Indigenous Arts, Knowledge and the Law

The 38th Annual Course of the International Association of Law Libraries
Terri Janke
28 October, 2019
About Terri Janke and Company

Your Knowledge: Your Future
1. Indigenous Cultural & Intellectual Property (ICIP)
What is Indigenous Cultural and Intellectual Property?

- **Place**: Communal
  - Literary, performing & artistic works
  - Languages
  - Ancestral remains
  - Immovable cultural property

- **Commutual**: Documentation of Indigenous Heritage
  - Indigenous Heritage & Intellectual Property
  - Traditional scientific & ecological knowledge

- **Culture**: Living culture
  - Linked to people, land and identity
  - Constantly evolving
  - Roles and responsibilities to look after the knowledge and pass it on
  - Consultation and consent processes according to customary laws
  - Linked to cosmology
  - Handed on through the generation

*Types of ICIP © Terri Janke and Company*
2. ICIP, International Law & Principles
UN Declaration on the Rights of Indigenous Peoples

Indigenous peoples have the right to self-determination over their ICIP:

- 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.
UN Convention on Biological Diversity

• Subject to national legislation, parties should as far possible and appropriate:
  • respect, preserve and maintain knowledge, innovations and practices…relevant for the conservation and sustainable use of biological diversity
  • promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices
  • encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices
    (article 8(J))
UN Convention on Biological Diversity

- Equitable sharing of benefits shall be upon *mutually agreed terms* (article 15(7))

- Access to genetic resources shall be subject to *prior informed consent* of the Contracting Party (article 15(5))
Nagoya Protocol

Each Party shall take measures, as appropriate, with the aim of ensuring that:

1. the prior informed consent or approval;
2. and involvement of indigenous and local communities,

is obtained for access to genetic resources

(article 6)
World Intellectual Property Organisation

Inter-Government Committee on Intellectual Property and Genetic Resources, Traditional Cultural Expressions and Traditional Knowledge have drafted provisions.
ICIP Rights

• To require prior informed consent
• To be recognised as the primary guardians and interpreters
• To authorise or refuse use
• To benefit commercially from authorised use
• To prevent derogatory use
• To maintain secrecy
• For the full list of rights see: Our Culture: Our Future Report, page 47 - 48
3. Intellectual Property (refresher)
Intellectual Property

Copyright
Designs
Confidential Information
Trade marks
Patents
Plant Breeders Rights

Intellectual property protects products of the mind
<table>
<thead>
<tr>
<th>Intellectual Property</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Copyright</strong></td>
<td><strong>Copyright Act 1968</strong></td>
</tr>
<tr>
<td></td>
<td>• Protects artistic, literary, musical and dramatic works; films and sound recordings in material form</td>
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<tr>
<td></td>
<td>• No need for registration</td>
</tr>
<tr>
<td><strong>Designs</strong></td>
<td><strong>Designs Act 2003</strong></td>
</tr>
<tr>
<td></td>
<td>• Protects visual appearance or design of a manufactured article if new or original</td>
</tr>
<tr>
<td></td>
<td>• Designs need to be registered</td>
</tr>
<tr>
<td><strong>Trade marks</strong></td>
<td><strong>Trade Marks Act 1995</strong></td>
</tr>
<tr>
<td></td>
<td>• Protects distinctive markers used by traders (e.g. a letter, word, phrase, sound, smell, logo etc.)</td>
</tr>
<tr>
<td></td>
<td>• Registration can be renewed as long as the mark is used continuously</td>
</tr>
<tr>
<td><strong>Patents</strong></td>
<td><strong>Patents Act 1990</strong></td>
</tr>
<tr>
<td></td>
<td>• Grants monopoly rights to inventors (must be a manner of manufacture; new; not obvious, and useful).</td>
</tr>
<tr>
<td><strong>Plant Breeder’s Rights</strong></td>
<td><strong>Plant Breeder's Rights Act 1994</strong></td>
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<tr>
<td></td>
<td>• Holders of plant breeder's rights have exclusive rights:</td>
</tr>
<tr>
<td></td>
<td>▪ over the production, sale and distribution of a new plant variety</td>
</tr>
<tr>
<td></td>
<td>▪ to market a new plant variety or its reproductive material</td>
</tr>
<tr>
<td><strong>Confidential Information</strong></td>
<td><strong>Common Law</strong></td>
</tr>
<tr>
<td></td>
<td>• Information that is not known by the public and which is given to another person in “circumstances of confidence”</td>
</tr>
<tr>
<td></td>
<td>• Protected by the action for breach of confidence</td>
</tr>
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</table>
Copyright

