AN UNWORKABLE RECONCILIATION?

INDIGENOUS ARTISTIC WORKS AND THE *COPYRIGHT ACT 1968* (CTH)

by Tami Sokol

Indigenous artists have only in the last thirty years sought protection under Western copyright law for their artistic works, due to the growing exploitation of Indigenous creative expressions as marketable commodities. This intersection of customary practice and Western law has revealed a fundamental disconnect between their respective ways of owning, knowing and creating art, and how these creative works can best be protected. The incongruity between cultural norms presents a formidable task for policy makers to maintain the integrity of the copyright regime whilst taking into account considerations of Indigenous law and culture.

This paper considers the legal developments in Indigenous copyright protection for artistic works and proposes an administrative and constitutional way forward. The first proposal is centred around a registration scheme administered by a representative body responsible for the management of works. Secondly, a constitutional approach will be considered stemming from the proposed referendum of the Gillard government for Constitutional recognition of Indigenous peoples.

INTRODUCTION

Artworks and other creative expressions are essential to Indigenous notions of tradition and identity. It is through art, music, dance, language and ritual that Indigenous peoples maintain a connection to tens of thousands of years of history and culture.

Traditional Indigenous knowledge crosses over many Western legislative schemes and consequently, at times, falls between the gaps. For instance an artistic work, in addition to its aesthetic value, might also contain ecological knowledge or knowledge about land or sacred sites potentially cutting across copyright, patent, environmental, cultural heritage and native title law. Copyright on the other hand is a proprietary bundle of rights only for authors of distinct categories of subject matter.[1]

This right is limited substantively and temporally having developed within a specific historical circumstance primarily seeking to encourage creative efforts by providing financial incentives.[2] With this reality in mind there have been many high level reports commissioned and policy directions compiled on this topic.[3] Yet these recommendations have largely remained unimplemented. In addition to financial restraints and limited political will, this paper explores some reasons why these proposals have remained largely theoretical.

LIMITATIONS OF THE CURRENT SCHEME AND RECENT REFORM PROPOSALS

SCOPE OF PROTECTION

Copyright, as a bundle of rights conferred upon creators of artistic and cultural material, only subsists in literary, dramatic, musical, cinematic and artistic works which are: original, in material form, have an identifiable author and have a relevant nexus to Australia.[4]

There has been extensive academic discussion of the incompatibility of these requirements with Indigenous notions of artistic and cultural works.[5] Problematically, these criteria appear to exclude significant Indigenous cultural expressions, for example, body painting that is temporary, art works based on pre-existing clan designs which may not be deemed original, and ancient rock paintings with no identifiable artist.

Under the Act generally, the author of the work to which the copyright attaches is the person who first reduces it to material form. The duration of the copyright protection is also dependent on the author, with the standard copyright period set to expire 70 years after their death.[6] In Indigenous discourse however, cultural rights may not have a fixed duration. Where artworks draw on traditional knowledge, rights may continue into perpetuity, having originated in the Dreaming. Therefore a gap in protection can be identified in relation to sacred manifestations of Indigenous ritual and culture.

The Act specifies that it is the author, as the first copyright owner (unless there are employee/employer provisions or future copyright assignments), who has the exclusive right to reproduce the work in material form, publish the

work or communicate the work to the public.[7] This will be the artist in the case of an Indigenous artwork. However, Indigenous cultural expressions are often communally owned in that the knowledge drawn upon in creating the artwork may be 'intellectual commons' or it may be that producing the artwork is a responsibility as part of a traditional Aboriginal land obligation.[8] Similarly it is not uncommon for individual creators of works to receive concepts, styles and techniques which have been handed down for generations and which restrict the authors creativity in order to pass on the collective customary practices. In this way traditional cultural expressions are held for the benefit of the group as a whole.[9]

Finally, it remains problematic that there is only limited protection against the unauthorised disclosure; use or acquisition of sacred cultural expressions.[10] The 'fair dealing' provisions under Division 3 of the *Copyright Act 1968* (Cth) operate as exceptions to liability for copyright infringement. For example, s 41A outlines that fair dealing with an artwork for the purpose of parody or satire does not constitute an infringement. This exception and others similar may be inappropriate where the target of the parody holds religious or spiritual significance for Indigenous peoples or where even the act of reproducing is itself a violation of customary law because it took place without the authority of the community.[11]

Equitable principles have been considered as a useful legal tool under which the protection of sacred knowledge can be recognised, by the imposition of fiduciary duties and the law of breach of confidence.[12] However both these equitable mechanisms are problematic since any decision based in the law of equity is vulnerable to statutory override by Australian legislators. Similarly, the different relationships that exist within each clan group may lead to unpredictable application of these principles to the detriment of Indigenous artists.

