

**TERRI JANKE AND COMPANY**

# **Developing our future together**

Managing Indigenous cultural and intellectual property in Indigenous business

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**Terri Janke speech for IED Forum 2009**

**Terri Janke**


**6 October 2009**

***Developing our future together***

Terri Janke, Terri Janke and Company Pty Ltd, Sydney, 2009

Indigenous Economic Development Forum speech, 2009

Convened by: Indigenous Economic Development Forum, Northern Territory

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**WARNING**

The document contains names of deceased Aboriginal and Torres Strait Islander people.

**Important legal notice**

This paper provides general advice only in an effort to encourage constructive debate on the topic. It is not intended to be legal advice. If you have a particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner.

**Acknowledgments**

Terri Janke, the author would like to thank Lan Pham - Professional Assistant of Terri Janke and Company for her assistance in putting this paper together.

## IED Forum

### Terri Janke speech for IED Forum 2009

#### Developing our future together

Managing Indigenous Cultural and Intellectual Property in Indigenous business

(20 minutes address)

#### **Good morning ladies and gentlemen:**

I acknowledge the traditional owners of the land, the Central Arrente people and pay my respects to the Aboriginal elders. I would also like to thank the organizers and sponsors for inviting me to the Indigenous Economic Development Forum. I especially acknowledge the support of IP Australia.

This forum is of great interest to me personally as a small business owner. My small to medium enterprise is a law firm.

I can't remember when I first heard the words 'Intellectual Property'. It must have been just after I started law school. It was an elective subject run every second year. 'Intellectual and Industrial Property' was the full name of the course. It didn't sound enthralling to me as an 18 year old. In my induction materials, I had highlighted criminal law, human rights and the location of the uni bar. Intellectual Property really wasn't part of my plans.

It was a blue hardback book with no picture on the cover. The title – *Real Property law in Australia*. I flicked through the 823 pages. I didn't like it at all. I tried to use yellow highlighter to make the phrase 'the doctrine of terra nullius' more appealing but it didn't

work. This ‘doctrine of terra nullius’ gave me no interest in being a lawyer. I didn’t know it at the time, but the Mabo judgment was just a year away. I left law school without even seeing the inside of the Intellectual Property law class.

I had ten dollars in my wallet the day I went for a job at the Aboriginal Arts Board of the Australia Council. I landed the position as secretary to the Director and then became a program officer. The Aboriginal Arts centre network was growing strong. Indigenous visual arts was exhibiting nationally and internationally. Sally Morgan’s book, *My Place* hit the best seller list although the bulk of writings about Indigenous people were penned by non-Indigenous authors. Indigenous music was thriving with bands like Warumpi Band and Yothu Yindi starting to attract a following. Bangarra Dance Theatre formed. This cultural activity showed me that arts and culture could deliver similar social and economic objectives as the law. I started feeling like I’d found my path. Then, that ten dollar note became the subject of a court case. That money had a morning star pole on it. Morning star poles are made for the sacred morning star ceremony. This one, by Terry Yumbulul was sold to the Australian Museum. Yumbulul had authority to make Morning Star Poles because he had attained a certain level of status in his community through ceremony and kinship relationships. Yumbulul signed an agreement that allowed his agent to licence his copyright work to the Reserve Bank. Yumbulul came under considerable criticism from his clan when they found out about their sacred designs being used in this way. Yumbulul was angry too. He took legal action in copyright law. The matter went to court and although unsuccessful, Justice French recognised that customary and copyright law have divergent interests. It was a sign of things to come. Other cases started and I got the message. I got to understand that Intellectual Property laws were relevant to Aboriginal people. I went back to law school, did that subject ‘Intellectual and Industrial Property’, and finished my degree.

In two decades, I have become a lawyer working internationally in Indigenous Cultural and Intellectual Property. I am the owner and sole director of Terri Janke and Company Pty Ltd, a small to medium enterprise. We celebrate our ten year anniversary next year. I hear the words ‘Intellectual Property’ every day, but this time I hear it from advisors

Indigenous creators, knowledge holders, Indigenous businesses. They want to know how they can protect their Indigenous Cultural and Intellectual Property when people from outside come in and want to record it, research it, or apply it. They want to know how to protect their rights when they are working with it, and bringing it to the public.

