

BEYOND GUARDING GROUND

A VISION FOR A NATIONAL
INDIGENOUS CULTURAL AUTHORITY

TERRI JANKE

TERRI JANKE AND COMPANY PTY LTD



BEYOND GUARDING GROUND:

A vision for a National Indigenous Cultural Authority

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

This paper draws from the paper Terri Janke presented at the Wentworth Lecture, 2008, convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra and research undertaken by Terri Janke, AIATSIS research grant 2003. The paper as delivered is available at www.aiatsis.gov.au.

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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.

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About the author



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Terri's law firm, Terri Janke and Company, is a Sydney based specialist Indigenous law firm representing Indigenous artists, writers, filmmakers and Indigenous businesses across many fields, in copyright and intellectual property issues.

She has written many articles and reports on Indigenous intellectual property issues including *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* and the World Intellectual Property Organisation commissioned report *Minding culture: Case studies on intellectual property and traditional cultural expressions*.*

Terri is also a published fiction author. Her novel *Butterfly song* was published by Penguin in 2005.

She is a board member of Tourism Australia, the National Indigenous Television and a member of the Council of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

* T Janke, *Minding culture: Case studies on intellectual property and traditional cultural expressions*, World Intellectual Property Organisation, Geneva, 2003, pp. 87–99.

Introduction

In the past 20 years Indigenous Australians have called for Indigenous cultural and intellectual property rights.

Their concern was that intellectual property system does not acknowledge Indigenous communal ownership of cultural expressions and knowledge passed down through the generations, and nurtured by Indigenous cultural practice.

Sacred knowledge was also at risk.

Ten years ago, I wrote the report *Our culture: our future – report on Australian Indigenous cultural and Intellectual property rights*.

The report called for new laws and policies to protect Indigenous cultural rights.

No new law has been adopted and the protection of Indigenous cultural and intellectual property rights is a hotly debated international issue.

In April 2009, the Australian Government adopted the *Declaration on the Rights of Indigenous Peoples*.¹

The Rudd government's decision to support this United Nations standard setting document came after it was adopted by most of the world, over a year before.

The document is ground breaking in that it encapsulates Indigenous cultural rights by stating in Article 31 that Indigenous people have the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions including oral traditions, literature, designs, visual and performing arts.

Included within this article too is the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

Now is the time for us to reassess the current cultural framework.

In 2008, I presented the Wentworth Lecture, *Guarding ground: a vision for a National Indigenous Cultural Authority* arguing for greater infrastructure to support and defend Indigenous cultural and intellectual property rights.²

It followed up on the idea I put forward in the Australia 2020 Summit for a National Indigenous Cultural Authority to facilitate consent and payment of royalties; to develop standards of appropriate use to guard cultural integrity, and to enforce rights.

This paper outlines the main ideas put forward in these above papers to encourage general public debate on whether Australia needs a National Indigenous Cultural Authority.

Historical background

In the last four decades there has been a remarkable growth in the value and demand for Indigenous arts, cultural expression and knowledge.

The Aboriginal Art Market is valued at \$300 million each year.

Traditional knowledge has applications in industries that range from tourism, entertainment through to the biotechnology industry.

The increase in demand also meant the rise of a rip-off industry where Indigenous arts and knowledge was taken without consent, and without acknowledgment.

In 40 years of calling for legal protection most of the measures have been instigated by Indigenous advocates guarding their ground by asserting cultural rights, bringing test cases, devising protocols and enforcing rights under agreement.

Hence, my call for formal structures administered by a National Indigenous Cultural Authority for Indigenous people to continue the advancement of rights.

Forty years of Indigenous cultural rights advocacy

Indigenous arts and cultural expression is interconnected with land and seas, handed down through the generations as part of cultural heritage.

Painting, dances, stories, songs, and knowledge come from the land, and are passed on from generation to generation as Indigenous cultural heritage.

Culture is not static, it evolves and adapts, and Indigenous people must be recognised as the primary custodians of their culture.

Since the 1970s, Indigenous artists have been calling for recognition of their creative rights on the same level as that of other Australian artists.

In Australia, the *Copyright Act 1968* (Cwlth) provides rights for copyright owners to control the use and dissemination of literary, dramatic, artistic and musical works, and also certain listed subject matter including sound recordings, cinematograph films, television and sound broadcasts, and published editions.³

There are certain requirements that must be met before protection is granted. But if a work, film or sound recording meets these requirements, then the law makes it the subject of copyright, without the need for registration.

This feature of the law has two main impacts for Indigenous people:

1. Indigenous arts and culture is orally and performance based, and therefore does not meet requirements of copyright, at least in the old days of the 1960s and 1970s.

Prior to the recent case law, Aboriginal arts was seen as *folklore* and considered unoriginal in that copying artistic traditions did not amount to innovation and interpretation.

2. The second main impact was that copyright was recognised however, in the written interpretations and recordings made of Indigenous knowledge, arts, dances, music and stories.

Copyright protected the films and tapes which recorded Indigenous people and their cultural knowledge. But, that copyright was

recognised in the material form created often by non-Indigenous people, and the ownership vested in the recorder as the 'author' of these works.

So songs, dances, customs, knowledge about bushfoods and medicines have been recorded and continue to be recorded but not by the Indigenous knowledge holders or their communities.

David Malangi and the \$1 note

In 1966, the new decimal \$1 note depicted 'ancient Aboriginal art' by David Malangi. The selection of this art for the note involved no consultation with the artist. The original bark painting was purchased by an international art collector three years before, and had subsequently been donated to the Paris Museum of Arts of Africa and Oceania. The collector gave a photocopy of the art to an officer of the Reserve Bank of Australia and then the designer of the \$1 note. Nugget Coombes, Governor of the Reserve Bank was deeply embarrassed by the incident, himself a great advocate for Indigenous artists' rights. The Reserve Bank had not consulted at all, assuming the design was the work of an 'anonymous and probably long dead artist'. It was a copyright work of course. David Malangi was given \$1,000, a fishing kit and a silver medallion.

// The Reserve Bank had not consulted at all, assuming the design was the work of an 'anonymous and probably long dead artist'.

//

Wandjuk Marika's call for copyright protection parity

In 1975, Wandjuk Marika, the first Chair of the Aboriginal Arts Board called for greater protection after seeing his important sacred works reproduced on a tea-towel. He said, 'this was one of the stories that my father had given to me and no-one else amongst my people would have painted it without permission. I was deeply upset and for many years I have been unable to paint. It was then that I realised that I and my fellow artists needed some sort of protection.'⁴ He pointed out copyright did not protect Indigenous arts and craft which was referred to as 'folklore' and dealt with as if it was in the public domain, *terra nullius*, free for all to use.