REVIEW AND REFORM

Suggestions for reform of the *Copyright Act 1968* (Cth) have included amendments to oblige a Court to take cultural harm into account in assessing damages, as was the case in *Milpurrurru*.[13] Similarly, incorporating consent provisions has been suggested to acknowledge traditional ownership rights, for example, the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Traditional Cultural Expressions and Traditional Knowledge draft provisions recommend the right to 'free, prior and informed consent' for the relevant community to protect works of particular cultural or spiritual value.[14] Partly in response to the issue of communal ownership raised above, the government released to interested parties an exposure draft of a *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*. Although this Bill was never introduced into parliament, there is extensive criticism of its complexity and unworkability, especially for those living in remote communities.[15] Unlike the automatic nature of moral rights for individual authors and creators, the draft Bill proposes formal requirements that must be met before a community can claim Indigenous communal moral rights. Criticisms have centred on the complex documentation required to prove an artist's connection to a community, the retention of the problematic copyright subsistence requirements, the onus on the Indigenous communities to negotiate with external parties who may have an interest in the work and the requirement for a written notice of consent to the moral rights.[16] Criticisms also recognise the difficulties of language access, legal translation and legal mediation.[17]

It has been argued that respecting customary rights of Indigenous artists should be a social and ethical rather than a legal matter.[18] As a result of this discussion, a voluntary commercial code of conduct was endorsed by the Australian Cultural Ministers Council and released on 9 October 2009. The Code encourages good commercial practice for the sale of Indigenous visual arts by setting minimum standards for conduct by dealers and the setting of certain rights and responsibilities in relation to the sale and management of Indigenous artworks.[19]

A Resale Royalty Scheme was also introduced on 9 June 2010, for the benefit of both non-Indigenous and Indigenous artists, to provide a public royalty for artworks acquired by the seller after that date.[20] Although these schemes have been welcomed as a progressive step toward protecting Indigenous artistic rights, they have also been subject to criticism, eg the Code is only voluntary. Since the operation of the Code and the royalty scheme are still in their infancy, their effectiveness at changing industry behaviour cannot yet be measured. In this paper, it is submitted that for more meaningful protection, it would be beneficial if supporting legislative schemes accompanied these initial governmental responses, such as the registration proposal outlined below.

A DIFFERENT APPROACH

Legislative attempts to address this clash have oscillated between approaches of sameness and difference. Some commentators argue that Indigenous artwork should be treated differently from Western creative works to acknowledge that artworks often hold sacred and spiritual significance in addition to their aesthetic value. Others

argue that to treat Indigenous artworks differently and afford special rules for their protection would only reinforce stereotypes, create confusion and undermine the integrity of the copyright regime.[21]

ADMINISTRATIVE APPROACH

Many commentators[22] have converged on the idea of sui generis legislation outside the bounds of the *Copyright Act* as the primary mechanism to ensure meaningful and lasting protection for Indigenous artists.[23] However, many practical questions remain as to the status of any rights, how rights should be managed and what exceptions should be afforded.

This paper advocates for a proposal which addresses the issue of the management of works and alternative dispute resolution, with the establishment of a registration system administered by an Indigenous Cultural Council.[24] The council would comprise of Indigenous members with the dual purpose of monitoring the use of Indigenous works, for example monitoring use of culturally sensitive material, and representing Indigenous copyright interests at a governmental level.

REGISTRATION SYSTEM

Unlike trademarks and patents, there is currently no registration system for copyright material. Given the difficulties of proving copyright subsistence for many Indigenous artworks, a registration system could allow subsistence criteria to be more flexible around Indigenous needs. Registration would not confer rights but would allow for a centralised database to be formed, to identify who owns a particular cultural expression and record its subsequent use. This register could also allow for an indefinite length of protection to be administered due to its independent management.

The register would not evidence title, but would provide a central contact point for potential users to contact the relevant community to get prior informed consent and for collecting and distributing royalty payments. Additionally, registration would allow artists to be aware of their rights before a dispute arises through Indigenous involvement in the administration of the scheme and the public nature of the register's management.

The register could also allow for two categories of works to be catalogued: a publicly available register and a catalogue of undisclosed or confidential material monitored by the Indigenous Cultural Council but managed with more care and sensitivity.

The register could be established at first to manage artistic works but if successful, could be expanded to other copyright works, subject matter other than works and traditional knowledge more generally.

To assist with raising awareness of the registration system, an outreach campaign could be conducted in consultation with legal and advocacy groups as well as representatives from smaller Indigenous rural communities. This awareness campaign would require face to face community consultations in both urban and rural settings in addition to the distribution of easy to understand informative material.

