

The Protection of Traditional Cultural Expressions

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Abstract

This paper examines the agitation for the protection of traditional cultural expression as an artefact of the international intellectual property regime. This agitation originated with calls for the protection of folkloric works within the context of the Berne Convention and then under UNESCO. It has also been adopted as a cause by groups of indigenous peoples. The paper examines justifications for the protection of traditional cultural expression and concludes with a testing of these justifications by an examination of the situation in Australia, where this branch of the law is probably the most elaborated.

1. The Protection of Traditional Cultural Expression in the International Intellectual Property Arena

Probably the first step towards establishing a political agenda for the protection of traditional cultural expressions was an African Study Meeting on Copyright, held in Brazzaville in August 1963 which had advocated copyright concessions for developing countries, including reductions in the duration of protection and the protection of folklore.¹ At the time of the Stockholm Conference for the Revision of the Berne Convention, which was convened in June 1967, there were 10 African states² included in the 58 Members of the Berne Union

The Stockholm Conference witnessed the first significant agitation from developing countries for an acknowledgement of their particular circumstances. In the preparations for the Stockholm Conference, it was proposed that the concerns of developing countries could be accommodated in a separate protocol. This question was the subject of some fairly acrimonious debates at Stockholm.³ The critical issues for developing countries were the definition of developing country translation rights and compulsory licensing. The establishment of a protective regime for folklore was a burgeoning consideration. Although a Protocol was grudgingly adopted by the final plenary session of the Stockholm Conference it did not come into force as it failed to secure the requisite number of ratifications. This Protocol became an Appendix to the Paris Act, which was adopted by the Paris Revision Conference of 1971.

The enduring effect of this Protocol is potentially quite significant, given that Article 9 of the TRIPs Agreement obliges Members of the WTO to comply with “Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.” Unfortunately, the Protocol and the Appendix failed to address the issue of TCE.



The failure of developing countries to secure an effective protection of folklore within the regime administered by the World Intellectual Property Organization, explains initiatives undertaken within other international organizations. In April 1973, the Government of Bolivia had sent a memorandum to the Director General of UNESCO requesting that the Organization examine the opportunity of drafting an international instrument on the protection of indigenous creative works in the form of a protocol to be attached to the Universal Copyright Convention, which is administered by UNESCO. Following that request a study was prepared in 1975 by the Secretariat of UNESCO on the desirability of providing for the protection of the cultural expressions of indigenous peoples on an international scale. Because of a perception of the broad scope of this analysis, in 1977 the Director General of UNESCO convened a Committee of Experts on the Legal Protection of Folklore, which in a report in 1977 concluded that the subject required sociological, psychological, ethnological, politico-historical studies 'on an interdisciplinary basis within the framework of an overall and integrated approach'.⁴

Pursuant to a resolution adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Belgrade, in September-October 1980 and a decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened. After a series of meetings the Committee formulated *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* which were adopted by the two organizations in 1985. Pursuant to a resolution adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Belgrade, in September-October 1980 and a decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened. After a series of meetings the Committee formulated *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* which were adopted by the two organizations in 1985.

The General Conference of UNESCO at its 25th session in 1989 adopted a Recommendation on the Safeguarding of Traditional Cultures and Folklore, which proposed a programme of measures to be taken at the national level for the identification, conservation, preservation and dissemination of the cultural works of indigenous peoples.

2. The Pejorative Connotations of "Folklore"

Since the mid 1980s, when WIPO and UNESCO had convened a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property, there has been a lively debate about the terminology which should be used to describe the creations of a cultural community. The representatives of the Spanish-speaking countries at the 1985 meeting of the Group of Experts took the position that "folklore" was an archaism, with the negative connotation of being associated with the creations of



lower or superseded civilizations. However, over that objection, the 1985 meeting adopted the following definition:

Folklore (in the broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

This definition was elaborated in the resultant *WIPO/UNESCO Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*. The misgivings expressed about the negative connotations of the term folklore were deflected by participants at the 1985 meeting who pointed out that "in recent times the term 'folklore' obtained a new meaning and is widely accepted as a term suitable for the purposes of a relevant international treaty".⁵

This terminological approach persisted until the conclusion of the World Forum on the Protection of Folklore, convened by WIPO and UNESCO in Phuket in April 1997. That Forum was convened in response to the recommendations in February 1996 of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and the Producers of Phonograms, that arrangements be made for the organization of an international forum to explore "issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore and the harmonisation of different regional interests".⁶

At the Forum, a number of speakers referred to the negative connotations and eurocentric definition of the term "folklore". For example, Mrs Mould-Idrissu, in a paper on the African Experience on the preservation and conservation of expressions of folklore⁷, observed that the western conception of folklore tended to focus on artistic, literary and performing works, whereas in Africa it was much more broad; encompassing all aspects of cultural heritage.⁸ For example, she noted that under the Ghanaian Copyright Law of 1985, folklore included scientific knowledge.⁹ Speakers criticised the western attitude to folklore as something dead to be collected and preserved, rather than part of an evolving living tradition.¹⁰ In a statement issued by Indigenous Australian representatives at the Forum, exception was taken to the use of "folklore" as being too narrowly defined and implying an inferiority of the cultural and intellectual property of Indigenous peoples to the dominant culture.¹¹ The Indigenous Australian representatives expressed a preference for the term "Indigenous Cultural and Intellectual Property", which had been coined by Ms Erica Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹²