This case reflects a *terra nullius* notion of Indigenous arts by which much of the art work was labelled 'artists unknown' and collected without reference to the cultural significance. Wandjuk Marika's call set the ground for action by Indigenous people over the following years.

Yumbulul and the \$10 note

Another case involving currency, occurred when the \$10 note commemorating Australia's bicentennial reproduced a morning star pole, rights granted under licence, by the Aboriginal Artists Agency, to the Reserve Bank. Morning star poles are made for the sacred morning star ceremony. This one, by Terry Yumbulul was made and sold to the Australian Museum. Yumbulul had entered into a licence agreement that had allowed his agent, the Aboriginal Artists Agency, to licence the work to the bank. Yumbulul came under considerable criticism from his clan when they found out that the morning star pole had been reproduced on the ten dollar note. He took action against the Agency and the Bank. The action against the Agency failed. Justice French recognised that: customary and copyright law have divergent interest when he said, "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."⁵

The Carpets Case

In 1994, *Milpurrurru v Indofurn*⁶ became the first Federal Court judgment recognising Indigenous artist's works, which depicted pre-existing clan owned designs, were original copyright works. The artists had met this requirement because of the skill and interpretation they had expended. In this matter, Justice von Doussa considered a claim that carpets with Indigenous designs amounted to copyright infringement. Justice von Doussa made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom. The court's finding that the company directors were also liable for copyright infringement was overturned on appeal. Still, the case set an important precedent and one media article likened it to the *Mabo* Case.

Bulun Bulun v R & T Textiles

This focus of western laws on the individual has been a real problem for Indigenous peoples. However, in *Bulun Bulun v R & T Textiles* (1998)⁷ an Australian court found that an individual Aboriginal artist (Johnny Bulun Bulun) had a responsibility to his clan to ensure communally owned traditional designs contained in his painting were appropriately used. In this case, the artist had met this responsibility. The court also said that if he hadn't taken action, then equity law would allow them to take action for infringement.

This point of law is referred to as 'the Bulun Bulun Equity' and may apply to other cases involving ICIP. For example, imagine a researcher has been given access to traditional knowledge, and is aware that the traditional knowledge is communally owned, and that there are certain restrictions

// Johnny Bulun Bulun had a responsibility to his clan to ensure communally owned traditional designs contained in his painting were appropriately used.

//

on its wide dissemination. It could be argued that the researcher has a legal duty to ensure that the copyright in her written report is not used inconsistently with any customary law restrictions, by a third party. If it is misused, and the researcher does nothing, the clan may exercise the Bulun Bulun Equity.

Since the Bulun Bulun case, there has been a growing trend for a traditional custodian's notice to be affixed to reproductions of art, and inside the cover of publications the incorporate Indigenous cultural expression.⁸

Brandl rock art case study

In 1997, Riptide Churinga, a Sydney based t-shirt manufacturer, produced a range of t-shirts with Mimi rock art figures.

The t-shirts were discovered on sale to the surprise of a descendant of the Badmardi clan and Dr Vivien Johnson, an Aboriginal art lecturer.

The use of the Mimi figures was guarded carefully under customary law, and is still significant to Indigenous cultural beliefs.

However, the rock art concerned is estimated to be about 4,000 years old and therefore not the subject of copyright.⁹

This presented a problem, how could the Badmardi clan stop the t-shirt maker from transgressing their laws?

As it turns out, the figures reproduced on the t-shirts were taken from drawings and photographs made by researcher Eric Brandl.

Brandl had made the copies from rock art sites in the Deaf Adder region of the Northern Territory with funding from the Australian Institute of Aboriginal Studies (now the Australian Institute of Aboriginal and Torres Strait Islander Studies).

These drawings and photographs of the Mimi rock art were then published by the Australian Institute of Studies in 1973.¹⁰

There was copyright in the book, the photographs and the drawings.

AIATSIS, the Brandl Estate and the Badmardi clan were able to demand that the t-shirt company stop production of the t-shirt.

They entered into a settlement in which damage, and delivery up of unsold items were included.

There was also a national public apology posted in *The Australian*, a national newspaper.

The Brandl case illustrates that copyright owners can work with 'cultural owners' to commence action, even though the 'cultural owners' have no copyright.

Summary of copyright cases: how does copyright law apply to Indigenous art and cultural expression?

In summary, these cases changed how copyright applied to Indigenous art, so that now Indigenous Cultural and Intellectual Property rights are seen as important rights for Indigenous people to be managed.

There are still shortfalls in the law as follows:

- Indigenous art and cultural expression is passed on orally or by imitation during performance. However, copyright does not protect the underlying ideas or information that is put into a work. It protects the expression.

This means that there is no protection for a style or method of art.

Some performances such as dance and music would not be protected and are left open for exploitation when they are recorded.

- There are no communal rights for Indigenous clans to own and control their cultural expression.
- Protection of works by copyright is only for the life of the author plus 70 years. This means that many old works of art and cultural expression are considered in the public domain and free for anyone to use without seeking permission.

This may be against cultural protocols and customary laws.

- There is no special protection for sacred or secret works. Making these widely available may transgress customary laws, but under copyright law there is no such restriction.

However, the precedent created in the Bulun Bulun Case may oblige the copyright owner of an artwork that embodies traditional ritual knowledge to use his or her copyright in ways that are consistent with the cultural obligations imposed on the use and dissemination of that knowledge.

As the above examples show, the struggle to protect Indigenous cultural and intellectual property using Australian laws has evolved somewhat through the courts over recent decades.

For the most part however, these small steps have come about through the ability of clever lawyers to manipulate the law to suit the unique needs of Indigenous cultural custodians.

But should Indigenous peoples have to rely on creative lawyers using inadequate laws to protect their cultural and intellectual property, when they have their own laws and customs that have been developed and followed over thousands of years?

The right to culture

Australia recently adopted the *Declaration on the Rights of Indigenous Peoples*.¹ The Rudd government's decision to support this United Nations standard setting document came after it was adopted by most of the world, over a year before. The document is ground breaking in that it encapsulates Indigenous cultural rights by stating in Article 31 that Indigenous people have the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions including oral traditions, literature, designs, visual and performing arts. Included within this article too is the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

The *Declaration on the Rights of Indigenous Peoples* in Article 31, states:

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 recognise and protect the exercise of these rights.*¹¹

In 1999, the report *Our culture: our future* recommended legislative and policy changes to better protect Indigenous cultural and intellectual property.¹²

Another recommendation was the establishment of a National Indigenous Cultural Authority to act as a leader organisation on the promotion and administration of ICIP rights.