The practical risks of a centralised register echo concerns about codifying customary law more generally, given the variety of Indigenous customs and practice across Australia. Accordingly further discussion must be entered into regarding the legal structure of the Indigenous Cultural Council administering the register.[25]

INDIGENOUS CULTURAL COUNCIL

The organisation of the registration system would be akin to the cultural heritage protection model in Victoria and Queensland. Central to the administration and overview of the scheme would be an Indigenous Cultural Council, composed of a number of Indigenous representatives. This approach would ensure Aboriginal people are recognised as the primary guardians and keepers of their traditional knowledge. The selection of a representative council would be a difficult task, as it would be unfeasible to create a committee which is representative of every Indigenous clan. At a minimum however, council members would need to include residents from all Australian states and territories with traditional or family links in that state or territory. They must have relevant knowledge or experience in the management of Indigenous artworks or Indigenous knowledge more generally. Janke suggests that strong national membership open to Indigenous cultural practitioners should have voting rights to elect a representative board.[26] This Council could assess prospective works for inclusion on the register according to a broader, more culturally appropriate, but similar set of subsistence criteria to that of the *Copyright Act 1968* (Cth). The Council could provide information to both users and owners on appropriate contracting practices and appropriate uses of Indigenous copyright material.[27] This function has been explored further in Terri Janke's *Beyond Guarding Ground.*[28]

The Council could also provide advice to the Federal Minister for Aboriginal Affairs and the Federal Attorney

General, both voluntarily and on request, on matters such as the protection and management of culturally sensitive information or on the application of the moral rights regime to Indigenous artists. As a result, the Council could identify issues requiring advocacy in government and business and seek their rectification.

Constitutional Approach

As part of the lead-up to the August 2010 Australian federal election there was significant bi-partisan discussion of a referendum to amend the Constitution to include formal recognition of Indigenous Australians. Although the form of any potential amendment remains unclear at this stage, it has the potential to affect the interpretation of any future Indigenous copyright matter before the Courts.

As a model for comparison, Aboriginal rights of the Aboriginal peoples of Canada received constitutional protection in 1982 under s 35(1) of *Constitution Act 1982* which reads 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.' It has been argued that this constitutional provision may provide a unique solution to the question of Indigenous intellectual property rights in this country. In the 1990 decision of *Sparrow,*[29] the Supreme Court of Canada stated that the protection of Aboriginal rights extended to those practices which were 'an integral part of their distinctive culture.'[30] In coming to this conclusion the Court outlined a four step framework for analysing claims under s35(1):

1. The claimant group must demonstrate it has an aboriginal right e.g. copyright. In the subsequent decisions of *R v Van der Peet*[31] and *Delgamuukw*[32] the Court defined an aboriginal right to include a spectrum of rights ranging from culturally integral activities to land title.[33]
2. If this is shown, the Court then inquires whether the right was extinguished prior to 1982;
3. If not, infringement by the state is considered;
4. If so, the final issue is whether state interference was justified.

There is no Canadian case law to date that has considered Aboriginal customary intellectual property rights according to this analysis. The Indigenous copyright protection argument may well be left open in both jurisdictions if Constitutional recognition is adopted in Australia.

In light of the Canadian experience, it appears that the utility of the constitutional approach may only be in the interpretation of legislation, which should be in a way that is not inconsistent with the protection of customary intellectual property rights. However these rights are yet to be defined, given there is insufficient protection for Indigenous artists. Obviously, the level of protection offered by a constitutional amendment would turn on the exact wording and substance of any such change. But given the ease with which legislation can be overridden, it would provide a way of 'anchoring rights' to ensure sustained protection.[34]

For broader application, recognition of Indigenous Australians as part of a preamble might allow for the interpretations of all laws to be consistent with the protection of Indigenous copyright. In the US, the Supreme Court has often referred to a preamble as evidence of the origin, scope, and purpose of the Constitution rather than acting as a source of power for any department of the Federal Government.[35] In Australia, a preamble recognising Indigenous Australians may operate in a similar way to international law in judicial decision making. This inclusion would therefore act as a tool of interpretation rather than as binding law.[36]

CONCLUSION

More than a decade after the *Our Culture, Our Future Report*[37] was published, adequate copyright protection for Indigenous artists is still lacking. Research and policy recommendations in this field have been numerous yet these recommendations have remained largely unimplemented.

The implementation of a registration system would take the crucial step to widen the scope of protection, return cultural knowledge and property to the hands of Indigenous peoples, monitor Indigenous intellectual property rights and prevent infringement. In order to facilitate this process, an Indigenous Cultural Council would be a vital tool to increase Indigenous participation in the protection process and provide a direct link to legislators and policy makers.