The expressions "Traditional Cultural Expressions" or "Traditional Knowledge", accommodate the concerns of those observers who criticize the narrowness of "folklore". However, the latter term significantly changes the discourse. Folklore was typically discussed in copyright, or copyright-plus terms.¹³ Traditional knowledge, on the other hand, also embraces traditional knowledge of plants and animals in medical treatment and as food. In this circumstance the discourse would shift from the



environs of copyright to patents law¹⁴ and biodiversity rights.¹⁵ This shift is, in part, an explanation of the suggestions for *sui generis* solutions to the protection of traditional knowledge. Thus Simpson adopts Daes' view that it is inappropriate to subdivide the heritage of Indigenous peoples "as this would imply giving different levels of protection to different elements of heritage".¹⁶

3. Indigenous Peoples' Declarations

A significant initiative during the UN International Year for the World's Indigenous Peoples was the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples which was convened by the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa, New Zealand in June 1993. The resultant *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* insisted that the protection of the rights of indigenous peoples in their traditional knowledge was an aspect of the right of indigenous people to self determination. The *Mataatua Declaration* recommended in art.1 that in the development of policies and practices, indigenous peoples should:

- 1.1 Define for themselves their own intellectual and cultural property.
- 1.2 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights.
- 1.3 Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.
- 1.4 Prioritise the establishment of indigenous education, research and training centres to promote their knowledge of customary environmental and cultural practices.
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- 1.6 Develop and maintain their traditional practices and sanctions for the protection, preservation and revitalization of their traditional intellectual and cultural properties.
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- 1.8 Establish an appropriate body with appropriate mechanisms to:
 - (a) preserve and monitor the commercialism or otherwise of indigenous cultural properties in the public domain;
 - (b) generally advise and encourage indigenous peoples to take steps to protect their cultural heritage;
 - (c) allow a mandatory consultative process with respect to any new legislation affecting indigenous peoples cultural and intellectual property rights.
- 1.9 Establish international indigenous information centres and networks.

The *Mataatua Declaration* in art.2.1 recommended that in the development of policies and practices, States and national and international agencies "should recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.' In art. 2.2 it urged the recognition that 'indigenous peoples also have the right to create new knowledge based on cultural traditions'. The insufficiency of existing protection mechanisms was asserted in art. 2.3. Article 2.5 provided for the development

...in full cooperation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:



- collective (as well as individual) ownership and origin- retroactive coverage of historical as well as contemporary works;
- protection against debasement of culturally significant items;
- co-operative rather than competitive framework;
- first beneficiaries to be the direct descendants of the traditional guardians of that knowledge;
- multi-generational coverage span.

The conference delegates recommended that the UN incorporated the *Mataatua Declaration* be incorporated in its Study on Cultural and Intellectual Property of Indigenous Peoples.

The Statement issued by the International Consultation on Intellectual Property Rights and Biodiversity organised by the Coordinating Body of the Indigenous Peoples of the Amazon Basin (COICA), held at Santa Cruz de la Sierra, Bolivia in September 1994 reiterated the assertion of the *Mataatua Declaration* that

All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self determination.

The COICA Statement was extremely critical of the current intellectual property regime. Article 8 declared that

Prevailing intellectual property systems reflect a conception and practice that is:

- colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples;
- racist, in that it belittles and minimises the value of our knowledge systems;
- usurpatory, in that it is essentially a practice of theft.

The COICA Statement in art.9 pointed to the danger of distortion to indigenous systems in adjusting them to the prevailing intellectual property regime. The Statement formulated short and medium term strategies to deal with these problems. In the short term it identified intellectual property principles and mechanisms which were either inimical to or useful for indigenous peoples. For example, art.12 recognised that ‘there are some formulas that could be used to enhance the value of our products (brand names, appellations of origin), but on the understanding that these are only marketing possibilities, not entailing monopolies of the product or of collective knowledge’.

The Statement in art.14 proposed the design of a protection and recognition system in the short and medium term of mechanisms which ‘will prevent appropriation of our resources and knowledge’. These would include ‘appropriate mechanisms for maintaining and ensuring rights of indigenous peoples to deny indiscriminate access to the resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially indigenous’. Although the COICA Statement was largely concerned with indigenous peoples rights in biodiversity¹⁷, it called for the training of indigenous leaders in aspects of intellectual property.