As of yet, there have been no attempts to introduce new legislation specifically aimed at protecting Indigenous cultural and intellectual property, other than a failed attempt to introduce an *Indigenous Communal Moral Rights Bill*.¹³

Despite the lack of legislative change, there has been development of many policies and protocols, and the increased use of contracts by Indigenous people, and supporting industry organisations.

With the adoption of the *Declaration on the Rights of Indigenous Peoples* and the heightened awareness of Indigenous cultural protocols, it is now time to establish a National Indigenous Cultural Authority. We need to look more closely to consider whether it should be part of our future cultural framework.

An idea worth discussing: a National Indigenous Cultural Authority

The following recommendation appears in *Our culture: our future*:

22.1 National Indigenous Cultural Authority

A National Indigenous Cultural Authority should be established as an organisation made up of various Indigenous organisations to:

- Develop policies and protocols with various industries.
- Authorise uses of Indigenous cultural material through a permission system which seeks prior consent from relevant Indigenous groups.
- Monitor exploitation of cultures.
- Undertake public education and awareness strategies.
- Advance Indigenous Cultural and Intellectual Property Rights nationally and internationally.

The National Indigenous Cultural Authority should be the peak advisory body on Indigenous Cultural and Intellectual Property Rights. Representation on the Authority should aim to cover all areas of Indigenous Cultural and Intellectual Property. The National Indigenous Cultural Authority should be funded by both industry and government.¹⁴

At the Australia 2020 Summit the idea of a National Indigenous Cultural Authority was discussed in both the Indigenous and Creative Arts streams.

Indigenous cultural and intellectual property rights were referred to in the initial report:

There was a strong sense that Indigenous culture represents a real economic opportunity, and among the suggestions was a formalised structure for promoting Indigenous cultural and intellectual property rights and developing standards for appropriate use, attribution and royalties for such works.¹⁵

The Australia 2020's initial report captured that idea as follows:

Creativity is central to Australian life and Indigenous culture is the core to this. To measure, document and leverage the strengths of this culture, to articulate our role and improve protection of indigenous culture, language and heritage through a National Indigenous Cultural Authority.¹⁶

The 2008 Summit report recommended the establishment of a national cultural authority for the protection of Aboriginal and Torres Strait Islander intellectual property. Since the Australia 2020 Summit, the Aboriginal and Torres Strait Islander Arts Board of the Australia Council articulated an interest for the establishment of a National Indigenous Cultural Authority.

The National Indigenous Arts Reference Group has been discussing the idea of a National Indigenous Arts and Cultural Authority.¹⁷

This is an indication that national infrastructure is seen as an important consideration in the advance of Indigenous cultural and intellectual property rights.

A question for the model developers however is whether the model should cover all Indigenous cultural and intellectual property, and not just arts and cultural expression. A self-determining model could best address the comprehensive nature of Indigenous Cultural and Intellectual Property. It could be a way to overcome the problems associated with customary laws being enshrined in legislation. It is also possible for this Authority to include local and regional decision-making structures.

Why do we need a National Authority for Indigenous culture?

Promoting rights

Indigenous people should have the right to own and control their own Indigenous cultural and intellectual property (ICIP).

Indigenous people should be enabled to actively manage use, reproduction and dissemination of their Indigenous cultural expression. Indigenous communities have the right to protect and promote their cultural heritage.

They also have the right to share it with others on terms acceptable to them. The *Our culture: our future*¹⁸ Report lists a number of rights that Indigenous people expressed generally for the recognition and protection of their Cultural and Intellectual Property.

These rights include:-

- Right to own and control Indigenous Cultural and Intellectual property
- Right to define what constitutes Indigenous Cultural and Intellectual property
- Right to control the commercial use and to benefit commercially
- Right to full and proper attribution
- Right to be recognised as the primary guardians and interpreters of their cultures
- Right to protect sacred and significant sites/symbols/objects
- Right to prevent derogatory, offensive and fallacious use
- Right to maintain secrecy
- Right to have a say in preservation and care
- Right to control use of traditional knowledge.

Whilst it is important to have rights, it is also important to establish mechanisms by which to assert them.

To administer rights and protect them, it is necessary to set up Indigenous cultural infrastructure – administrative processes and persons in authority who can act, negotiate and hold collectively rights to culture.

There may also be the need for national infrastructure to be established, and in the long term, sui generis legislation to protect these important cultural rights.

Rights management

A structured and coordinated approach will also help manage the Indigenous Cultural and Intellectual property rights themselves.

Convention copyright royalties for public performance, for instance, are managed through the statutory licensing provisions of the Copyright Act, and collected by the Australasian Performing Rights Association (APRA).

Composers and copyright owners of musical works become members of APRA who distribute to them royalties collected under APRA licences.

These models are effective economies of scale but there is a need to ensure transparency of processes so that the benefits of administration are not outweighed by high charges or lengthy and cumbersome processes.

A National Indigenous Cultural Authority can provide leadership and administer rights either directly or by establishing a rights clearance framework for Indigenous cultural and intellectual property rights.

Cultural maintenance

There are also the cultural maintenance reasons for collective management - caring for culture. We need to make sure it is appropriately used, properly recompensed, that our Indigenous creators are valued and attributed, and also that our culture is not derogatorily used.

Representation

Another important function of the National Indigenous Cultural Authority is to lobby for these rights holders in the face of industry.

The National Association for the Visual Arts lobbies for the rights of visual artists and they have been instrumental in lobbying for the introduction of Viscopy and the forthcoming resale royalties scheme.

We Indigenous cultural creators need to have our own lobby voice to promote our interests.

There is no national independent organisation that represents Indigenous artists and creators. Since the demise of the National Indigenous Arts Advocacy Association in 2003, legal advice has been provided by the Arts Law Centre of Australia through its Artists in the Black program.¹⁹

Further, there has been some important work in Indigenous visual arts conducted by the National Association for the Visual Arts (NAVA) including the development of protocols *Valuing art, respecting culture*²⁰ and *Indigenous Australian art commercial code of conduct*.²¹

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. A National Indigenous Cultural Authority will give a collective voice for Indigenous culture – which to date has been absent.

Administering prior informed consent

The other important role of the National Indigenous Cultural Authority is to administer the framework for prior informed consent rights to cultural material. Currently, Indigenous cultural expression and knowledge is supplied and used without a fee. If we charged a royalty on use, just like copyright and other intellectual property, the resulting income could be distributed, through NICA, to the traditional owners and communities, which in turn would support community development, and artistic and cultural development, and maintenance.