- Copyright Act 1968 (Cth)
- Copyright protects two separate classes of creations:
  - “Works”
  - “Subject Matter Other Than Works”
- Economic rights
  - exclusive right to control the reproduction of their work and other subject matter
- Moral rights
  1. Right of attribution
  2. Right not to have authorship falsely attributed
  3. Right of integrity
Copyright

copyright can’t protect:

- Single words
- Titles
- Headlines
- Oral stories
- Oral songs
- Oral histories
- Ideas
- Styles
- Techniques
## Differences Between Copyright and ICIP

<table>
<thead>
<tr>
<th>Copyright</th>
<th>ICIP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Material Expression</td>
<td>Material &amp; Immaterial</td>
</tr>
<tr>
<td>Individual Ownership</td>
<td>Communal Ownership</td>
</tr>
<tr>
<td>Protected Under Law</td>
<td>Recognised; not Enforceable</td>
</tr>
<tr>
<td>Economic &amp; Moral Rights</td>
<td>Cultural Rights</td>
</tr>
<tr>
<td>Assignable Rights</td>
<td>Handed Down/Cultural Practice</td>
</tr>
<tr>
<td>Limited Duration</td>
<td>Rights Continue</td>
</tr>
</tbody>
</table>
4. IP & ICIP: Challenges
Scope of the Problem

- Misappropriation of Indigenous Cultural and Intellectual Property – Indigenous Knowledge and Indigenous Cultural Expression
- Occurs without consent and without benefit sharing
- This misappropriation demeans cultural practices and distorts meanings (HARM)
- Sacred and secret knowledge disrespected
- Unfair copycats and unjust enrichment, no benefit sharing (ECONOMIC)
Scope of Problem: Application of Law

- The misappropriation of Indigenous Knowledge and Cultural Expression is not adequately protected by IP laws
- IP laws protect western knowledge systems based on individual property and material form culture
- This has led to misappropriation and Indigenous disempowerment and inequity
- A history of mistrust which stops collaborations of both western and Indigenous knowledge systems
## Key developments for ICIP

### Australia

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>Wandjuk Marika calls for copyright protection of Aboriginal Art</td>
</tr>
<tr>
<td>1975</td>
<td>$1 note &amp; David Malangi</td>
</tr>
<tr>
<td>1991</td>
<td><em>Reserve Bank v Yumbulul</em> ($10 note case)</td>
</tr>
<tr>
<td>1992</td>
<td>Establishment of National Indigenous Arts Advocacy Association</td>
</tr>
<tr>
<td>1996</td>
<td>Cth Government Issues Paper, <em>Stopping the Ripoffs</em></td>
</tr>
<tr>
<td>1996</td>
<td><em>Milpurrurru v Indofurn</em>, the Carpets Case</td>
</tr>
<tr>
<td>1998</td>
<td><em>Bulun v R &amp; T Textiles</em></td>
</tr>
<tr>
<td>1999</td>
<td>NIAAA Label of Authenticity (discontinued 2003)</td>
</tr>
<tr>
<td>2004</td>
<td>Arts Law Centre – Artists in the Black est.</td>
</tr>
<tr>
<td>2007</td>
<td>Indigenous Art: Securing the Future Australia’s Indigenous visual arts and craft sector (Report)</td>
</tr>
<tr>
<td>2009</td>
<td><em>Resale Royalty Rights for Artists Act</em> (Cth)</td>
</tr>
<tr>
<td>2016</td>
<td>Launch of the ‘Fake Art Harms Culture’ campaign</td>
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<tr>
<td>2016</td>
<td><em>Aboriginal Heritage Act</em> (Vic)</td>
</tr>
<tr>
<td>2017</td>
<td>Return of Albert Namatjira copyright to family</td>
</tr>
<tr>
<td>2018</td>
<td>House of Representatives Fake Arts Inquiry</td>
</tr>
<tr>
<td>2018</td>
<td>IP Australia Indigenous Knowledge discussion paper</td>
</tr>
<tr>
<td>2019</td>
<td>ACCC v Burubi</td>
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# Key developments for ICIP