In Australia, the *Julayinbul Statement on Indigenous Intellectual Property Rights*, was adopted by a Conference on Cultural and Intellectual Property held at Jingarrba on 25-27 November 1993. The *Julayinbul Statement* affirmed the unique spiritual and cultural relationship of Indigenous Peoples with the Earth which determined their perceptions of intellectual property. The Statement asserted that “Aboriginal intellectual property, within Aboriginal Common Law, is an inherent inalienable right which cannot be terminated, extinguished or taken”. The Statement called on governments to review legislation and non-statutory policies which did not recognise indigenous intellectual property rights and to implement such international conventions which recognised these rights. The Conference also issued a *Declaration Reaffirming the Self Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area*. This *Declaration* was primarily concerned with bioprospecting and the intellectual property rights of indigenous peoples to traditional knowledge.¹⁸

In April 1995 the South Pacific Regional Consultation on Indigenous Peoples’ Knowledge and Intellectual Property Rights, held in Suva, Fiji in April 1995. The Final Statement issued by the Regional Consultation declared ‘the right of indigenous peoples of the Pacific to self-governance and independence of our lands, territories and resources as the basis for the preservation of indigenous peoples’ knowledge’. Article 7 urged the strengthening of indigenous networks and encouraged the UN and regional donors to continue and support discussions on indigenous peoples’ knowledge and intellectual property rights’. Article 8 pointed out the importance of strengthening ‘the capacities of indigenous peoples to maintain their oral traditions, and encourage initiatives by indigenous peoples to record their knowledge in a permanent form according to their customary access procedures’. Finally, the Final Statement urged ‘universities, churches, governments, non-governmental organizations and other institutions to reconsider their roles in the expropriation of indigenous peoples’ knowledge and resources and to assist in their return to their rightful owners’.

One of the results of the United Nations International Year for the World’s Indigenous Peoples, was the promulgation of a *Draft Declaration on the Rights of Indigenous Peoples*. Article 12 of the *Draft Declaration* recognised the right of indigenous peoples to ‘practice and revitalize their cultural traditions and customs, including the right

...to maintain, protect and develop the past, present and future manifestations of their cultures, such as ...artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 29 recognised the entitlement of indigenous peoples ‘to the full ownership, control and protection of their cultural and intellectual property’. This article also asserted the right of indigenous peoples ‘to special measures to control, develop and protect their...cultural manifestations, including ...oral traditions, literatures, designs and visual and performing arts.’



The growing self-realisation of indigenous peoples that the international recognition of their intellectual property rights in their cultural expressions would depend upon their own efforts, has resulted in the development of international solidarity through international conferences of indigenous peoples. These conferences have promulgated intellectual property declarations, formulating norms for the protection of traditional knowledge.¹⁹

4. Traditional Cultural Expression and Intellectual Property

The criticism that the concept of “folklore” was derived from Eurocentric precepts is equally applicable to the concept of intellectual property itself. The propertization of traditional knowledge implies, rights such as authorship, ownership, alienation and exploitation.

An intellectual property regime which provides for the protection of traditional cultural creativity should also permit the natural development of culture through permissible borrowings.

A particularly problematic instance of cultural borrowing is the use of sacred beliefs in apparently profane contexts. Salman Rushdie’s *Satanic Verses* is an example of this genre. It is interesting to note in this regard that English copyright law began life as a system for the political censorship of works.

In the debate about the protection of traditional cultural expression, the implied beneficiaries of this protection are traditional peoples. Invariably, these are referred to as "Indigenous Peoples". A definitional issue related to the delineation of the content of traditional knowledge, is defining the groups or communities who can assert property rights over this knowledge.

The definition which appears to enjoy widest support, is that of Dr Martinez Cobo²⁰ who describes indigenous communities, peoples and nations as “those which, having historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories or parts of them”. However, it should be acknowledged that a number of representatives of these groups have asserted that the diversity of the worlds indigenous peoples renders problematic an all-embracing definition and that efforts by the international community to develop a binding, all-inclusive definition are a diversion of energies.

Dr Erica-Martin Daes identifies four factors²¹ which provide practical definitional guidance:

- (a) priority in time with respect to the occupation and use of a specific territory;
- (b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) self-identification, as well as self-recognition by other groups; and
- (d) an experience of subjugation, marginalisation, dispossession, exclusion, or discrimination, whether or not these conditions persist.



A perceived corollary to an acceptable definition of the concept “Indigenous Peoples” is the expectation that as peoples they will be able to avail themselves of the protections conferred by international instruments such as the UN Charter, which in Article 1 refers to “the principle of equal rights and self determination of peoples” and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which similarly refer to the “right of all peoples to self-determination”. However, as General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, subsequently provided, the rights of peoples are subordinated to the sovereignty of states. This statist interpretation of the rights of peoples has been a barrier to the recognition of various political and property rights, including intellectual property rights, of Indigenous Peoples and traditional communities.

5. Why Protect Traditional Cultural Expressions?

Alan Jabbour suggested a taxonomy of four "inchoate" concerns or anxieties which have led to international proposals for the protection of folklore.²² First, a concern for the authentication of folklore in the face of the economic, psychological and cultural threat from alien sources. Secondly the expropriation, not only of physical objects, but also the documentary and photographic record of traditional societies. Thirdly, the issue of compensation for appropriation and cultural harm. Fourthly, the issue of nurture, or cultural health.

In Australia, these concerns have been manifested in five main areas: (a) the infringement of the copyright of individual artists; (b) the copying of works not authorised by aboriginal groups and communities; (c) the appropriation of Aboriginal images and themes; and (d) the culturally inappropriate use of Aboriginal images and styles by non-Aboriginal creators.

Each of these problems is addressed below, together with a consideration of the efficacy of existing intellectual property law to provide a remedy.