Monitoring

The body could also monitor Indigenous Cultural and Intellectual Property protection nationally. A national approach to protecting Indigenous people's rights is required.

Networking

The NICA would also have an important networking role. Decision-makers in all States and Territories need to be aware of developments in other areas and communities of Australia, as well as internationally.

Business and employment

Under this system, corporations would give back to Indigenous communities what they now take for free. More art and culture would be performed and encouraged. Indigenous people would find employment opportunities in not only arts and culture but in management, business, investment and as professional advisers to these industries including lawyers and accountants.

This system could promote the practice of culture and the business of culture at the same time.

What needs protection?

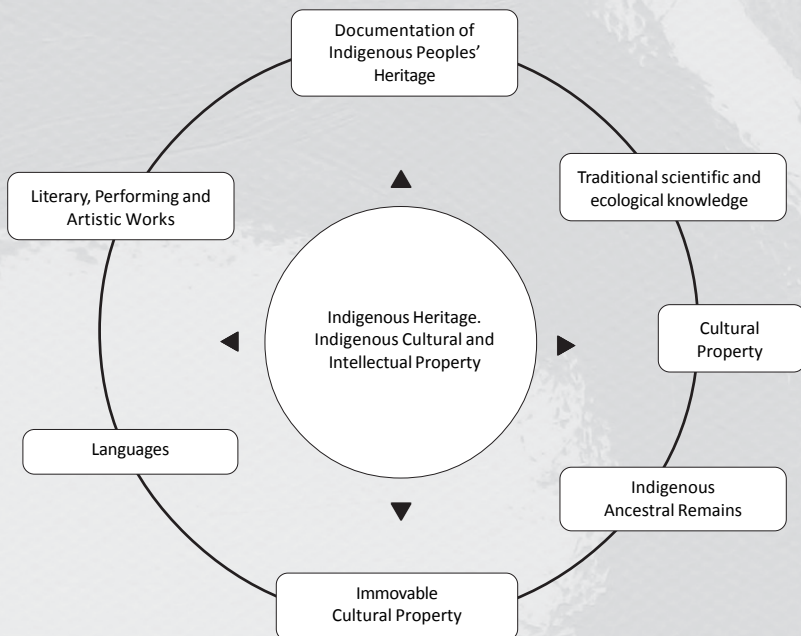
What scope should the National Indigenous Cultural Authority have in terms of the range of Indigenous cultural and intellectual property it would help to protect and manage?

At this stage, a wide view should be taken, although it may be that certain aspects of Indigenous cultures are covered by other bodies and legal structures. For example, should the cultural authority focus only in the areas of the arts for protection of traditional cultural expression? Should there be protection of traditional knowledge of plants, animal and environment?

This knowledge is being sought after by pharmaceutical companies, biotechnology companies and the natural resources industry. Could both areas be covered by a NICA? The two overlap in the cultural context. An expression of culture is a manifestation of traditional knowledge including stories, songs, sculpture, painting, music and textiles.

Traditional knowledge is the underlying knowledge which is created, acquired or inspired for traditional purposes, transmitted from one generation to another, it belongs to a clan or group, and has collective origins. However, traditional cultural expression and traditional knowledge have different applications in intellectual and industrial property.

For example, a traditional cultural expression may come within conventional copyright law models whereas traditional knowledge applications would need knowledge of patent, plant breeders rights and trade marks which are more industrial, and require registration.



Operational issues

Legal structure

How should the National Indigenous Cultural Authority be legally structured? Will it be a government agency or statutory authority or should it be independent from government?

One option is to establish a statutory authority like the Australian Institute of Aboriginal and Torres Strait Islander Studies. Bodies such as AIATSIS have their own establishing legislation – a statute passed by the Commonwealth parliament.²² It could be a government company like the Australian Securities and Investments Commission. It could be a company limited by guarantee, a not for profit company. It must have the power to raise money and invest. An example of this type of structure is the National Indigenous Television Inc. NITV is an independent legal entity, but it relies on government funding to operate. The funding agreement imposes a means for government to monitor the organisation's work, ensuring that it meets important agreed criteria.

Membership

For a cultural organisation to thrive, the National Indigenous Cultural Authority should be underpinned by strong membership which is open to Indigenous cultural practitioners with voting rights to effectively elect a representative Board.

The membership base should be made up of Indigenous stakeholders, the owners of Indigenous culture. The Board could be formed from a range of traditional owner representatives, industry and legal experts.

The National Indigenous Cultural Authority should be accountable to its membership to continue its charter, and implement good governance.

The National Indigenous Arts Advocacy Association, which shut its doors in 2002, failed to do this. According to the NIAAA Review Report, the leadership of the organisation was highly volatile and unstable.²³ A NICA model must focus on good corporate governance and service delivery.

Government funding and reporting

Such an agency would require government funding at least initially.

The Board and management should be required to report to government and meet certain threshold performance criteria in the same way that the collecting societies are kept in check by reporting to government and tabling their annual report in parliament.

Collecting societies must also comply with developed codes of conduct.

A NICA must be transparent and the administration charges should not outweigh the benefits to members.

Tools to assist functions

To undertake its functions, the NICA would need to make use of a range of tools which are intellectual property (IP) based, such as trade marks, and copyright licensing agreements. It would also use other measures such as protocols, bench-marking and Indigenous mediation services (as discussed below).

A distinctive trade mark and brand

The NICA would need to develop a strong trade mark and branding system for it to have clout – once developed the trade mark should be registered, and operate to endorse projects, goods and services which are facilitated by the NICA processes of prior informed consent.

Like the National Heart Foundation mark is applied to goods that meet criteria for healthy food, the NICA trade mark would appeal to consumers who are looking for authentic products and services that are made with fair trade through the sharing of benefits with Indigenous custodians of culture. The Indigenous community must adopt a distinctive trade mark to be affixed to approved ICIP projects and works. Trade mark protection lasts for as long as it remains in use and registered. The trade mark can allow protection by promoting “authorised reproduction” – the mark becoming a imprimatur or mark of endorsement or geographical indication.

Ethical trade marks such as the Fair Trade mark inform the discerning consumer that a product is not exploitative but is produced in observance of certain standards. The Fair Trade logo is used for the marketing of export goods, such as chocolate and coffee, from developing countries to developed countries. The logo is used on products which pay producers a “fair price” and where production of the goods meets certain social and environmental standards.

A comprehensive database

Keeping track of who owns rights, and who has made use of them, is an important feature of a rights access and management system.

