ENSURING ETHICAL COLLABORATIONS IN INDIGENOUS ARTS AND RECORDS MANAGEMENT

by Terri Janke

INTRODUCTION

Traditional cultural expression ('TCE') and traditional knowledge ('TK') and its interface with intellectual property laws raise many challenges for law and policy makers. TCE and TK are viewed as incongruent with conventional intellectual property laws. However, the case studies in this paper will examine how the law, and protocols have dealt with this meeting place of culture and law to consider what lessons can be gleaned. I will then make some concluding comments about my vision for a National Indigenous Cultural Authority.

TRIBUTE TO THE CARPETS CASE

Twenty years ago, when I just finished law school, I worked at the National Indigenous Arts Advocacy Association and I got to help out on a case the team was running which established a legal precedent for the recognition of Indigenous cultural rights in artistic works using copyright law—*Milpurrurru v Indofurn*, known widely as 'the Carpets Case'.[1] I came across an old photograph of the artists and the advisers taken at that time. At the centre of the photograph was Colin Golvan, the barrister in the case, who cleverly ran the legal argument that saw the first legal win for Aboriginal artists in copyright. The photograph was taken by Michael McMahon, then CEO and lawyer at the National Indigenous Arts Advocacy Association[2], who coordinated the case with assistance from Northern Aboriginal Legal Aid Services Ltd[3]. The Aboriginal artists came from Bulabula Arts, an arts centre in Arnemland, Central Australia. There was also Banduk Marika from Yirrkala. Her work was represented through Buku Larnngay Arts Centre. Banduk Marika, a member of the Rirratingu clan, is the only remaining living artist of the eight who took the case. Her artwork *Djanda and the Sacred Waterhole* was copied from a portfolio produced by the National Gallery of Australia. Her right to depict the iconic sand goanna from the creation story of her people was her birthright. She had the responsibility to care for its use in public. The carpet that reproduced her artwork put her at risk of losing this cultural right. Her ability to take the case and stop the unauthorised and offensive copying redeemed her status with her community. It was the first time the Federal Court of Australia recognised that Indigenous artists were entitled to use copyright to stop the unauthorised copying of their works on imported carpets, made in Vietnam. The respondent had argued from the outset that Aboriginal art was in the public domain and that the artworks were not original. Justice Von Doussa hearing the case, made a clear key point that even though the artists may have followed pre-existing cultural designs, copyright did apply to the artworks because each artist had imparted skill, labour and effort to meet the criteria of copyright. In this way, they were entitled to control the copying of whole or part of their works. It was a landmark judgement in Australia, celebrated as a win. This was because the case represented a meeting place between conventional copyright law and cultural laws. The individual artists were recognised as copyright creators, however, the community space in which they operated their arts and cultural practice was recognised in the giving of evidence and also in the judgment. For instance, cultural damages were awarded to living artists for the anguish suffered in being held responsible for the derogatory manner on the reproduction of an important cultural story where it would be walked upon. The case set a pathway for many Indigenous artists to control their art and cultural expression and make a living out of monies derived from copyright. Viscopy, which is the Australian copyright collecting society, has over 11,000 members, and half of those are Aboriginal and Torres Strait Islander artists, many working in art centres across remote communities.[4]

ART

Art comes from place and defines the life of the people. The artist's practice links with land, belonging and identity. The lines and dots may seem like pretty patterns that look good on walls, carpets and clothing, but they represent insignia, claims to country, rank and responsibility for Indigenous artists. The *Carpets Case* opened the door for Indigenous artists to use copyright to protect their cultural and economic interests. However, there is a rise in the number of stylised versions of 'Aboriginal art' or 'inspired by' Aboriginal art which appropriate Indigenous styles and themes.[5]

BIBI BARBA & THE HOTEL ECLIPSE

In 2012, Bibi Barba, Aboriginal Artist from Mandandanji country, googled her own name in preparation for a website she was establishing for her art. She discovered that her name came up linked to the Hotel Eclipse in Domaslaw, Poland. The carpet pattern in the hotel rooms looked very much like her works, *Desert Flowers* and *Flowers of the Desert*. She saw her prominent features of her artwork also reproduced in wood panelling, glass dividers, the table tops and the art panels in the foyer. Obviously Bibi was 'absolutely gutted' in seeing her works used in this way. [6] In Bibi's words, the artwork was a connection to spirituality and country that should not be corrupted. The artworks were displayed, with permission, on a website of the Sydney Gallery. Now, across the world, the works were used by a Polish designer, commissioned by the Hotel Eclipse. The designer alleges that this is not a copyright infringement but merely the designer drawing inspiration. The designer argues that she 're-designed' the artwork.[7] In Australian law, the test is a substantial reproduction. However, the case must be taken in Poland. Bibi Barba continues to pursue her copyright case against the Hotel and the designer. In a recent email to me she wrote:

> Why is copyright so important to me? In essence, it is someone's intellectual property, their thoughts, feelings and emotions, expressed visually. Particularly being an Indigenous artist, it is my connection to spirituality and country that should not be corrupted. This is my passion and livelihood.[8]

Her right to depict the iconic sand goanna from the creation story of her people was her birthright. She had the responsibility to care for its use in public. The carpet that reproduced her artwork put her at risk of losing this cultural right.