(a) Copyright Infringements

There are numerous instances of the designs of Australian Aboriginal artists being reproduced without their permission. The Australian Copyright Act 1968 provides a remedy to artists whose works have been copied without authorisation. The first case which attracted significant attention concerned the 1989 action brought by John Bulun Bulun and 13 other artists to obtain compensation concerning the unauthorised reproduction of their works on T-shirts.²³ The case attracted some attention as it came immediately after the Bicentennial celebrations and injunctions and an out of court settlement of \$150,000 was obtained in this matter.²⁴ A more recent reported case, concerning the unauthorised copying of the designs of Aboriginal artists was *Milpururru v. Indofurn Pty Ltd*²⁵ This concerned the importation by a Perth-based company of carpets manufactured in Vietnam, upon which were reproduced the designs of George Milpururu, Banduk Marika, Tim Payungka Tjapangati and five deceased Aboriginal Artists. These designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The defendants in this case were obliged to pay substantial damages.²⁶

(b) Copying Not Authorised by Aboriginal Groups and Communities

Although, the Australian Copyright Act provides a remedy in relation to the unauthorised copying of the works owned or licensed by individual creators it does not recognise the communal harm which may result from the unauthorised reproduction of Aboriginal designs.

The claim of communal proprietorship in sacred images was rejected by the Federal Court in *Yumbulul v. Reserve Bank of Australia*²⁷ That case concerned an attempt by representatives of the Galpu Clan to prevent the reproduction by the Reserve Bank, of the design of a Morning Star Pole on a commemorative banknote. The pole had been created by a member of the clan who had obtained his authority and knowledge to create the pole through initiation and revelatory ceremonies. The Galpu asserted that the communal obligation of the artist was such that he owed an obligation to the clan to prevent the design of the pole from being used in any way which was culturally offensive. Although sympathetic to this argument, the trial Judge considered that the artist who had created the pole had successfully disposed of his intellectual property rights in it through a legally binding agreement. He lamented that "Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin",²⁸ and concluded by recommending that "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators".²⁹

A related issue to the failure of the courts to recognise communal proprietorship of traditional works is their failure to compensate communal harm.³⁰ In *Milpururru*, mentioned above, the court awarded damages for breach of copyright to a number of Aboriginal artists whose designs were wrongfully reproduced on carpets. The court agreed that this was a particularly egregious breach of copyright, involving a culturally demeaning use of the infringed works. However, the court considered itself unable to compensate the communities whose images were used in culturally inappropriate ways, as 'the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories'.³¹

Indeed a major problem, which has been identified in analysing traditional knowledge and cultural expression in conventional intellectual property terms, is the observation that "indigenous peoples do not view their heritage in terms of property at all...but in terms of community and individual responsibility. Possessing a song, story or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected".³²

The most recent Australian case concerned with the communal rights of an Aboriginal people in Australia, *Bulun Bulun & Anor v. R & T Textiles Pty Ltd*,³³ arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr John Bulun Bulun, in his work "Magpie Geese and Water Lillies at the Waterhole". The proceedings were commenced on 27 February 1997 by Mr Bulun Bulun and by Mr George Milipurruru. Both applicants



were members of the Ganalbingu people. Ganalbingu country is situated in Arnhem Land in the Northern Territory of Australia. Mr Bulun Bulun sued as legal owner of the copyright in the painting and sought remedies for infringement under the Australian Copyright Act 1968. Mr Milpurruru brought the proceedings in his own name and as a representative of the Ganalbingu claiming that they were the equitable owners of the copyright subsisting in the painting.

Upon commencement of the proceedings, the respondents admitted to infringement of Mr Bulun Bulun's copyright and consented to permanent injunctions against future infringement. In its defence to Mr Milpurruru's actions the respondent pleaded that as Mr Bulun Bulun's claim had been satisfied, it was unnecessary to consider the question of the equitable ownership of the copyright. Mr Milpurruru sought to continue the action as a test case on the communal intellectual property rights of indigenous Australian peoples arising from the copyright infringement.

The principal questions for the court to address were whether the communal interests of traditional Aboriginal owners in cultural artworks, recognised under Aboriginal law, created binding legal or equitable obligations on persons outside the relevant Aboriginal community. This depended upon there being a trust impressed upon expressions of ritual knowledge. The Court acknowledged that amongst African tribal communities, tribal property was regarded as being held on trust by the customary head of a tribal group.³⁴ However, in the instant case the court considered there to be no evidence of an express or implied trust created in respect of Mr Bulun Bulun's art. This was an issue of intention and the court found no evidence of any practice among the Ganalbingu whereby artworks were held in trust.

In an extensive *obiter dictum* in this test case, the court was prepared to impose fiduciary obligations upon Mr Bulun Bulun, as a tribal artist, to his people. The factors and relationships giving rise to fiduciary obligations under equity law do not admit of easy definition.³⁵ In the instant case, the Court found the subsistence of a fiduciary relationship between Mr Bulun Bulun and his people, arising from the trust and confidence reposed in him, that his artistic creativity would be exercised to preserve their integrity, law, custom, culture and ritual knowledge. The fiduciary obligation imposed on Mr Bulun Bulun was "not to exploit the artistic work in such a way that is contrary to the laws and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work."

