INTELLECTUAL PROPERTY AND INDIGENOUS CULTURE

Ben Goldsmith and Brad Sherman[*]

This special issue of the *Griffith Law Review* focuses on Intellectual Property and Indigenous Culture. The first article in this issue, Christine Morris's 'A Full Law', introduces an idea which informs, to varying degrees, most of the other contributions collected here. Morris argues that conflict or friction between Indigenous and non-Indigenous Australians in a range of areas could be assuaged by a greater accommodation between the principles of Indigenous law and those of the common law system. Indigenous laws are organised around the principles of reciprocal obligation, respect and custodianship. The role, rights and responsibilities of the individual are understood as being subordinate to, considerate of and conditional upon the well-being of the Land and of every aspect of life on Earth. Morris argues that Indigenous law is a 'full law' because it is guided by and responsive to 'the spiritual realm'. In Morris's formulation, the common law system is, by contrast, only a 'half law' because it is only concerned with 'the seen reality'. But the common law collides with Indigenous law, Indigenous people and 'unseen reality' daily in Australia. The articles that follow illustrate many such entanglements in the production and reproduction, use and exchange of Indigenous art, intellectual and cultural property.

Historically, non-Indigenous systems and institutions of knowledge management, regulation, governance, ethics of conduct or practice in law and commerce have been inadequately and often inconsiderately engaged with Indigenous laws and practices. Consequently, they often deal imperfectly with the most important issue for Australians today: how do we live together in this place? To understand and come to terms with ourselves in this place — Australia — non-Indigenous people need to acknowledge that there is much to be gained from the coexistence of Indigenous and non-Indigenous systems of law. In Morris's terms, to become a 'full law', the common law system must welcome and respect Indigenous traditions, beliefs, culture and law on its terms. Respectful coexistence is possible with the appropriate protocols in place for the negotiation of the relationship between Indigenous and non-Indigenous law.[1]

Morris's point is that Indigenous intellectual and cultural property is knowledge, and Indigenous law is a system of knowledge management — primarily about how to care for the Land, and be guided by its spirits and

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1 See 'You'll Find Out When You Make That Call: Video Protocols in the Torres Strait'. This project was completed with the support of the ARC Collaborative Grant, 'Legal and Cultural Protocols for the Development of Indigenous Arts and Cultural Industries in Queensland'.

stories — as well as an ethical framework or set of moral principles which guide social behaviour. This system of knowledge management is flexible enough to accommodate and make use of new developments such as those in information and communications technologies, as the following article, by Christine Morris and Michael Meadows, describes. This article is based on a report prepared as part of a collaborative project with the National Indigenous Media Association of Australia (NIMAA) and the Aboriginal and Torres Strait Islander Commission (ATSIC). The project examined the ways in which Indigenous systems of regulating and managing traditional knowledge and cultural property can resolve, or mediate, disputes over intellectual and cultural property. Morris and Meadows report on the ways in which traditional structures of governance can enable and inform the use of new technologies. Using the example of the Cape York Digital Network, Morris and Meadows show how networks can be designed to fulfil particular functions and meet the specific, self-defined needs of different communities. In part, this is a critique of the Broadcasting for Remote Aboriginal Communities Scheme (BRACS), which delivered the same technology package to Indigenous communities. The one-to-many form of broadcasting was, however, not always compatible with Indigenous traditions of knowledge transmission, exchange or management. Digital networks may now be.

The question of whether legislative or judicial recognition of Indigenous laws can be usefully extrapolated beyond the context of native title and land rights is explored in the third article in this issue. Stephen Gray considers the extent to which principles of Indigenous laws elaborated in the context of native title could inform legal understanding of Indigenous rights in art. Through a careful reading of the High Court's decision of *Mabo and Others v. Queensland (No 2) 1992*, and subsequent case law, Gray details the contexts in which Indigenous customary laws have been recognised as having survived the introduction of the common law. Gray extends the analysis of the various judgments on native title in the report prepared by Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* for the Australian Institute of Aboriginal and Torres Strait Islander Studies and ATSIC, where it is argued that the scope of native title could be understood as extending beyond rights and interests relating directly to land.[2] Gray argues that the *Mabo* decision acknowledged that traditional common law understandings of property do not account for the specific 'nature and incidents' of native title, and that subsequent cases have recognised that Indigenous intellectual property laws and laws relating to art are *sui generis* and 'cannot be equated exactly with land law, copyright law or indeed any single other branch of Anglo-Australian law'. Gray argues that there is insufficient evidence that there has been a 'clear and plain intention' in executive practice to extinguish Indigenous laws of intellectual property. But he acknowledges that Indigenous communities that have lost their traditional connection to land may also lose rights in art under traditional law unless they

2 T Janke (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Co, pp. 168–69.

'continue to uphold traditional laws relating to the use of works of art by reference to a continuing spiritual, although now legally extinct, connection with the land'. With this in mind, Gray argues that it may be preferable for some Indigenous people to argue that traditional rights in art are separate from native title rights in land rather than as a 'nature and incident' of such title. Gray concludes by highlighting some of the problems that may arise when Indigenous intellectual property laws are infringed, and suggests that the Native Title Tribunal would be an appropriate venue for dispute resolution.

