Australian Law Reform Commission produced a report which considered the broader recognition of customary law in the Australian legal system, but also recommended the enactment of specific legislation to safeguard against the exploitation of Aboriginal culture.<sup>71</sup> No immediate action followed the release of this report.
- The 1994 'Stopping the Rip Offs' paper.<sup>72</sup> The paper sought submissions regarding the protection of Indigenous art and cultural expressions through intellectual property laws. An inter-departmental committee (IDC) on Indigenous Arts and Cultural Expression was established to evaluate these submissions and consider legislative and policy reform in the area. The IDC's main submission was the enactment of specific legislation. The committee stated, however, that further consultation was required.
- The House of Representatives Aboriginal and Torres Strait Islander Standing Committee's *Inquiry into Culture and Heritage*. This inquiry started in 1995, but was abandoned in 1996 after a change of government.
- Intellectual property and Indigenous art disputes also entered Australian courts around this time, in particular *Milpurrurru v Indofurn Pty Ltd*<sup>73</sup> and *Bulun Bulun v R & T Textiles Pty Ltd*<sup>74</sup>.

In 1997, the Aboriginal and Torres Strait Islander Commission (ATSIC) established the Indigenous reference group (IRG) on Indigenous Cultural and Intellectual Property. The IRG cooperated with the Australian Institute of Aboriginal and Torres

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<sup>69</sup> Section written by Peter Dawson, Legal Intern, Terri Janke and Company, 2012

<sup>70</sup> Working Party on the Protection of Aboriginal Folklore, *Report*. Department of Home Affairs and Environment, Canberra, 4 December 1981

<sup>71</sup> Australian Law Reform Commission 1986 *Recognition of Aboriginal Customary Laws Report No 31* <<http://www.alrc.gov.au/publications/report-31>>

<sup>72</sup> Commonwealth of Australia *Stopping the Rip-Offs : Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples Issues Paper*, October 1994, <[http://www.ag.gov.au/Documents/stopping\\_the\\_rip-offs-no\\_frame.doc](http://www.ag.gov.au/Documents/stopping_the_rip-offs-no_frame.doc)>

<sup>73</sup> (1995) 30 IPR 209

<sup>74</sup> (1998) 157 ALR 193.

Strait Islander Studies (AIATSIS) to produce the *Our Culture: Our Future Report 1999*, which outlined the current state of intellectual property law, articulated Indigenous peoples' desired outcomes for the protection of their knowledge and recommended statutory reform. The five main areas of recommendations in the report were 'sui generis' legislation, reform of existing legislation, administrative changes, developing collection systems, cultural infrastructure and education/awareness efforts.

- In late 2005, the Law Reform Commission of Western Australia released their own *Aboriginal Customary Laws: Discussion Paper*<sup>75</sup> which included a detailed section and accompanying background paper on *Indigenous Cultural and Intellectual Property and Customary Law*.<sup>76</sup> The paper further reinforced the need for reform in this area of law and gave lengthy recommendations.
- Over the last decade, there has also been increased international pressure for nations to offer better legal protection for the knowledge of their Indigenous peoples. This has come primarily from the UN Declaration on the Rights of Indigenous Peoples, UNEP, the Permanent Forum on Indigenous Issues and the World Intellectual Property Organisation (WIPO).<sup>77</sup>

Unfortunately, none of these reports have led to substantive changes to the intellectual property laws, or sui generis laws, to better protect Indigenous knowledge.

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<sup>75</sup> < <http://www.lrc.justice.wa.gov.au/094-DP.html>>

<sup>76</sup> < <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-12.pdf>>

<sup>77</sup> WIPO have been particularly active in this area, with a number of publications such as 'A Stronger Voice for Indigenous and Local Communities in WIPO's work on traditional knowledge, traditional cultural expressions and genetic resources', <[http://www.wipo.int/export/sites/www/freepublications/en/tk/936/wipo\\_pub\\_936.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/936/wipo_pub_936.pdf)>

## Appendix B - Case Studies

There are many published case studies on traditional knowledge and cultural expression including those in *Nanga Mai Arung Dream Shield: A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders*, produced by IP Australia<sup>78</sup> and *Minding Culture*. The following three case studies illustrate the deficiencies in the current intellectual property framework that make it difficult to protect Indigenous knowledge as applied artistically.