(c) *Simulation of Aboriginal Images by Non-Aboriginal Creators*

A controversial issue in recent years in Australia, has been the creation of works or products: (a) which are claimed to be produced by Aboriginal creators or which are got up in the style of Aboriginal schools of art; (b) by people who think that they are Aboriginal creators; (c) or which are allegedly inspired by Aboriginal spirits or muses.

In relation to works which are falsely claimed to be produced by Aboriginal persons, trade descriptions remedies would seem to provide an adequate remedy. Because of these remedies, some traders pass their work off as "Aboriginal-style" or "Aboriginal inspired". This sort of qualification may well avoid liability, but it remains as a



dilution of the repute of genuine Aboriginal creations. A particular problem which has arisen in a couple of instances in Western Australia, is that of works produced by persons who assert that they are of Aboriginal descent or who claim to be inspired by an Aboriginal muse. In the first category are the books of Colin Johnson, written under the name of 'Mudrooroo Nyoongar' and the books of Leon Carmen written as those of an Aboriginal woman, 'Wanda Koolmatrie'. Similarly, the Western Australian artist, Elizabeth Durack, painting under the pseudonym, 'Eddie Burrup' claims to be inspired by an Aboriginal spirit. These impostures, range from the malicious to the misguided, but each has been criticised as offensive to Aboriginal Peoples³⁶ On the other hand, in western eyes, the reinterpretation of classical stories is often considered to stand at the heart of some modern literature.

(d) *Culturally Offensive Use of Aboriginal Images and Themes*

The adoption of Aboriginal themes and motifs in products has sometimes caused harm to those Aboriginal Peoples for whom those matters have great spiritual and cultural significance. The National Indigenous Arts Advocacy Association, Inc (NIAAA) reported the use of the use of the Wandjina spirit as a logo for a surfboard company.³⁷ The Wandjina are the Creation Ancestors of the Kimberley Aboriginal People and their painted images are found in the rock galleries in that region. The question of authorship is impossible to resolve as it is believed that the paintings were done by the Wandjina.³⁸ In any event, the antiquity of these images means that their authorship is unknown. Wandjina images may be retouched or painted today, provided that appropriate deference is given to the ancient spirits. The Kimberley Aborigines believe that inappropriate treatment of these images will cause death and devastation.³⁹ However, there is currently no law to prevent the use of these images by commercial enterprises.⁴⁰

In *Foster v Mountford*⁴¹ an anthropology text, *Nomads of the Desert*, which was written to document the life of the Pitjantjatjara People, reproduced images which were forbidden to uninitiated members of the Pitjantjatjara. The court in this case was prepared to grant an injunction to prevent the book being distributed in the Northern Territory because the author had been shown these sacred matters in confidence.⁴²

However, Aboriginal Peoples have no right equivalent to those which are conferred under the action of blasphemy. The NIAAA Report refers to a story used in the television series 'Heartlands' which belonged to a Western Australian Aboriginal community, but which was represented as coming from New South Wales.⁴³ Because the story was in the public domain, the relevant community had no rights to prevent the transmission of this programme. The law does not currently recognise the proprietary interests of Aboriginal peoples in their Dreamings, stories, sacred images or dances.

Related to the culturally offensive use of Aboriginal themes is the misrepresentation of Aboriginal cultural life. A recent spectacular instance of this concerns the publication in 1990 of the book *Mutant Message Down Under*, by American author, Marlo Morgan. This book contained an account of Morgan's alleged travels among 'cannibalistic' Western Australian Aboriginal tribes. The book was on the US best sellers list for 25 weeks and was shortlisted for the 1995 American Booksellers Book of the Year, and the author merchandised CDs and videos to promote the work and



her form of new age spiritualism. Following a detailed investigation for the Kimberley Law Centre, it was revealed that the author had never visited Australia. And she confessed that the work was a hoax

Another factor which has played an important role in agitation for the protection of traditional cultural works, is economics. As in other areas of piracy and counterfeiting, Ralph Oman, has highlighted the developments in communications and reprographic technologies, which have exposed formerly isolated cultures to digital imitation and to global transmission, without compensation.⁴⁴ As with the exploitation of developing countries through bioprospecting, the exploitation of traditional cultural resources without exploitation raises similar issues.⁴⁵ Indeed Chengsi has suggested that folklore protection has become a “trade-related issue”.⁴⁶

6. Modalities for the Protection of Traditional Knowledge

Proposals of mechanisms for the protection of traditional knowledge have ranged across two axes. Along one axis are various suggestions to improve the private law rights of the creators or custodians of traditional knowledge. These suggestions range from proposals to modify existing copyright law through to the creation of sui generis traditional knowledge rights. Along another axis are suggestions to deal with the protection of traditional knowledge as a public law right. These suggestions range from the creation of a public protection authority, through *domaine public payant* proposals, to the empowerment of Indigenous peoples' protective agencies. These various suggestions are considered below.

At the minimalist end of discussions concerning the protection of traditional knowledge, are suggestions to deal with the perceived inadequacies of existing intellectual property laws by supplementary legislation. It should be noted at the outset that a number of commentators have questioned whether traditional knowledge is amenable to private law remedies. For example, Rosemary Coombe has raised the issue of the applicability of private law concepts to cultural expressions.⁴⁷ Puri, questions whether property concepts are cognizable under customary Aboriginal law.⁴⁸ Daes, explains,

...indigenous peoples do not view their heritage as property at all- that is something which has an owner and is used for the purpose of extracting economic benefits- but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.⁴⁹

However, bearing these reservations in mind, the various private and public law suggestions for the protection of traditional knowledge are canvassed below.