Intellectual Property is an important asset for any business, but for Aboriginal and Torres Strait Islander people, Indigenous Cultural and Intellectual Property is often the foundation. The application of Indigenous traditional knowledge and traditional cultural expression in economic development can cover a range of potential markets including arts and culture, tourism, bush food, medicines, health and beauty, and merchandising for a range of products including clothing, carpets and stationary. If Indigenous Cultural and Intellectual Property rights are managed effectively, Indigenous people can benefit economically, socially and culturally from increasing consumer desire for authentic Indigenous products and services. In sharing Indigenous cultures, the Indigenous business sector should be aware of Intellectual Property laws and prepare for the challenges and opportunities.

## **Intellectual property**

Intellectual Property is the legal protection of ideas and creations of the mind like art, music, film, inventions and knowledge. The IP Australia website defines IP as ‘the property of your mind or intellect’. It can be an invention, trade mark, original design, or the practical application of a good idea.<sup>1</sup> Intellectual Property includes:

- Copyright
- Trade marks
- Designs
- Patents
- Confidential information

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<sup>1</sup> IP Australia 2009, *What is Intellectual Property*, Commonwealth of Australia, <[www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)>. ©Terri Janke, 2009

The Intellectual Property law system rewards the creators of knowledge product. The material form to their ideas, like writing books, making films, patenting useful inventions and painting images on canvas. Intellectual Property is a term used to define the rights that the law gives to ideas and creative efforts, borne out of ‘intellect’. The focus of IP laws, are to protect the economic investment in creative effort.

## **Indigenous Cultural and Intellectual Property**

Indigenous Cultural and Intellectual Property refers to Indigenous peoples rights to their cultural heritage. “Heritage comprises of all objects, sites and knowledge; the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory.”<sup>2</sup> Indigenous people’s heritage is a living heritage and includes objects, knowledge, literary, musical and performing works which may be created now or in the future based on that heritage.

Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity.

Any definition of Indigenous Cultural and Intellectual Property should be flexible to reflect the notions of the particular Indigenous group and the fact that this may differ from group to group and may change over time.<sup>3</sup>

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<sup>2</sup>This definition adopts and expands upon Madam Erica Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and Chairperson of the Working Group of 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

<sup>3</sup> T Janke, *Our Culture: Our Future-Report on Australian Indigenous Cultural and Intellectual Property Rights*, Australian Institute of Aboriginal and Islander Studies, Sydney, 1998, page 11 – 12.

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Intellectual Property rights are legal rights to control how others can use the creations of the mind. They are creative and commercial rights. In Australia, they include copyright, patents, trade marks and designs law. In business terms, IP is a key component of success in business today. It is often the edge which sets successful companies apart and as world markets become increasingly competitive, protecting your Intellectual Property becomes essential.

In the past 15 years there has been a call for Intellectual Property laws to expand to protect the knowledge of Indigenous people. Traditional knowledge of bush tucker, cultural stories, history, the techniques of creating art and handicrafts were seen to be unprotected by copyright because they were collectively created and handed down through the generations. This left them open to exposure and theft. Styles of art are copied, fake handicraft such as boomerangs and didgeridoos made overseas. Cultural knowledge of stories put into children's books and knowledge of heritage sights used in the tourism sector.

There are no Australian laws that specifically protect Indigenous Cultural and Intellectual Property. However, Intellectual Property laws, contracts and protocols are available for Indigenous people to protect their cultural expression knowledge and control how it is used. The issue is currently being considered by the World Intellectual Property Organisation (WIPO). In particular, WIPO has drafted a 'gap analysis on the protection of TK' (available on-line).<sup>4</sup> This document and the 'gap analysis on Traditional Cultural Expressions (TCEs)' give a comprehensive analysis of the inadequacies of current IP laws when it comes to protecting Indigenous Cultural and Intellectual Property (ICIP). But I will go into more detail on International IP issues later.

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<sup>4</sup> WIPO, 'Draft gap analysis on the protection of traditional knowledge', see 'earlier drafts' at <<http://www.wipo.int/tk/en/igc/gap-analyses.html>>, viewed 20 November 2008.  
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## **Protection under current laws**

If you have an idea for a story, and you write it down, you will own copyright to that written form story. So too, if you create a song, the song will be recorded, and you will own copyright in the song, and there will be a separate copyright in the sound recording. An artwork is protected by copyright, however, the style of art, or the theme or image may not be protected.

There are a number of Intellectual Property issues that could help Indigenous business. For instance, branding and the use of trade marks can be very helpful to promote authenticity, and origin and source. Marketing through trademarks and accreditation systems can allow for greater understanding and communication of that message.