In the fourth article in this issue, Leanne Wiseman examines the development of one mechanism that has been developed to try to circumvent legal process and resolve questions over the ways in which Indigenous arts and cultural property are used, exchanged and commercially exploited. Wiseman charts the adoption and implementation of the Labels of Authenticity introduced to protect against unauthorised use and reproduction of Indigenous art and cultural property. The Labels — swingtags attached to work to indicate either that it has been produced by a person or persons who are recognised as Indigenous, or that it has been produced by recognised Indigenous people under fair arrangements with non-Indigenous people or firms — were registered as certification marks, designed to distinguish 'authentic' Indigenous artistic goods and services from other products. The agency overseeing the introduction of the labels, the National Indigenous Arts Advocacy Association (NIAAA) met considerable resistance from some Indigenous groups contesting the process of definition of Indigeneity and 'authenticity'. Professional associations like Art.Trade, the association of Indigenous art dealers, have also contested NIAAA's stewardship of the process, and raised concerns about the openness of the labelling system to abuse. Art.Trade argued with some substance that, while in a number of cases traders in Indigenous art had sometimes used unethical practices to obtain products, the real instances of abuse tend to be in the tourist and souvenir markets. For its part, Art.Trade developed its own code of ethics for dealers in Indigenous art. Others saw that the proliferation of marks and labels on works offered for sale would only serve to confuse consumers.

Wiseman prefaces her analysis of the Labels with the note that certification marks are but one mechanism which may be used to regulate the manufacture and sale of Indigenous art and cultural products. She defines the characteristics of the Labels and their status under the *Trade Marks Act* 1995 (Cth) before outlining how the certification process works and detailing the concerns of a number of interested parties who have pointed to the key question of the certification of goods and services, and the capacity of competent certifiers to monitor and control the use of the mark. NIAAA's definition of 'authenticity' and the issues that arise in the process are examined in detail. First, Wiseman highlights the issue of how the notion of authenticity relates to 'traditional' Indigenous art, which is often seen as the sole marker of authenticity, and how it will deal with the work of urban and non-traditional artists. Second, Wiseman raises the issue of whether Indigenous artists are required to comply with Indigenous laws relating to the creation or performance of Indigenous artistic and cultural goods and services. Wiseman

concludes her analysis of the Labels by noting alternative and additional strategies that may be adopted to assist in protecting Indigenous arts and culture, including the formation of a peak body of galleries and shops empowered to develop and encourage the use of protocols and codes of ethical conduct. Such a body could register a collective mark to show that merchandise sold in galleries and shops is produced by persons recognised as members of an Indigenous cultural organisation. Alternatively, an accreditation scheme for galleries or shops could be developed, along the lines of the successful Craftmark scheme. Both the collective mark and the accreditation scheme, like the Labels, are designed to inform and give the consumer confidence in the product, but to be effective they will need to be widely adopted.

It is still early days for the Labels, but anecdotal evidence suggests that the scheme has not been as widely implemented as hoped. The impending bonanza of the Olympic Games had created a sense of urgency among those keen to see the Labels in place well before September 2000. But disputes about almost all aspects of the Labels slowed any momentum generated by their launch in November 1999. Wiseman observes that, while the Labels will only provide limited protection to Indigenous artists, they have value as tools to educate the public about Indigenous art and culture. The questions of 'rights in art', of authority to disclose knowledge through art, and of communal ownership of stories are at the core of the debate over the introduction of the Labels, just as they are in a number of cases detailed in other contributions to this volume.

In the next article, Matthew Rimmer examines the ways in which the Bangarra Dance Theatre has negotiated its stated desire to connect traditional Indigenous cultures and new forms of contemporary artistic expression. Bangarra has developed special contractual arrangements to recognise the communal ownership of the traditional Indigenous culture and heritage drawn upon in the company's work. Rimmer documents the collaboration between Djakapurra Munyarrun and Bangarra's choreographer and composer Stephen and David Page that would lead ultimately to the opening ceremony of the Sydney Olympic Games. This collaboration is guided by a novel agreement in which Bangarra recognises that the entire intellectual property in the dances, songs and stories used by the company is vested in the Munyarrun people. The community is paid a fee for use of the material. As Rimmer observes, this agreement circumnavigates decisions in copyright cases which have had difficulty recognising communal ownership. The constant negotiation of the arrangement through consultation with community elders is designed to ensure the integrity of the project but, as Rimmer observes, the arrangement is of little use in inhibiting the misappropriation of Indigenous art and culture.