(a) Copyright

As has been indicated, in the survey of Australian cases above, existing copyright law does not easily recognise communal authorship and to a lesser extent, communal

ownership. Both of these matters can be dealt with by statutory amendment. For example, a form of representative or class action, could be brought by Indigenous and communal groups.

Another ownership issue, is the matter canvassed in the *Yumbulul* case, discussed above, whether notwithstanding an assignment of copyright, a communal group retains the underlying right to the folklore. It has been suggested that this could be dealt with by the recognition of an underlying equitable right in the communal group.⁵⁰ This right would seem to have a similar quality to the moral rights which are recognized in civil law jurisdictions.

A major limitation of western copyright law, is its insistence upon material fixation as a precondition for protection. The Tunis Model Law on Copyright for Developing Countries, 1976, in s1(5bis) provides a useful precedent of the fixation requirement being waived for folklore.

The limited duration of copyright protection has been perceived as a problem for traditional works, some of which may have originated many thousands of years ago. Again this is a problem which could yield to appropriate legislative drafting.

It has been suggested that the unauthorised appropriation of the styles of Indigenous peoples, could be dealt with by the concept of copyright in derivative works.⁵¹

In general, the view of many commentators and committees of review is that the legal structure of copyright, with its emphasis on private proprietary rights, is ill suited to protect traditional works.⁵²

(b) Moral Rights

Another copyright possibility for the protection of traditional knowledge is within the rubric of moral rights. Each of the moral rights of publication, paternity and integrity, have an applicability to the protection of traditional knowledge. The right of publication allows a creator to decide whether a work should be made public. This would permit the creators of spiritually sensitive works to control their dissemination. The right to have paternity acknowledged, would be useful in securing the authentication of traditional works. Most important is the right of integrity, which protects works from distortion, alteration, or misrepresentation.

(c) *Domaine Public Payant*

To deal with the fact that copyright works fall into the public domain after a finite time, a number of states have introduced legislation to prevent or sanction the use of such works, which would prejudice their authenticity or identity.⁵³ Additionally, a fee may be imposed for the use of such works. The moneys thereby received can be diverted to the promotion of cultural activities. This scheme is particularly suited for the nurturing of traditional works. The Tunis Model Law on Copyright encourages the use of *domaine public payant* to assist developing countries to “protect and disseminate national folklore”.⁵⁴ However, the extent to which this sort of law can protect traditional works has been questioned.⁵⁵



(c) ***Authentication Marks***

A suggestion emanating from IP Australia, the Australian intellectual property office, is the appending of an authentication mark to works of Indigenous creativity. This would be in the nature of a certification mark,⁵⁶ although, of course, it will be limited to certain manifestations of traditional knowledge.

(d) ***Public Protection Models***

The approach to protection, which was adopted in the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*, envisaged a system of prior authorisation to be administered by a competent authority which representing the relevant traditional community's interest in protecting its folklore. Authorisation was required for commercial uses of folklore other than in the traditional and customary context, subject to the supervision of the competent authority.

Where folklore was used in a traditional context, an authorisation was needed for the publication, recitation, performance or distribution. Use of folklore outside its traditional context would have to seek the prior consent of the community or an authorised person. Authorisation was not required for uses of expressions of folklore if the purposes relates to research, conservation and archiving. Furthermore, there is no need for authorisation, outside of the traditional or customary context, when an expression of folklore was used: for educational purposes; by way of illustration; for creating an original new work; for reporting of a current event; and where folklore is permanently situated in a public place.

The Model Law prohibited unauthorised commercial use of expressions of folklore. It provided that where the competent authority granted authorisation, it could set the level of remuneration and collect fees. The fees would be used for the purpose of promoting or safeguarding national culture or folklore. The commentary on the Model Law suggested that it would be advisable to share this fee with the community from which the folklore originated. The Model Law provided for offences relating to distortions of expressions of folklore. The offence provisions required the element of "wilful intent", with fines and imprisonment imposed as punishment. There were also civil sanctions and seizure provisions.

The *Model Law*, was anticipated in Australia, by the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, which envisaged the appointment of Commissioner of Aboriginal Folklore to exercise a protective jurisdiction. The Commissioner, rather than Indigenous peoples would initiate litigation against infringing activities. This Report was commended in the 1982 WIPO/UNESCO meeting of experts on folklore⁵⁷, but it was not implemented. The notion of a protective jurisdiction would certainly not find favour today. Certainly in Australia, the notion of a government-administered, protective, jurisdiction has been thoroughly discredited, particularly because of the disastrous consequences of other paternalistic policies of protectivism.