## **Why protect Indigenous Cultural and Intellectual Property?**

There is a need to ensure that the culture is maintained so that there is something to pass on to future generations. Some commentators argue there is a need to preserve and protect Indigenous Cultural and Intellectual Property against the influences of modern society such as mass media, new technologies and the continued globalisation of popular cultures. These forces threaten to assimilate Indigenous cultures into the dominant cultures.<sup>5</sup> Indigenous Cultural and Intellectual Property defines Indigenous peoples and visa versa. Hence Indigenous peoples must be in control of their own cultural dynamic.

There is also a purely economic argument. Commercialisation of Indigenous cultural products has lead to commercial exploitation of cultural knowledge and forms of cultural expression outside the Indigenous communities themselves, without any payment or

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<sup>5</sup> Dr Shubha Chaudhuri, Director, Archives and Research Centre for Ethnomusicology, American Institute of Indian Studies, presentation on “The Experience of Asia” at UNESCO/WIPO Forum on the Protection of Folklore, 1997.  
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benefits flowing back to that community.<sup>6</sup> Why shouldn't the Indigenous people benefit from the commercial use of their cultures?

### **What rights do Indigenous People want to their Cultures?**

The *Our Culture: Our Future Report* listed a number of rights that Indigenous Australians are seeking in order for them to continue and maintain their cultures. These rights are what I refer to as “Indigenous Cultural and Intellectual Property Rights” and include:-

- The right to own and **control** Indigenous Cultural and Intellectual Property;
- The right to require prior informed **consent** or otherwise for access, use and application of Indigenous Cultural and Intellectual Property, including Indigenous cultural knowledge and cultural environment resources;
- The right to **benefit** commercially from the authorised use of Indigenous Cultural and Intellectual Property;
- The right to full and proper **attribution**.<sup>7</sup>

### **IP Management**

An Intellectual Property management plan is a proactive plan for managing the IP you use, or create within your business, or as part of a project. This is a very important tool

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<sup>6</sup> J.C. Weiner, “*Protection of Folklore: A Political and Legal Challenge*”, *International Review of Industrial Property and Copyright*, vol 18, 1987, p 67.

<sup>7</sup> For the full list of rights see *Our Culture: Our Future Report*, page 47 - 48

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for business, and for Indigenous business. It creates value, and also protects Indigenous Cultural and Intellectual Property by developing systems that look after culture, especially where legal measures fall short. You can set systems for safeguarding Indigenous Cultural and Intellectual Property by using copyright, protocols and written agreements.

IP Management allows you to protect your arts, ideas and cultural innovations. Copyright, trademarks and designs law might provide some protection to many non-Indigenous businesses. For Indigenous peoples, protecting cultural knowledge and cultural forms of expression is not so simple. The Intellectual Property law regime is designed to protect non-Indigenous notions of innovation that are primarily commercial in nature. However, for Indigenous peoples, sharing cultural information, artistic expression and traditional knowledge involves a continuing obligation to maintain the cultural value that is intrinsic to that information, expression and knowledge. Intellectual Property laws, in many situations, are not adequate in protecting Indigenous cultural interests.

Given the lack of protection at law, Indigenous peoples must balance cultural and commercial factors when sharing their cultural knowledge. Indigenous peoples and communities must be in control of weighing up this balance. IP Management will allow Indigenous artists to have their rights protected and also provide them with a safe environment to share their skills and knowledge of arts. This will ultimately assist in the greater recognition of Indigenous culture.

## Copyright

Copyright protects individual creator's rights and the rights of the owners of recordings in sound and film. It is a Commonwealth law, which protects works for a limited time.<sup>8</sup> For example, the composer of a song is recognised as the copyright owner of the musical

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<sup>8</sup> T Janke, *Our culture: our future, Report on Australian Indigenous Cultural and Intellectual property rights*, op. cit., p. 51.

work. As such, he or she can control how that song is reproduced, recorded and adapted. The maker of the recording is recognised as the copyright owner of the recordings. As the copyright owner of the recording, the owner can make copies or authorize others to make copies of that recording. This is good for composers of the song, like writers of 'Down Under', they'd receive a royalty every time that song is played. But what if a traditional song is used to create the new song? In Aboriginal and Torres Strait Islander laws, this song may be owned collectively with rights about who can perform and record it.