## International

<table>
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<tr>
<th>Year</th>
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<tbody>
<tr>
<td>1976</td>
<td>Tunis Model Law</td>
</tr>
<tr>
<td>1985</td>
<td>UNESCO WIPO Model Provisions for National Laws on the Protection of Folklore</td>
</tr>
<tr>
<td>1986</td>
<td>ILO Convention 169</td>
</tr>
<tr>
<td>1992</td>
<td>Convention on Biological Diversity</td>
</tr>
<tr>
<td>1994</td>
<td>GATT and TRIP Uruguay Round</td>
</tr>
<tr>
<td>1994</td>
<td><em>Study on Indigenous Cultural and Intellectual Property</em> (UN Report)</td>
</tr>
<tr>
<td>1996</td>
<td>Word Forum on Folklore Thailand</td>
</tr>
<tr>
<td>2000</td>
<td>WIPO IGC established</td>
</tr>
<tr>
<td>2001</td>
<td>Indigenous TK database</td>
</tr>
<tr>
<td>2002</td>
<td>Pacific Model Law</td>
</tr>
<tr>
<td>2008</td>
<td>UN Declaration on the Rights of Indigenous People</td>
</tr>
<tr>
<td>2010</td>
<td>Nagoya Protocol on Access and Benefit Sharing</td>
</tr>
<tr>
<td>2011</td>
<td>WAI 262 (NZ)</td>
</tr>
<tr>
<td><strong>Current</strong></td>
<td>Draft Articles “Traditional Knowledge” and traditional cultural expressions</td>
</tr>
</tbody>
</table>
Copyright Challenges

Copyright protects:
• books, art, film, written text, music, dance, software, compilations of data

Western legal system challenges:
• databases,
• machine-created works,
• new technologies,
• languages, stories,
• Indigenous Cultural & Intellectual Property (ICIP) (cultural knowledge)
© challenges: cultural expressions
Bogus boomerangs
© challenges: cultural expressions

Ancient rock art

Marketing from website:
“inspiration from the magnificent species and various cultures with which we share our planet”
© challenges: *cultural expressions*

*Bibi Barba and Hotel Eclipse*

*Desert Flowers, Bibi Barba (2009)*
© challenges: cultural expressions

Bibi Barba and Hotel Eclipse

Inspiration or copying?
© challenges: communal ownership
*Milpurrurruru v Indofurn* (the ‘Carpets Case’)

*Djanda at the Sacred Waterhole*
Banduk Marika (1984)

Carpet produced by Indofurn Ltd
© challenges: communal ownership

Bulun v R & T Textiles

What are the clan’s rights to copyright in a work that uses traditional knowledge?
Case Study: ACCC v Birubi Art Pty Ltd

- Birubi sold fake Aboriginal souvenir products in Australia.
- The Court found that customers would be likely to be misled by the design on the products in conjunction with labels claiming the products were made in Australia.
- Birubi fined $2.3m for making false and misleading representations in breach of the Australian Consumer Law (ACL).
- Birubi is now in voluntary liquidation.
- Around 80 per cent of Aboriginal souvenir products sold are “fake art”.