### Case Study: Wandjina Sculpture

The Worrora, Wunumbal and Ngarinyin Aboriginal people from Western Australia have painted the sacred creator spirit 'Wandjina' for thousands of years. Under Customary Law, they are the only people entitled to produce the image. Unauthorised reproduction is believed to destabilise the natural balance of the world and undermine the culture, spirituality and identity of the local people.

In 2010 a gallery in the Blue Mountains erected a sculpture for public display depicting a crudely drawn Wandjina figure with a mouth, whereas the traditional Wandjina is considered too powerful to be depicted with mouths. Both the Kimberley Aboriginal communities and the local Darug people of the Blue Mountains were extremely offended by this unauthorised misappropriation.

The gallery also exhibited a number of other Wandjina paintings by non-Indigenous artists, published a book containing the images and a thesis which argued that Aboriginal people are a dying race suffering from spiritual atrophy.

Copyright law was unable to prevent the offensive reproduction of the Wandjina image for a number of reasons. The sculpture, while instantly recognisable as a Wandjina figure, was not a direct copy of an existing Wandjina artwork and therefore may have met the requirement of originality. Also, Wandjinis were first painted thousands of years ago, so there is no identifiable author and artwork more than 70 years old does not attract copyright as it is considered part of the public domain.

The Australian Competition and Consumer Commission (ACCC) found that the reproduction did not breach the *Trade Practices Act 1974* (Cth) for misleading and deceptive conduct.<sup>79</sup>

An unusual remedy was pursued when it was discovered that the sculpture required planning approval by the Blue Mountains City Council. After significant lobbying by a number of Indigenous and non-Indigenous groups, the Blue Mountains City Council refused to approve the sculpture and it was ordered to be removed. Their decision was upheld by the Land and Environment Court.

This incident highlights the need for robust legal protections for Indigenous cultural and intellectual property. Unfortunately, there is nothing to stop a similar situation from occurring

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<sup>78</sup> IP Australia, *Nanga Mai Arung Dream Shield: A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders*, Commonwealth of Australia, 2010, <[http://www.ipaustralia.gov.au/uploaded-files/2973/Dream\\_Shield.pdf](http://www.ipaustralia.gov.au/uploaded-files/2973/Dream_Shield.pdf)>.

<sup>79</sup> Ayres R, 2010, 'The Wandjina case demonstrates the lack of protection for Indigenous culture', viewed 26 April 2012, <<http://www.artslaw.com.au/articles/entry/the-wandjina-case-demonstrates-the-lack-of-protection-for-indigenous-cultur/>>

again and no guaranteed remedy. Last chance pleas to a receptive local council do not constitute binding legal precedent or legislative protection.

One option to avoid this kind of incident may be to recognise under law the significance of importance cultural designs which belong to clan groups, and act as insignia or cultural emblems, and have customary law obligations concerning their control.

### **Case Study: 'Aboriginal Inspired' Skating Routine**

During the 2010 European Ice Skating Championships and the Winter Olympics, a Russian ice-skating duo performed a routine supposedly inspired by Australian Aboriginal dance and culture.

The performers wore dark skin-toned body suits with bright red loin cloths, white body paint and eucalyptus leaves. During the performance the male skater led the female around by her ponytail, they stuck out their tongues and mimicked the hand over mouth gesture that was once associated with American Indians.

The performance drew heavy criticism from Aboriginal leaders.<sup>80</sup> There was no Aboriginal input in the development of the music, costumes or routine and no legal recourse for Indigenous people.

This case study highlights that there is currently no legal requirement to follow cultural protocols or to consult with Aboriginal people when performing Aboriginal dance movements. For Aboriginal people, it is important to always consult and keep a connection. Under customary law, there are strict guidelines around who performs traditional dance movements, how they are performed and their cultural and spiritual meaning.

NAISDA, the Aboriginal and Torres Strait Islander Dance College, wrote to the International Olympic Committee to notify them that the routine had offended Indigenous people and showed a lack of respect. The letter also noted the need for guidelines for dealing with Indigenous cultural material. No response has been received.