A National Indigenous Cultural Authority could manage rights clearances by keeping a comprehensive database of intangible cultural material and list rights holders, so that those who want to negotiate or seek appropriate use can do so, by contacting the relevant parties. A Register would be a fundamental implementation tool for the national authority.

It should be made clear however the database is not a rights registration system, which infers rights once registered, like the trade mark registration system, but the database would be an identifier of who owns the rights to a particular item of cultural heritage.

The United Nations University’s report on *The Role of Registers and Databases in the Protection of Traditional Knowledge* will be useful to consider in developing a model for the National Indigenous Cultural Authority.²⁴

Databases can also be used as a measure to inform other rights based systems and assert Indigenous rights to material by preventing others to register rights in Indigenous traditional knowledge or cultural expression. Also of note is the Database of Official Insignia of Native American Tribes, which stops others from registering Native American insignia as trademarks in the United States of America.²⁵

There is a need to explore methods for enforcing rights over time. In this way, the database and the recording of information allows for the rights to be tracked and managed for a period of time.

Agreement templates

The National Indigenous Cultural Authority would be responsible for developing standard terms for licence agreements entered into for use of material, as well as the branding to use the NICA trade mark.

Collective organisation models have long known the benefits of using standard agreements to limit administration costs, as well as set appropriate terms of use.

A good example is the Australian Society of Authors Model Contract of publishing agreements.

Once approved, the applicant must enter into a written agreement with the Indigenous community for use of the ICIP.

If agreement is not reached on the terms, no approval is given. If agreement on terms is reached, a written and legally binding contract is entered into between the artist and the other party.

The terms to be included in a written agreement should cover the following issues: -

- Purpose
- Attribution (individual and communal)
- Non-exclusive/exclusive use
- Fee structure and collection and distribution of royalties
- Recognition of any customary rights
- No alteration (integrity protection)
- Provide for artists or representatives to check quality of reproduction (moral rights)
- Process of approval and consent
- Accounting
- Jurisdiction.

The terms should also recognise the cultural integrity rights of the Indigenous community by allowing the Indigenous communities' representative or ICIP committee to check and monitor how their information is used.

For example:

- If filmed, a checking process is allowed in the contract for the film to be checked at rough cut;
- If reproduced in a book, there is a quality control measure for checking to be introduced at final draft stage.

The checking and monitoring points can be altered by the Indigenous community depending on the subject matter and the experience of the applicant, or the involvement of Indigenous people in the project.

Protocols

The National Indigenous Cultural Authority could develop protocols which set standards for consent procedures, attribution and integrity. Consultation with Indigenous communities will be necessary to develop these protocols.

Already a strong framework for protocols has developed and whilst these are largely ethical in nature, or enforced in funding agreements for projects, protocols provide scope to examine how things might be implemented by a national coordination body, like the National Indigenous Cultural Authority.

The Australia Council for the Arts has published protocols for the development of Indigenous arts which advise that when using performing or recording communally owned works, it is important to seek permission from the relevant community owners.

The five Australia Council Indigenous protocols guides cover:

- Media arts
- Music
- Performing arts
- Visual arts
- Writing.

The protocols guides follow a framework for respecting Indigenous heritage:

1. Respect
2. Indigenous control
3. Communication, consultation and consent
4. Interpretation, integrity and authenticity
5. Secrecy and confidentiality
6. Attribution and copyright
7. Proper returns and royalties
8. Continuing cultures
9. Recognition and protection.

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.²⁶

In this respect, the model can be used to enhance the preservation of traditional knowledge and expression of culture. It acknowledges the role of community ownership and control within that culture.

Dispute resolution

An authority and rights regime of this nature will almost certainly require thought on how competing interests and overlapping knowledge are dealt with.

Our culture: our future recommended the establishment of a tribunal system to ‘mediate any disputes and provide fast-track, low-cost, culturally appropriate remedies.’²⁷

Mediation is a flexible method to resolve disputes. The World Intellectual Property Organisation has a dispute resolution program.

The use of alternative dispute resolution services has been employed to resolve Indigenous disputes generally because it allows for cultural considerations and customary law issues to be considered.²⁸

Alternative dispute resolution, especially mediation, could be employed by the National Indigenous Cultural Authority.

Such a rights administration body would need to develop skills in resolving ‘IP disputes’ and negotiating rights— between Indigenous individuals, and communities (clan groups) and between Indigenous and non-Indigenous commercial entities, and between Indigenous and Indigenous groups.

This approach is used in native title; lessons learned in that arena can be shared. The process used by WIPO for mediation of international disputes concerning domain name registration is also a useful model.

An approach for Indigenous mediation services is recommended.

The Arts Law Centre of Australia has mediation guidelines and convenes a mediation service to deal with arts disputes.

In my opinion, there are benefits in this approach.

Prior informed consent models

The NICA is largely based on the premise that users of Indigenous cultural expression material should seek the prior informed consent of the traditional owners.

The community has the right to control use, dissemination and reproduction of their Indigenous cultural expression.

They have the right to say no to commercialisation of cultural material.

The commercialisation of the Indigenous Cultural Expression should be done with the informed consent of the relevant creators, and the community.

When should consent be obtained?

Consent is required for certain uses of Indigenous cultural expression that are commercial.

Any model of consent should seek to maintain cultural practices and should not seek to control customary uses that are of small scale.

Customary use refers to use by a person who is a member of the relevant clan, or authorised under the relevant customary laws, to use and reproduce Indigenous culture for cultural purposes.

The various models differ in the types of permissions required. Under customary law it may be that a member of a clan can use a certain aspect of culture belonging to that clan freely without having to get consent of a group.

This is permissible under cultural protocols or customary laws.

However, what if an Indigenous person from another community seeks to use the property of another clan. Should consent be obtained?

What if the person is non-Indigenous? Should they seek consent from the relevant owners of the cultural and intellectual property?

The community must decide what types of uses require consent via this process.

Full disclosure of proposed use

Prior informed consent requires that the full details of the proposed use of the cultural material or knowledge is disclosed to the relevant traditional owners. The requests can be made to the Indigenous community, group or organisation. If funds are available, an officer could be employed to take on the role of administering the procedure. Generally, traditional owners exercise the rights to communal ICIP. The traditional owners are the group, clan, community of people or Indigenous person who is recognised by a group, clan, or community as the individual; in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group.

The applicant should be asked to fully disclose how the ICIP will be used:

- What type of material is being made use of?
- What is the project or proposed use?
- Has the applicant spoken to relevant Indigenous people about the proposed project?
- What involvement of Indigenous people is envisaged in the project?
- Will the proposed project involve alterations or additions to the Indigenous cultural expression?
- What are the perceived benefits and risks of the project? – economic and cultural benefits should be discussed.