In a series of profiles of the key players in the company, Rimmer outlines the creative contribution of choreographer and artistic director Stephen Page, composer David Page and designer Fiona Foley. The company is innovative in its work, and open to working with other media once the appropriate permissions have been obtained from the Munyarrun community. Rimmer examines the copyright implications of the company's media presence, and

questions how a system of moral rights might impact upon performers and creators. In a profile of Rhoda Roberts, artistic director of the Festival of the Dreaming, a year-long Indigenous themed festival commissioned by the Sydney Organising Committee for the Olympic Games, Rimmer describes the measures put in place by Roberts to recognise the authorship of products, activities and events in the Festival. Bangarra Dance Theatre participated in the Festival and the Olympic Games Opening Ceremony, both valuable platforms to increase the company's profile internationally, but both criticised by some Indigenous groups for erasing or obfuscating the real social problems faced by many Indigenous people. As Rimmer shows, in their practice and understanding of the sensitivities attached to their work, Bangarra act to educate the public about Indigenous culture and Indigenous laws. They are, Rimmer concludes, at the forefront of efforts to recognise Indigenous understandings of intellectual property in artistic and creative practice.

In his article, Andrew Kenyon examines recent writing about copyright and Indigenous art. Kenyon groups commentary into four subject areas: copyright, cultural heritage and self-determination; the criteria for copyright protection; appropriation; and the 'common place' of law and Indigenous art. The first part of the article assesses the way in which Indigenous intellectual and cultural property has been interpreted in law either as cultural heritage or intellectual property. It is abundantly clear that neither is entirely satisfactory for all concerned, and it is suggested that the development of specific legislation granting greater self-determination for Indigenous people in relation to cultural knowledge is gathering support. Kenyon points out, however, that copyright may offer greater international protections than cultural heritage for Indigenous art and cultural expression. Acknowledging copyright law's failings, Kenyon argues that copyright law has been 'one of the Australian legal system's successes in dealing comparatively appropriately with Indigenous people' despite, *inter alia*, problems over the definition of originality under the Act. This leads into a discussion of the issue of appropriation, and fair dealing arrangements allowed under copyright law. Kenyon suggests that this is a point at which cultural heritage frameworks might usefully be applied to copyright, in order to better serve the aims of Indigenous communities to protect and retain control over their art and culture. But it is precisely the overlap between copyright and any specific Indigenous cultural heritage legislation that makes the task of reformers more difficult. Kenyon concludes by arguing that the various decisions have created a 'common place' of copyright law and Indigenous art in legal discourse which has enhanced the visibility of the Indigenous art and expanded concern for its appropriate use.

Greater awareness of the sensitivities involved in the commercial reproduction of Indigenous products as well as products inspired by Indigenous art is the theme of the next article. Ben Goldsmith tells the story of Sakshi Anmatyerre, a painter whose work openly drew inspiration from Indigenous stories, themes and motifs, but whose rights to produce that work, claim authority to interpret the stories and receive financial reward for its exploitation were nationally and publicly contested. Anmatyerre's work was

mass marketed in a series of stationery products that were sold at major outlets, including Australia Post. After a series of complaints, the work was withdrawn and ultimately destroyed. The publisher, Steve Parish, realised that his business activity had caused offence to the Anmatyerre people, and began a journey to redress the harm. The story of Sakshi and Steve Parish highlights copyright law's limitations in dealing with Indigenous art. It is also a story of the ways in which new accommodations can be made which respect Indigenous laws and practices and allow for income to be generated from the use and reproduction of art. Goldsmith concludes that the story is the result of a collision of value systems. This collision creates unsettlement or unease which can positively and productively activate the social by serving as a constant reminder of the multiple entanglements of Indigenous and non-Indigenous people, laws and culture.