Kim Walker, Executive Director of NAISDA, advocates for tighter laws for cultural practice:

'In today's world of YouTube and the internet generally, it is far too easy for elements of traditional culture to be misused. This can be done deliberately or indeed through ignorance and lack of understanding.

NAISDA Dance College has a cultural practice that aims to adhere to the cultural protocols of the communities we engage with. In teaching of cultural dance and songs, all material taught to the development artists remain the property of the communities. NAISDA endeavours to perform all dances and songs of the communities with live musicians. All recorded material done as part of our cultural learning remains with NAISDA. No recorded material of the dances and songs are given to the NAISDA Developing Artists at any time. NAISDA Developing Artists are also taught that all Cultural dances and songs they learn at NAISDA are not to be performed outside of NAISDA and upon

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<sup>80</sup> Reilly T, 'Russian ice dance 'offensive but legal'', *Sydney Morning Herald*, 27 January 2010, <<http://www.smh.com.au/sport/russian-ice-dance-offensive-but-legal-20100126-mwel.html>>.



graduation or departure from the College, unless they have received permission from the relevant Cultural tutors and communities that the dances and songs originate from.<sup>81</sup>

### **Case study: Aboriginal words as business names and trade marks**

The use of Aboriginal and Torres Strait Islander language group names or the names of people in a commercial or unassociated context is a common complaint. The *Finding the Way* brochure provides a case study on the Mabo/Mambo trade mark. Whilst this started as a trade mark opposition by Mambo to the proposed Mabo trade mark, Malcolm Mabo and Mambo were able to find a solution for both trade marks to co-exist which even involved a collaborative project where benefits could be shared. However, this is unique.

Many businesses use Indigenous words and names without knowledge or consultation. Most are unauthorised and inappropriate uses of Indigenous words for products and services.<sup>82</sup>

The *Trade Marks Act 1995* (Cth) does not make inquiries concerning whether a trade mark owner is linked to the country name, or clan word. Arguably, to name a business a clan group's name, or a language group's name, implies some connection. There may be scope under trade practices provisions of the Australian Consumer Law concerning misleading sponsorship, connection or affiliation.

In the US, the Native American Tribal Names and Insignia database lists insignia that various federally and state recognised Native American tribes have identified as their official tribal insignia. The database is managed by the US Patents and Trademarks Office (USPTO) and is a collection of insignia, rather than registered trade marks.<sup>83</sup> Under US Trademark Act, the Commissioner of Trademarks may refuse to register marks that falsely suggest a connection with particular institutions. If a mark that an applicant wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO can refuse registration if the mark suggests a false connection with the tribe.<sup>84</sup>

Recently, in the United States, the Navajo nation took action against Urban Outfitters<sup>85</sup> when the word 'Navajo' was used to market fashion items, including clothing, underwear, alcoholic flasks. The same items include designs that imitated Navajo tribal geometric designs. The alcoholic flasks were offensive because the Navajo had alcohol restrictions with the nation's borders.

The action was successfully established under the trade marks law but also on the strength of the *Indian Arts and Craft Act*, which makes it an offence to use a tribal name in a way that falsely suggests that a product is of Indian origin. No such laws apply to Australia, but there may be scope to adopt similar laws.

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<sup>81</sup> Walker, K, NAISDA Dance College, Email to Terri Janke, 27 April 2012

<sup>82</sup> Janke, T 2003 *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, pp.28-49, viewed on 26 April 2012, <[http://www.terrijanke.com.au/documents/MindingCulture\\_finalstudy.pdf](http://www.terrijanke.com.au/documents/MindingCulture_finalstudy.pdf)>

<sup>83</sup> USPTO Database of Official Insignia of Native American Tribes, established as a result of the Trademark Law Treaty Implementation Act (1998).

<sup>84</sup> Section 2(a) US Trademark Act, 15 U.S.C. §1052(a), <<http://www.uspto.gov/trademarks/law/tribal/index.jsp>>

<sup>85</sup> <<http://www.pillsburylaw.com/index.cfm?pageid=34&itemid=40492>>



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