Individual vs collective rights

There may also be the rights of individuals or families that require clearing as well.

This is where identifying the right people to consult is important.

For example, a song, can be 'collectively owned' but the arrangement of performance is owned by an individual performer or musician.

The rights of individual authors would also require clearance. It is possible for the community to facilitate this.

The individual author refers to the person:-

- performing the dance or song;
- providing the information or cultural expression,
- creating the information or form of cultural expression.

Another example is where a family might be the holders of the knowledge and not the wider Indigenous clan group.

In this respect, consent and consultation with the family may be more relevant than obtaining consent and consulting widely.

Succession rights: after someone passes on

When a person dies, who should have the right to control the use of Indigenous cultural material created by the deceased? Like other property, intellectual property can be passed on to family and representatives as the owner sees fit under a written will. A problem is that not many Indigenous people have a will and plan for succession. A NICA could assist living people identify who should speak for their arts and culture after they pass away.

World Intellectual Property Organisation

The World Intellectual Property Organisation (WIPO) is a specialised agency of the United Nations dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest.

Since 2000, the World Intellectual Property Organisation (WIPO) has convened an Inter-Governmental Committee on intellectual property and genetic resources, traditional knowledge and folklore.²⁹

The WIPO IGC has developed two documents:-

- (i) *Draft provisions for the protection of traditional cultural expressions (TCEs)*
- (ii) *Draft provisions for the protection of traditional knowledge.*³⁰

Whilst these documents remain contentious within the IGC debate, it is expected that the draft guidelines will shape future laws and policies relating to traditional cultural expressions and traditional knowledge.

The *Draft provisions on traditional cultural expressions* protect both tangible and intangible 'traditional cultural expression'(TCE) which includes songs, stories, ceremonies, rituals, dance and art including rock art, face and body painting, sand sculptures, bark paintings.

The WIPO provisions on Traditional Cultural Expressions include compliance with the 'free, prior and informed consent' principle and the recognition of customary laws and practices.'

Under the WIPO Provisions the prior consent of traditional owners would be required for before recording and making public traditional cultural expression.

There would also be moral rights for communities but these would be automatic and not voluntary, as the *Indigenous Communal Moral Rights Bill 2003* had proposed.

Pacific Model Law

The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.³¹

The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available on line and electronically transmit, traditional knowledge or expressions of culture.

The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture recognises the pivotal role of a cultural authority in administering prior informed consent rights.

The explanatory memorandum of the Pacific Model Law states:

The model law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for the use of the traditional knowledge or expressions of culture. These avenues are:

- *applying to a 'Cultural Authority' which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners; or*
- *dealing directly with the traditional owners.*

*In both cases, the prior and informed consent of the traditional owners is to be evidence by an 'authorised user agreement'. And in both cases, the Cultural Authority has a role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised authorised user agreements.'*³²

This model law would be a great reference point for those seeking the introduction of a National Indigenous Cultural Authority, and such a model may not need legislation but could be established to facilitate

negotiated agreements for use of Indigenous cultural and intellectual property, where both parties are willing to recognise ICIP rights, and where there are certain incentives for commercial interest groups to do so, for instance, where use of a branded trade mark or authentication label is given, as part of the licensed user rights.

Using this model as a guide, there are six Pacific countries which are considering introduction of traditional cultural expressions and traditional knowledge laws –Palau, Cook Islands, Papua New Guinea, Fiji, Kirabati and Vanuatu.

The Pacific Model Law aims to establish a new right for traditional knowledge and expressions of culture.

The Law will vest ownership of this new property in the appropriate traditional groups, clans, and communities.

The Model Law requires prior and informed consent for all non-customary uses of traditional knowledge and expressions of culture.

Conclusion: Towards a National Indigenous Cultural Authority

In summary, to advance the rights of Indigenous artists and creators and to allow them to share in the benefits from the appropriate use of the culture, Australia should establish a National Indigenous Cultural Authority.

A National Indigenous Cultural Authority would set a new framework which would enrich the artistic, social and economic lives of Indigenous creators.

The National Indigenous Cultural Authority Model should be flexible to allow Indigenous Australian communities to implement a practical strategy for protecting and managing their Indigenous cultural and intellectual property.

It is important for the right infrastructure to be in place to manage rights and to provide good sound policy for service delivery.

A National Indigenous Cultural Authority could have multi-functions relating to the promotion and protection of Indigenous arts and culture. It has a role to assist users make contact and identify relevant Indigenous owners.

For there to be effective and efficient management of ICIP rights, there needs to be infrastructure to assist rights holders.

The establishment of a National Indigenous Cultural Authority would promote Indigenous cultural and intellectual property and set standards for appropriate use including royalties, cultural integrity and attribution.

In creating this model an appropriate balance must be struck between recognising Indigenous communal rights but also acknowledging individuals and users' rights to creativity and freedom of expression.

Discussion questions

What should be the policy objectives of a National Indigenous Cultural Authority?

- to protect the rights of traditional owners in their ICIP
- to promote negotiated use of tradition-based creativity and innovation, including commercialisation
- to ensure that the use of ICIP (in terms of tradition-based creativity and innovation) takes place with the prior informed consent of the traditional owners
- to ensure the sharing of benefits derived from the use of ICIP with the traditional owners.

What cultural material should be covered by the NICA model?

- Arts and cultural expression
- Traditional knowledge including biodiversity knowledge

When should consent be necessary?

- For commercial use?
- For non-customary uses?

Who are the beneficiaries of protection?

- Should individual knowledge holders benefit?
- Those who participate in the project?
- Traditional custodians of knowledge?
- Communities and community organisations?

Who do you get consent from?

- What if more than one community has the same or similar traditional cultural expression?
- What if the clan or community is not contactable or identifiable?

What are the exceptions and limitations that the NICA Model should include regarding rights clearances?

- News and current affairs?
- Research focussed use?
- Education?

How long should ICIP be protected?

- For the term of copyright?
- For as long as the culture continues?
- In perpetuity?

What are the formalities for protection?

- Should registration be required?
- Can the system be voluntary or is legislation required?

How should rights be enforced?

- What legal remedies should be available?
- What processes can be used for dispute resolution?
- What is the role of customary law in managing disputes and unauthorised use?
- What is the relationship of ICIP rights with intellectual property protection?

Can an Indigenous ICIP trade mark and brand be adopted as a national system?

- Will a national trade mark be accepted by Indigenous people?
- How can the NICA effectively market the trade mark to consumers both nationally and internationally?
- Are there models like the Fair Trade logo that can assist?