The issue of appropriate recognition and use of Indigenous creators is central to Cate Banks' article on the moral rights recently introduced into Australian law. Banks argues that, contrary to some expectations, the development of a moral rights regime does not represent an accommodation of Indigenous laws and in particular the principle of communal ownership of art and stories. The interests represented by the new moral rights regime are undoubtedly welcome in many sections of the arts. For the first time, the non-economic rights of filmmakers and authors of literary, dramatic, musical and artistic works have been recognised in Australian copyright law. Banks describes the two new moral rights: the right of integrity that gives weight to authors' objections to derogatory treatment of their work; and the right of attribution that recognises authorship of a work. Both rights are individual rights, meaning that one of the fundamental components of Indigenous intellectual property laws — communal ownership and custodianship of art, stories and other knowledge concerning the management of the land — remains unrecognised in law. Banks argues that the recognition of individual rather than communal rights reflects the ethnocentricity of the common law system and its privileging of property and economic rights. With this qualification in mind, Banks investigates the potential value that the two moral rights hold for Indigenous creators. She notes that, in many of the copyright actions concerning Indigenous art, the violation of the integrity of the work had harmful repercussions for the artist and their community. However, because the moral rights regime protects the individual rather than the community, false attribution or identity claims are not actionable. The Anmatyerre people would have been unlikely to have been able to bring a successful action against Sakshi Anmatyerre for falsely claiming an Indigenous identity, for example. To make up for the deficiencies of the moral rights regime, Banks proposes the development of *sui generis* legislation that accommodates Indigenous intellectual property laws.

In one way or another, the articles in this collection are concerned with the ability of the law to regulate, control and protect the creation and use of Indigenous cultural objects and practices. While the penultimate contribution in this collection continues this theme, it departs from the legal focus of preceding articles to examine the challenges facing archivists responsible for

records relating to Indigenous peoples. Margaret Reid describes the debate within the archival profession over the management of records and their availability to subjects and their descendants. In response to representations from Indigenous bodies and member support for the recommendation of the Royal Commission into Aboriginal Deaths in Custody that governments provide access to all of their records relating to the history of Indigenous people, the professional association of archivists, the Australian Society of Archivists (ASA), in 1996 endorsed a set of protocols for libraries, archives and information services in dealing with records relating to Aboriginal and Torres Strait Islander people. The following year, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families made further recommendations on the management of Indigenous records. As Reid describes, the archival profession has addressed the issue of its approach to Indigenous records through the production of a series of guides to collections, but the resources devoted to the development of indexes and finding aids for Indigenous material are far exceeded by those available to researchers of non-Indigenous genealogies. Reid sees the ASA's commitment to providing access in the future becoming evident in its commitment to educating and assisting those wanting to establish community archive programs, and in training Indigenous archivists. As she well describes, archivists are actively engaged in the process of institutionalising respect for the integrity of Indigenous histories and consideration of the particular rights of Indigenous people.

The final article in this collection argues that in other institutional contexts, this respect is replaced by real and symbolic violence. Adam Shoemaker traces the 'changing geographies of the (Australian) mind' and the paradoxical condition of Australia which merge around the figurehead and its presence in Australian currency and culture. Beginning by noting that Australian banknotes are now 'headless' because none features the royal figurehead, Shoemaker develops the metaphor of decapitation to introduce the issue of the treatment of Indigenous human remains by museums and, most recently, biotechnology companies. He retells the story of the efforts of the Nyoongah people to retrieve the skull of Yagan, a warrior killed by settlers in 1833. Yagan's head was toured around the medical and anthropological circuits in Britain and invoked as evidence for countless crackpot theses of racial hierarchy and human development. It was eventually buried in 1964 in a plot which later overflowed with the remains of stillborn children. Only after the British Prime Minister Tony Blair was convinced of the need to redress the offence was the skull retrieved without disturbing the children's remains, and returned to Western Australia. A statue of Yagan in Perth was reportedly repeatedly beheaded at the time of the retrieval of the skull, but newspaper commentary found humour rather than outrage to be the acceptable response. The decapitated skull becomes the vandalised headstone of Eddie Mabo as Shoemaker explores the symbolic violence inflicted on Indigenous people. He goes on to discuss the exploitation and effacement of David Unaipon by those who claimed credit for his work and those who sought to use his image on the $50 note, in the Olympic Festival of the Dreaming, or in a poorly conceived

advertising campaign for Citibank. Unaipon's family was not asked for permission to use David's image in advertisements for the festival or for the bank, and were in fact offended by the treatment his image received. Shoemaker concludes his chapter with a discussion of the defacement and decapitation of a sculpture of the Queen and Prince Philip in Canberra in 1998 and the public and media responses it generated. In the context of a sometimes heated national debate leading to the referendum on the republic in 1999, there seemed to be multiple motives for the attack on the statue, which could have been carried out in either the republican or the monarchist cause. But what is most interesting, as Shoemaker observes, was the public reaction to the symbolic beheading of the monarch and how it contrasted with public responses to Yagan's double decapitation.

The editors would like to take the opportunity to congratulate Stephen Gray on winning the Vogel award for his novel *The Artist is a Thief*, which will be published in 2001 by Allen & Unwin. They would also like to acknowledge the support of the ARC Collaborative Grant, 'Legal and Cultural Protocols for the Development of Indigenous Arts and Cultural Industries in Queensland' in completing this project.