The Intellectual Property system doesn't acknowledge Indigenous communal ownership of cultural expressions and knowledge passed down through the generations, and nurtured by Indigenous cultural practice. Sacred knowledge is also not protected.

Copyright laws grant exclusive rights to authors to use, adapt and reproduce their works without conditions. This is at odds with the Indigenous cultural laws. In many Indigenous clans, there are laws that are based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. An individual or group of individuals may be empowered to act as the caretaker of a particular item of heritage.<sup>9</sup> The traditional custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole.

Copyright laws apply to the performing arts, including contemporary and traditional dance, song, storytelling, theatre, poetry and film. Performers rights protect the people who perform. Since 2001, our Australian Copyright law has included moral rights, the right of consent, and copyright in certain sound recordings.

Copyright management is an important consideration for Indigenous artists because it is one thing to have these rights and another to be able to collect royalties for authorised use of your work. There are opportunities for Indigenous people to develop collecting agencies like Viscopy, the national Visual Arts Collecting Society, which has

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<sup>9</sup> Although in some groups, where customary laws are less intact, there may not be, due to the disruption of cultural practices since colonisation.

approximately 48% Indigenous membership.<sup>10</sup> Viscopy collects and manages for educational use, and other uses of an artists' work copied by third parties, they have set rates which vary depending on the use to be made of a work. For example, a rate for reproducing an art work on the cover of a magazine would be higher than a smaller reproduction inside a magazine. Viscopy authorises uses and collects licence fees and then pays the member artist twice yearly.

## **Trade marks**

Trade marks can also give added protection of ICIP. A trade mark is 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 any other person.”

A trade mark can be registered or unregistered. But registered is better. Unregistered Marks are used by many businesses but are not Intellectual Property. Registered Trade Marks are personal property rights – enforced under trade marks law. Protection once registered can last as long as trade mark is in use.

## **Protocols**

Generally, protocols are ethical principles of guiding behaviour in a given situation. Protocols set appropriate ways of using Indigenous cultural material, and interacting with Indigenous peoples and their communities. Protocols are not law but encourage ethical conduct and promote interaction based on good faith and mutual respect.

All government, industry and professional bodies should be encouraged to develop protocols when dealing with uses of Indigenous Cultural and Intellectual Property. Issues

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<sup>10</sup> Viscopy 2006, viewed 8 December 2006 < <http://www.viscopy.com>,>  
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covered could include dealing with sacred material, processes for clearances and consents, attribution and maintaining the integrity of the cultural material.

There is a lot these laws can offer, but education on use is needed. But then there are fundamental shortfalls, like no protection for non-material form, collective heritage works. It is Indigenous cultural protocol to seek permission, and to give recognition of the source of a song or dance. The Australia Council for the Arts has published protocols for the development of Indigenous music which advise that when performing or recording communally owned musical works, it is important to seek permission from the relevant community owners of the music. Robynne Quiggin, author of the *Music protocols for producing Indigenous Australian music* states:

‘Observing customary law means finding out who can speak for that music, so the right people are asked for permission to use the music. For instance, if a musician wanted to use a rhythm or phrase from music belonging to a Torres Strait Island language group or family, it is essential to locate the correct language group or family group from the particular Island owning that song or music.’<sup>11</sup>

There have already been some moves to recognise ICIP through the voluntary codes and guides that have developed such as *Valuing Art, Respecting Culture*<sup>12</sup> and *Indigenous Australian Art Commercial Code of Conduct*.<sup>13</sup> These two organisations have done well to advance the rights of Indigenous artists however, there is a need for an Indigenous managed and controlled agency to take the lead on these important issues, and to provide a collective voice and meaningful representation.

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<sup>11</sup> R Quiggin, *Protocols for producing Indigenous Australian music*, Australia Council for the Arts, Sydney, 2007, p. 14.

<sup>12</sup> D Mellor with a legal section by Terri Janke, *Valuing Art, Respecting Culture: Protocols for working with the Australian Indigenous visual arts and craft sector*, National Association for the Visual Arts, Sydney, 2001

<sup>13</sup> National Association for Visual Arts, <[www.visualarts.net.au](http://www.visualarts.net.au)>, viewed 9 July 2008.

## **International developments**

In this part of my presentation I would like to update you with what has been happening with the international debate on the protection of traditional knowledge and traditional cultural expression. Since 1997 the World Intellectual Property Organization established a new global issues program which aims to identify and include new beneficiaries of intellectual properties, specifically indigenous people and traditional knowledge custodians.