However, in countries which have not endured this sort of colonial experience, the protective model is considered unobjectionable. For example, the folklore provisions



of the Nigerian Copyright Act 1988 are based extensively on the WIPO/UNESCO Model Law and the supervision of the exploitation of cultural works is conferred upon the Nigerian Copyright Council.⁵⁸

7. Traditional Cultural Expression and Self Determination

The discourse about the protection of traditional knowledge assumes the necessity for this protection and also assumes that the primary beneficiaries of this protection will be Indigenous peoples and community groups. However, the state as guardian of its people's cultural heritage, also has an interest in the preservation of the traditional knowledge which exists within it⁵⁹. The various African laws which seek to protect folklore, stress its significance as part of the national heritage.⁶⁰ Multiculturalism has begun to replace nationalist uniformity as the new orthodoxy. An incidental beneficiary will be the nation state, first from the vigour of cultural health and secondly, from the commercial exploitation of traditional knowledge.

A corollary to the assumption of the necessity to protect traditional knowledge, is the assertion of the right of Indigenous peoples and traditional communities "to determine the appropriateness of the use being made of their culture"⁶¹. Thus Erica-Irene Daes, declared that "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used"⁶².

The increasing involvement of Indigenous peoples in models for the protection of traditional knowledge can be seen in the Australian experience. In the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, proposed the establishment of a Commissioner for Aboriginal Folklore, who would exercise a protective jurisdiction on behalf of traditional peoples. Further reports in 1987,⁶³ 1989⁶⁴ and 1994⁶⁵ made recommendations which envisaged an increasing role for Indigenous peoples in the protection of traditional knowledge. In 1998-99 Australian Indigenous Peoples conducted their own inquiry, based on a discussion paper *Our Culture, Our Future: Proposals for the recognition and protection of Indigenous cultural and intellectual property*.⁶⁶

Today in Australia, Indigenous peoples regard the protection of traditional knowledge as an issue of self-determination.⁶⁷ For other countries, with a less unfortunate colonial history, the issue of who controls the protection and conservation of traditional knowledge might be less politicised.

Among the political issues which have been raised in Australia are: whether eurocentric intellectual property law can be trusted with the subject of traditional knowledge⁶⁸ Similarly, it has been suggested that "a suspicious eye should be cast over any assertion of legal or moral authority by non-Indigenous people to adjudicate disputes between traditional and non-traditional artists".⁶⁹

8. TCEs in UNESCO

The difficulties of action within WIPO and the WTO has permitted UNESCO to step into the vacuum. Member States of UNESCO in 2001 adopted the *UNESCO*

Universal Declaration on Cultural Diversity and its action plan. This instrument recognized cultural diversity as the “common heritage of humanity” and committed UNESCO to “pursue its activities in standard-setting, awareness-raising and capacity-building in the areas related to the present Declaration within its fields of competence”¹ The first paragraph of the action plan recommended “taking forward notably consideration of the advisability of an international legal instrument on cultural diversity”. The Director-General in his preliminary study on the technical and legal aspects relating to the advisability of a standard-setting instrument on cultural diversity² proposed a number of options including a binding standard-setting instrument on the Protection of the Diversity of Cultural Contents and Artistic Expressions.

The elaboration of this new instrument, was undertaken in two stages: first three meetings of independent experts took place between December 2003 and May 2004 for preliminary deliberations with a view to producing a first preliminary draft convention along with a preliminary report. Secondly, From September 2004, a series of intergovernmental meetings were held in order to finalize the preliminary draft Convention and report. At these meetings a draft text for the convention was elaborated.

The preamble to the draft text included the following:

Affirming the fundamental right of all individuals and societies to share in the benefits of diversity and dialogue as primary features of culture, as the defining characteristics of humanity,

Being aware that cultural diversity, the common heritage of humanity, is a mainspring of sustainable development, and that it is thus as vital for humankind as biological diversity is for living organisms,

....

Recognizing the fundamental right of social groups and societies, in particular of members of minorities and indigenous peoples, to create, disseminate and distribute their cultural goods and services, including their traditional cultural expressions, to have access thereto, and to benefit therefrom for their own development,

Emphasizing the vital role of the creative act, which nurtures and renovates cultural expressions, and hence the vital role of artists and other creators, whose work needs to be endowed with appropriate intellectual property rights,

Being convinced that cultural goods and services are of both an economic and a cultural nature, and that because they convey identities, values and meanings, they must not be treated as ordinary merchandise or consumer goods,

The objectives of the Convention, were stated in Article 1 to include:

(a) to protect and promote the diversity of cultural expressions;

¹ Article 12(c).

² UNESCO Doc., 166 EX/28, March 2003.

- (b) to give recognition to the distinctive nature of cultural goods and services as vehicles of identity, values and meaning;
- (c) to facilitate the development and adoption of cultural policies and appropriate measures for the protection and promotion of the diversity of cultural expressions;
- ...

Article 7 of the Convention obliges signatories to promote the diversity of cultural expressions, declaring that:

1. States Parties shall provide all individuals in their territory with opportunities:
 - (a) to create, produce, disseminate, distribute, and have access to their own cultural expressions, goods and services, paying due attention to the special circumstances and needs of the various social groups, in particular, minorities and indigenous peoples;
 - (b) to have access to the cultural expressions, goods and services representing cultural diversity in other countries of the world.
2. States Parties shall also ensure:
 - (a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;
 - (b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

Article 8 imposes an obligation to protect forms of cultural expression which are “deemed to be vulnerable to or threatened by the possibility of extinction or serious curtailment”.