Would a National Indigenous Cultural Authority assist Indigenous traditional owners of culture protect their ICIP rights by:

- Lobbying for rights and discouraging misappropriation?
- Setting standards for negotiated use?
- Assisting with the collecting of royalties and rights enforcement?

Would a National Indigenous Cultural Authority assist users of culture by:

- Assisting with identifying traditional owners for rights clearances and authenticity?
- Providing assistance with gaining consent and facilitating payments?
- Continued connections with relevant traditional owners?

How should international infringements be managed?

- Is there scope for other countries to develop similar structures?
- Should there be international laws?
- What is the role of international agencies like the WIPO and government agencies like IP Australia?

Scenarios

Dance performance

A contemporary Indigenous dance group performs a traditional dance taught to the dancers whilst a college.

None of the dancers are from the relevant Indigenous community.

They are paid fees for their performance, and a film company wants to record their performance and make DVDs for sale internationally.

- Should the contemporary Indigenous dance group get consent from the traditional owners?
- How should the Indigenous community be attributed?
- Are there any issues relating to how the dance might be filmed or edited for the DVD?
- Should they pay fees?

Visual arts

An Indigenous artist wants to reproduce an Indigenous cultural image in his work.

This image belongs to his clan collectively.

Does he need permission to paint the image?

How should he get the consent from his cultural custodians? How should he attribute the Indigenous community?

Should he pay royalties or fees to the custodians? If his work is mass produced on carpets, should he get consent of the custodians?

Writing traditional stories

Traditional stories are handed down orally, from generation to generation in Indigenous cultures. Oral stories are not covered by copyright until they have been recorded, either as film or sound, or written down.

This means that individual authors (or film makers) can take traditional stories without needing to get permission, and make them their own copyright material by expressing them in a material form.

Under Indigenous laws, groups and individuals are responsible for handing on stories, guarding them from inappropriate use, and keeping them alive.

However under copyright law, the custodians are denied the right to say how their stories are used unless they take copyright by writing the story down. And even then, copyright will belong to one person only, and will eventually expire, whereas the story will be passed on orally to subsequent generations.

Shouldn't the group, including future generations be given a right say how their stories are used? Should the custodians be paid royalties as copyright holders in original works are?

The National Indigenous Cultural Authority would address this issue by creating a register on which cultural expressions such as stories could be recorded and described, with the group or individuals responsible listed.

Anyone wishing to use the story would have to get permission through the Authority, which could then consult with the custodians, and ensure they receive benefits through a royalty scheme.

Archive & museum

Various archives and museums around Australia and the world contain a wealth of Indigenous cultural expressions and knowledge including film recordings, sound recordings, photographs, artifacts and even human remains. Many of these materials are of interest to Indigenous people and non-Indigenous people for various reasons, whether they want to use them for research, for repatriation, or because they are culturally responsible for them. But who can speak for the materials?

How does someone who wants to use them find the right person to speak to, even if they do want to do the right thing and seek consent?

Could a NICA assist Indigenous communities register their interests?

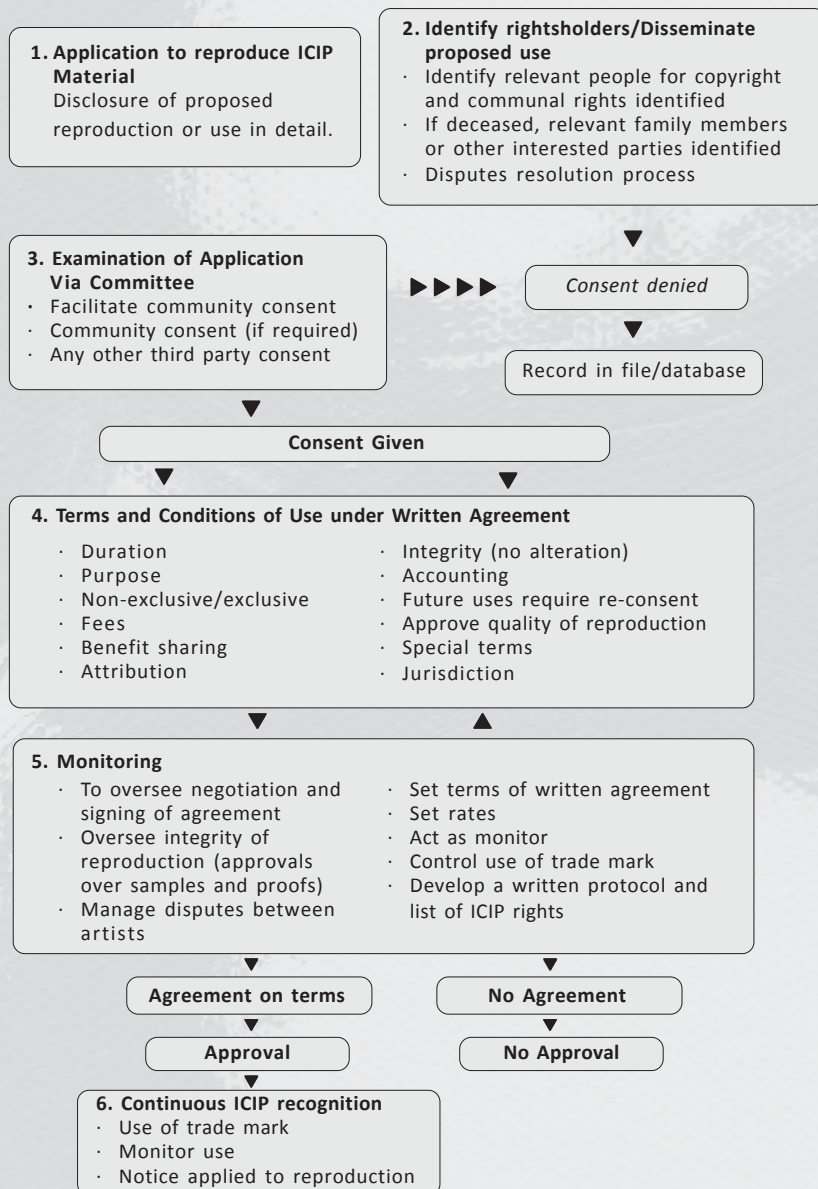
How can benefits be returned to the custodians of the cultural expressions and knowledge embodied in these materials?

There is also the problem that control of these materials is in the hands of the copyright owners and/or depositors, who are often non-Indigenous people who have collected or inherited them.

Lack of appropriate structures mean much of this material containing potentially invaluable cultural material remains locked away gathering dust.