Trade mark challenges: Indigenous words

- No Australian law to stop non-Indigenous people from using and trademarking Indigenous words, or using Indigenous language commercially
  - Such as a business name, product name, brand or room names
  - Or use of Indigenous languages in songs, books, etc

- Lack of requirement to consult with and obtain the consent of Indigenous people for the use of Indigenous people in business – takes away Indigenous communities’ control over languages
Indigenous Arts, Knowledge and the Law

Case Study: *Bush Medijina Trade Mark*

Bush Medijina®
Patent challenges: *Indigenous knowledges*

- Once information is published it’s not novel – not patentable
- Indigenous people are often prevented from patenting their traditional remedies as this knowledge is often published already, and part of the prior art base
- Large companies often do significant research and development to get around this requirement – resources that Indigenous people may not have
- Indigenous people have historically been seen as informants and subjects, rather than collaborators or co-inventors
Case Study: *Gumby Gumby*

- Ghungalu people in Central Queensland have used leaves of the *Gumby Gumby* plant for traditional medicinal purposes.
- In 2008 an Austrian couple patented the process for the production of *Pittosporum phillyraeoides*, commonly extracted from Gumby Gumby leaves.
- In 2016, they also registered a composite mark including the words ‘Gumby Gumby’ and have since tried to register the words ‘Gumby Gumby’.
- **No permission or consultation for use.**
- QLD Indigenous business, The Golden Gumby Gumby Company, was sent cease & desist.
Case Study: *Patent Co-Sharing*

Griffith University, John Watson & The Jarlmadangah Community

University of South Australia & The Chuulangun Aboriginal Corporation

University of Queensland & The Indjalandji-Dhidhanu People

Spinifex Project
5. Protocols
What are protocols?

- Protocols are appropriate ways of using Indigenous cultural material and interacting with Indigenous people and their communities.
- Flexible approach.
- Reflect Indigenous customary laws.
- Recognise Free Prior Informed Consent.
- Promote interaction based on good faith and mutual respect.
- Protocols can be binding if included as a terms in contracts.
Self-determination & Indigenous Governance

Successful ICIP frameworks incorporate IP law and protocols

- Make protocols the accepted national standard
- Use contracts for licensing rights to ensure terms are understood
- Use IP law to vest ownership in Indigenous people
- Roles and responsibilities covered in protocols that can be specific
- A Model for Indigenous people to govern the cultural interface
Indigenous Arts, Knowledge and the Law

TRUE TRACKS

1. RESPECT
2. SELF DETERMINATION
3. CONSENT & CONSULTATION
4. INTERPRETATION
5. CULTURAL INTEGRITY
6. SECRECY & PRIVACY
7. ATTRIBUTION
8. BENEFIT SHARING
9. MAINTAINING INDIGENOUS CULTURE
10. RECOGNITION & PROTECTION
Industry Protocols: *Australia Council Protocols*

- Five artform guides – music, performing arts, visual arts, new media and writing.
- Set up a framework of respect for traditional cultural expression, as well as advise about copyright law.
- The music protocols advise to seek permission from the relevant community owners of the music before performing or recording.
Indigenous use of True Tracks protocols
Institutional use of True Tracks protocols
Indigenous Arts, Knowledge and the Law

TRUE TRACKS

1. RESPECT
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Conclusion

• ICIP includes Traditional Knowledge and Cultural Expressions.

• True Tracks® ICIP framework is a proven track record for dealing with ICIP.

• This framework can be used and adapted in various industries including tech, tourism and business.

• This approach can assist Indigenous people assert their ICIP rights with the necessary supporting infrastructure and governance.

• The True Tracks ® ICIP framework can inform new law.
Thank you

- **Website:** [www.terrijanke.com.au](http://www.terrijanke.com.au)
- **Email:** [terri@terrijanke.com.au](mailto:terri@terrijanke.com.au)
- **Facebook:** Terri Janke and Company
- **Twitter:** @TerriJanke
- **Linked in:** Terri Janke