An interesting innovation, in Article 11 is the obligation on States Parties to “encourage civil society to assume its share of responsibility for the protection and promotion of the diversity of cultural expressions, and shall foster the participation of civil society in their efforts in this domain.”

9. UNESCO, WIPO and WTO

An important political issue is how the proposed UNESCO convention will fit into the TCE landscape, which is already occupied by WIPO and the WTO. This is sought to be addressed in Article 19, which provides two options:

Option A

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.
2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

Option B

Nothing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.

It will be interesting to see how this turf dispute plays out.

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- ¹ See [1963] *Le Droit d'Auteur* 250.
- ² Cameroon, Congo, Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Niger, Senegal, Upper Volta [1967] *Le Droit d'Auteur* 132-133.
- ³ See eg S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London, CCLS, 1987, at 607-620.
- ⁴ *Study on the International Regulations of Intellectual Property*, UNESCO/WIPO/WG.1/FOLK/3, Tunis, 11-13 July 1977.
- ^{i.} 'Report', [1985] *Copyright: Monthly Review of the World Intellectual Property Organization*, 40 at 41.
- ⁶ '1967, 1982, 1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights', WIPO doc., UNESCO-WIPO/FOLK/PKT/97/19 (March 21, 1997), 15.
- ⁷ WIPO doc., UNESCO-WIPO/FOLK/PKT/97/1 (March 17, 1997)
- ⁸ *Ibid.*, 3.
- ⁹ *Ibid.*
- ¹⁰ Eg see Janke, 'UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural & Intellectual Property' (1997) 15 *Copyright Reporter* 104 at 109.
- ¹¹ *Ibid.*, at 110.
- ¹² Working Group on Indigenous Populations, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, E/CN.4/Sub.2/1993/28, 28 July 1993.
- ¹³ Eg, Puri, 'Copyright protection of folklore; a New Zealand perspective' (1988) XXII, No.3 *Copyright Bulletin* 18; Blain & De Silva, 'Aboriginal Art and copyright' (1991) 75 *Copyright Bulletin* 1; Blakeney, 'Protecting expressions of Australian Aboriginal Folklore under Copyright Law', [1995] 9 *EIPR* 442; Chengsi, 'On the copyright protection of Folklore and Other Legislation in China' (1996) 3 *China Patents and Trade Marks* 91; Puri, 'Preservation and conservation of expressions of folklore' (1998) XXXII No.4 *Copyright Bulletin* 5; Brown, 'Can culture be copyrighted?', (1998) 39 *Current Anthropology* 193.
- ¹⁴ Eg see Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: An Australian Perspective' [1997] 6 *EIPR* 298.
- ¹⁵ See Blakeney, 'Biodiversity Rights and Traditional Resource Rights of Indigenous Peoples' [1998] 2 *Bio-Science Law Review* 52.
- ¹⁶ T. Simpson, *Indigenous Heritage and Self-Determination*, IWGIA Document 86 (Copenhagen, 1997), 55.
- ¹⁷ On the biodiversity rights of indigenous peoples see Blakeney, 'Access to Genetic Resources: the View from the South' [1997] 3 *Bio-Science Law Review* 94.
- ¹⁸ See Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: an Australian Perspective' [1997] 6 *EIPR* 298.
- ¹⁹ See Appendix 1 for a full list of Indigenous Peoples' Declarations.
- ²⁰ Study of the Problem of Discrimination Against Indigenous Populations, E/CN.4/Sub.2/1986/7 and Add.1-4.
- ²¹ Daes, 'Rights of Indigenous Peoples', paper presented at *Pacific Workshop on the United Nations Draft Declaration on the Rights of Indigenous Peoples*, Suva, Fiji, September, 1996, 28.
- ²² Jabbour, 'Folklore protection and national patrimony: developments and dilemmas in the legal protection of folklore' (1982) XVII, No.1 *Copyright Bulletin* 10 at 11-12.
- ²³ *Bulun Bulun v Nejlam Pty Ltd*, Federal Court of Australia, Darwin, 1989 (unreported), referred to in Golvan, 'Aboriginal Art and copyright. The Case for Johnny Bulun Bulun', [1989] 10 *European Intellectual Property Reporter* 346; C. Golvan, *An Introduction to Intellectual Property Law* (Sydney: Federation Press, 1992), 51.

24 *Ibid.*
25 (1995) 91-116 *CCH Australian Intellectual Property Cases* 39,051.
26 See also the discussion of this case in Miller, 'Collective Ownership of the Copyright in
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28 (1991) 2 *Intellectual Property Reports* 481.
29 (1991) 2 *Intellectual Property Reports* at 490.
30 *Ibid.*, at 492.
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36 Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action', (1995) 9
37 *Intellectual Property Journal* 293 at 308.
38 [1998] 1082 FCA (3 September 1998), reported at <[http://www.austlii.edu.au/au/cases/cth/
39 federal_ct/1998/1082.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1082.html)>.
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49 1980, 73.
50 *Ibid.*, 74.
51 See also Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights', (1995)
52 *2 Aboriginal Law Bulletin*, 5.
53 (1976) 14 *Australian Law Reports* 71
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61 3 *China Patents and Trade Marks* 91 at 93.
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