Finally, the constitutional recognition of Indigenous peoples may provide the potential for further incorporation of customary principles and cultural sensitivity into a sui generis rights framework that will have an impact on the application of copyright law.

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1 Colin Golvan, *Copyright Law and Practice*, (Federation Press, 2007) 7.

2 Ibid, 2-3.

3 Peter Banki, 'Report of the Working Party on the Protection of Aboriginal Folklore', (Final Report, Australian Copyright Council, 1983)*;* Terri Janke, *Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* (Michael Frankel and Company, 1999); Department of the Attorney-General, *Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, (Issues Paper, Department of the Attorney-General, 1994).

4 *Copyright Act 1968* (Cth) s32.

5 Western Australia Law Reform Commission, *Indigenous Cultural and Intellectual Property and Customary law*, Background Paper (2005) 458.

6 *Copyright Act 1968* (Cth) s94.

7 *Copyright Act 1968* (Cth), s31(1)(b).

8 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193, 518-520.

9 Silke von Lewinski, 'The Protection of Folklore' (2003) 11 *Cardozo Journal of International and Comparative Law* 747, 757.

10 *Revised Draft Provisions for the Protection of Traditional Cultural Expressions: Policy Objective and Core Principles*, WIPO, (2009), <http://www.wipo.int/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet-tce.pdf>, 22.

11 Patricia Loughlan, 'The Ravages of Public Use: Aboriginal Art and Moral Rights', (2002) 7 *Media and Arts Law Review* 17, 23.

12 *Coco v A.N. Clark (Engineers) Ltd* (1969) RPC 41.

13 *Milpurrurru & Others v Indofurn Pty Ltd* (1994) 30 IPR 209.

14 WIPO, above n 10, 21.

15 For more extensive discussion on the inadequacies of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* see Jane Anderson, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law', (2004a) *Indigenous Law Bulletin*, 5(30); Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004b), 27(3) *UNSW Law Journal*, 585; Colin Golvan, 'Protection of Australian Indigenous Copyright: Overview and Future Strategies' (2006) 65 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 10.

16 Jane Anderson, above n 15, (2004b), 3.

17 Jane Anderson, above n 15, (2004b), 598.

18 L J Wood, 'Copyright Law and Postmodern Artistic Practice: Paradox and Difference', (1996) 1(2) *Media and Arts Law Review* 72, 84.

19 *Cultural Ministers Support Strengthening Fair and Ethical Trade in Indigenous Art,* Cultural Ministers Council, (2009) < http://www.cmc.gov.au/__data/assets/pdf_file/0020/90254/indigenous_art_code_media-release.pdf>.

20 *Resale Royalty Right for Visual Artists Act 2009* (Cth).

21 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) 16.

22 Erin Mackay, 'Indigenous Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach' (2009) 31 *UNSW Law Journal* 1, 3; WIPO, above n 10; Terri Janke above n 3.

23 Arguments against the introduction of sui generis legislation focus on concerns about inappropriately codifying Indigenous custom and treating Indigenous peoples as if they all practice the same customary laws. See Kathy Bowry, 'Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practice' (2006) 6 *Macquarie Law Journal* 65.

24 The development of this proposal builds upon the foundations set out in Terri Janke above n 3, 18.9; Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009) 22.

25 This issue is briefly canvassed in Terri Janke, above n 24 (2009).

26 Ibid.

27 Colin Golvan, above n 15, 16.

28 Terri Janke, above n 24 (2009), 25.

29 *R v Sparrow [1990]* 1 SCR 1075, 68.

30 See *Delgamuukw v British Columbia [1997] 3 SCR 1010*, 572 (Wallace JA)

31 *R v Van der Peet [1996]* 2 SCR 507, paras 1-2.

32 *Delgamuukw v British Columbia [1997] 3 SCR 1010.*

33 David Robbins, *Aboriginal Custom, Copyright and the Canadian Constitution*, (1999), Union of British Columbia Indian Chiefs, <https://www.ubcic.bc.ca/files/PDF/Robbins.pdf>.

34 Erin Mackay, 'Regulating Rights: The Case of Indigenous Traditional Knowledge' (2010) 7(21) *International Law Bulletin* 14.

35 *Jacobson v. Massachusetts,*(1905) 197 US 11, 25 S.Ct. 358.

36 A preamble would complement the current international law position as set out in *UN Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2007), art 31.

37 Terri Janke, above n 3.

Scallop Shells 2011
Mick Quilliam

Acrylic on canvas
610mm x 305mm