An Inter-Governmental Committee was established in 2002 after three years of fact finding and research. The IGC has met 15 times. The debate has focussed on whether new rights should be established. The IGC has produced two draft provisions:

1. *Protection of Traditional Culture Expression*
2. *Protection of Traditional Knowledge.*

These documents are still controversial in the international scene. However, they set the ground work for developing national and regional sui generis systems which recognise Indigenous peoples knowledge to recognise, protect and promote their culture. These draft provisions were first published in 2005 and are still open for comment, but some of the following themes are as follows:

The main policy objectives include to recognise the value of traditional knowledge, to recognise the holistic nature of traditional knowledge and its intrinsic value including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value and to acknowledge that traditional knowledge systems are frameworks of on-going innovation. They are distinct intellectual and creative life ways that are fundamentally important to Indigenous communities, in the same way that scientific value is attached to other knowledge systems promotes respect for these traditional knowledge systems and for the contribution that they make to the lively hoods and identities to traditional knowledge holders. They also encourage the promotion of

preservation of traditional knowledge by respecting, preserving, protecting, and maintaining traditional knowledge systems and another heading is empowering holders of traditional knowledge to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems.

They promote the prior informed consent and exchanges based on mutually agreed terms coordinated through international and national regimes and as well as the promotion of equators benefits sharing. This is not law yet it is a draft provision but it sets the pace for work that has been happening in the convention on biological diversity and also work being on the Declaration on the Rights of Indigenous people. So we have a number of challenges and opportunities:

1. What consent and issues are involved?
2. What rights and benefits would attach to Indigenous people as people who will become owners of substantial amounts of traditional knowledge?
3. Who will be giving prior informed consent: who will be identified as the person to benefit? In what ways can you provide notices to protect Indigenous people?

## Conclusion

Indigenous businesses should adopt proactive measures to ensure the protection of their Intellectual Property, and that they are respecting the Intellectual Property rights of others. This can be achieved by using trade marks, copyright notices, release forms, written agreements, ICIP acknowledgments and domain names.

Development of protocols, procedures and policy relating to Intellectual Property will play an important part in implementing an effective IP management strategy. These protocols, procedures and policy could then be included in a single document called an 'IP management manual'.

An IP management manual would provide a guide for new staff and include up to date policy on various matters. The manual could include forms and templates to assist staff manage IP in their day to day work operations.

Despite copyright, there are still gaps in protection. Indigenous cultures are orally based but copyright requires material form for copyright to exist in a work of art, or a dance. It also doesn't protect traditional knowledge and traditional cultural expression.

There have been calls internationally to recognise and protect traditional knowledge and traditional cultural expression. The World Intellectual Property Organisation implements the International Intellectual Property Rights regime. Since 2000, it has been exploring the accommodation of traditional knowledge, folklore and traditional cultural expression within the IP legal system. The IP system itself is not perfect and it is arguable that it has contributed to the problem of Indigenous knowledge exploitation. Secondly, the recognition of Indigenous rights stem from much larger political and historical factors. It is yet another area of law that has overlooked us. But it is a law that can be used as a spear or a shield to protect Indigenous knowledge.

In 1999, the report *Our Culture: Our Future* report was released. Now ten years ago, the call for rights recognition within the Australian legal framework remains strong.

Cultural heritage for Indigenous people is integrated. The tangible and intangible are interconnected. Things you can see and touch are related and entwined with the associated knowledge and ideas.

There are 17 listed rights Indigenous people wanted to their Indigenous Cultural and Intellectual Property including the right to own their ICIP; the right of attribution, right of integrity and the right to share in the benefits from commercial use of culture.

Indigenous knowledge is a knowledge that has been handed down through the generations – it is knowledge and cultural expressions that are our heritage. They are the ways of life, and ways of expressing culture, that are handed down from generation to generation, and are regarded as pertaining to a particular Indigenous group or its territory.

IP Management offers benefits for Indigenous people including employment, business and economic development, pride and social unity, cultural revival and strengthening and better relationships between non-Indigenous and Indigenous people, borne out of sharing culture. There is also the opportunity to use our knowledge, and Intellectual Property to bring about economic returns, grow business and to also use IP laws to empower Indigenous people to protect their cultural heritage. There is a lot you can do just by getting tactical.

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