A National Indigenous Cultural Authority would provide the space for dialogue to occur, which would address some of these issues by identifying custodians and providing a link between them and the users. While these materials may provide a means of revitalising culture, it is important that they are also repatriated to the right people.

NICA Model: Commercial Consent and Approvals Procedure



Commercial Consent and Approval Process

A National Indigenous Cultural Authority could establish processes for commercial consent and approval for users of ICIP and the traditional owners. The process should address identification of rights holders, consent, negotiation and approval issues including: -

(1) Information of Use disclosed

The applicant is required to provide details about itself and how the ICIP will be used: -

What type of material is being made use of?

What is the project or proposed use?

Have you spoken to relevant people with authority about your project?

Will you alter, add to the ICIP material?

What are the perceived benefits and risks of the project?

(2) Identify rights holders

The Committee identifies whether there are copyright owners, other clans or third parties that will need to be consulted. **Consider what methods are appropriate to disseminate information to clan –

- via officer, newspaper (notice in the *Koori Mail* or *National Indigenous Times*), notice to members of organisation, website notices.

(3) Consent or no consent

Clearance through Committee for wide dissemination – consultation process with arts representatives, community representatives.

(4) Terms and Conditions

Once approved, the user must enter into a written agreement with the community for use of the ICIP.

(5) Monitoring

The ICIP Committee continues the process of monitoring use of the approved ICIP material.

(6) Continuous ICIP Recognition


The trade mark is to be used with reproductions and approved uses of ICIP material. Notices also to be included.

Footnotes

- 1 *United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues*, 2007, viewed 5 May 2009, <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>.
- 2 T Janke, *Guarding ground: a vision for a National Indigenous Cultural Authority*, Terri Janke and Company, Sydney, 2008.
- 3 *Copyright Act 1968* (Cwlth) – for full text see www.comlaw.gov.au.
- 4 Dr Vivien Johnson, *Copyrites*, National Indigenous Arts Advocacy Association, Sydney, 1997, p. 11.
- 5 *Yumulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481 (F.C. Aus.).
- 6 *Milpurrurru & Others v Indofurn Pty Ltd & Others* 30 IPR 209
- 7 *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513.
- 8 The Arts Law Centre recommends that following traditional custodian notice in artworks with traditional knowledge: ‘The images in this artwork embody traditional ritual knowledge of the (name) community. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorized by the custodians is a serious breach of the customary law of the (name) community, and may also breach the *Copyright Act 1968* (Cwlth). For enquiries about permitted reproduction of these images contact (community name)’. Arts Law Centre of Australia, www.artslaw.com.au, viewed 21 August 2008.
- 9 Terri Janke, *Minding culture: case studies on intellectual property and traditional cultural expressions*, World Intellectual Property Organisation, Geneva, 2003, p. 106.
- 10 E. J. Brandl, *Australian Aboriginal Paintings in Western and Central Arnhem Land, Temporal Sequences and Elements of Style in Cadell and Deaf Adder Creek Art*, Aboriginal Studies Press, Canberra 1973.
- 11 *United Nations, Declaration on the Rights of Indigenous Peoples*, <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>, viewed 19 May 2009.

- 12 Terri Janke, *Our culture: Our future – Report on Australian Indigenous cultural and intellectual property rights*, Michael Frankel and Company, Sydney 1999.
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- 14 Terri Janke, *Our culture: Our future*, op.cit.; p. 237.
- 15 Commonwealth Government, Australian Summit, *Initial report*, Canberra, March 2008, p. 28.
- 16 Commonwealth Government, Australian Summit, *Initial report*, March 2008, p. 29.
- 17 Australia Council, *Aboriginal and Torres Strait Islander arts news*, Sydney, July 2008, emailed 7 July 2008.
- 18 *Ibid*, pp 43 - 47
- 19 Arts Law Centre of Australia, Artists in the Black Program information is available from www.artslaw.com.au, viewed 9 July 2008.
- 20 Doreen 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.
- 21 National Association for Visual Arts, www.visualarts.net.au, viewed 9 July 2008.
- 22 The Australian Institute of Aboriginal and Torres Strait Islander Studies is established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cwlth) and Tourism Australia is established under the *Tourism Australia Act 2004* (Cwlth).
- 23 Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics', *Indigenous Law Journal*, Volume 3, Fall 2004, pp. 139 – 179, p. 161.
- 24 United Nations University -IAS Report, *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis*, http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf, viewed 9 July 2008.

- 25 <http://www.uspto.gov/web/offices/com/speeches/01-37.htm>, viewed 21 August 2008.
- 26 Robynne Quiggin, *Protocols for producing Indigenous Australian music*, Australia Council for the Arts, Sydney, 2007, p. 14.
- 27 Terri Janke, *Our culture: our future*, op.cit., p.190.
- 28 I also note the recommendation of Toni Bauman, a participant to Australia 2020. Toni is working on the project, Indigenous Facilitation and Mediation Project, at the Australian Institute of Aboriginal and Torres Strait Islander Studies. Her one big idea for Australia 2020 was a recommendation for a National Indigenous Mediation Centre.
- 29 See the World Intellectual Property Organisation's website, www.wipo.int/globalissues: Our government is represented on that IGC, but there has been limited input from Indigenous Australian into the government's contribution, and little feedback to Indigenous communities.
- 30 See the World Intellectual Property Organisation's website, www.wipo.int/globalissues.
- 31 Secretariat of the Pacific Community, drafted by legal experts in July 2002, WIPO/UNESCO, Section 6 of the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community, Noumea, 2002.
- 32 Explanatory Memorandum for the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community with legal expert teams from WIPO and UNESCO, 2003.



In the past 20 years Indigenous Australians have called for greater recognition of Indigenous cultural and intellectual property rights.

The intellectual property system does not acknowledge Indigenous communal ownership of cultural expressions and knowledge passed down through the generations, and nurtured by Indigenous cultural practice.

Sacred knowledge is also at risk.

115 legislative and policy recommendations were made in Terri Janke's 1999 report - *Our Culture: Our Future* – report on Australian Indigenous cultural and Intellectual Property Rights.

Yet, the protection of Indigenous cultural and intellectual property rights remains largely unprotected in Australia, and a hotly debated international issue. Now is the time for us to reassess the current framework.

This Paper sketches out the ground gathered by Indigenous copyright cases and examines international model laws and draft provisions.

It argues for greater infrastructure to support and defend Indigenous cultural and intellectual property rights.

Terri Janke's vision is for a National Indigenous Cultural Authority to facilitate consent and payment of royalties; to develop standards of appropriate use to guard cultural integrity, and to enforce rights.