ART PROTOCOLS

In Australia, non-Indigenous artists who copy Indigenous art design and themes are acting inconsistently with nationally recognised cultural protocols. The peak agency for arts in Australia is the Australia Council for the Arts. The Australia Council's Aboriginal and Torres Strait Islander Arts Board developed a set of cultural protocols, which advocate for the proper respect of arts practice.[9] The protocols are based on key principles which include Indigenous control and communication, consultation and consent. The visual arts protocols state that consent is necessary for the reproduction of Indigenous visual arts, and if traditional communal designs are included, consent may be required from traditional owners.[10] These protocols have set standards, and are also made legally binding, to those who receive grant funding from the Australia Council.

MUSÉE DU QUAI BRANLY: AUSTRALIAN INDIGENOUS ART COMMISSION

A different story concerns the Musée du Quai Branly, a museum in Paris, which commissioned eight Indigenous Australian artists to produce works that were incorporated into the architectural skin of the administration building.[11] The French architect Jean Nouvel had the idea of including the Aboriginal art in the building, and to go about this task, the Musée worked with the Australia Council for the Arts on the Australian Indigenous Art Commission. Two highly experienced Australian Indigenous curators were chosen to select and work with the artists—Brenda Croft and Hetti Perkins. They worked with Australian Installation Architect firm Cracknell & Lonergan, to select the artists and to consult with the artists about the creation of the installation works. This was an important process to ensure that the artist could control any community owned cultural material included in the works, and ensure that they complied with any customary obligations. The artists included Lena Nyadbi of Warmun Arts, whose work is featured on the façade and the rooftop; and Judy Watson, whose work is in the foyer of the building. To secure the rights, contracts in French and English covered the rights to install the artworks in to the building and to grant the non-commercial uses that the Musée would need.[12] The artists were paid a fee, and also attended the launch. The contract included attribution clauses; community recognition clauses; annual reporting provisions; and the Indigenous visual arts protocols guide was translated in French and attached in an appendix. A curatorial guide was created for the Musée so that the care of the works could be properly managed.

LESSONS LEARNT FROM ART CASE STUDY

Copyright has been used by Indigenous artists in Australia to stop infringements of their cultural works. The Australian case of *Milpurrurru v Indofurn* is an example of this, where it was shown that there was direct and substantial copying of existing work. However, the protection of styles and themes can fall through the cracks. Further, copyright only protects TCE that is expressed in a material form, and protection is only for the term of the copyright, which in Australia is 70 years after the death of the creators. Bibi Barba's case shows the difficulty that Indigenous artists have in controlling how their works are used internationally. Bibi's works appear to have been used towards the development of the Hotel Eclipse's interior design, but she was never contacted or consulted. Whilst clearly she is copyright owner of her works, there are limitations for Indigenous artists in using copyright to protect their works when international use is alleged. It is up to foreign jurisdictions to consider whether

the work has been copied or if it is inspiration. A better approach is to work with a living artist, as was the case with the Musée du Quai Branly. The individual artists granted copyright rights to the Musée and worked within community cultural protocols to ensure an acceptable installation of the artworks in the building.[13] For those wanting to make use of Indigenous or TCE styles, it is best to commission the work of an Indigenous artist rather than use Indigenous TCE as 'inspiration'. The Musée du Quai Branly project provides an example of successful engagement with Indigenous artists and the community. There were also long term benefits such as Indigenous curatorial fellowships.

RECORDS

Another significant issue for Indigenous people is around copyright of anthropological records that contain images and words of family members, TK and TCE. Henrietta Fourmile Marrie, Yidinji woman, has been an inspiration to me throughout my career. Her 1989 article 'Who owns the Past? Aborigines as Captives of the Archives'[14] highlighted the fundamental issue for Indigenous people, that is, we don't own the records taken of us. She pointed out the oral stories and cultural expression and knowledge is captured in sound recordings, film and in the records taken by researchers. Indigenous people have no stake in the ownership. Access and use to these materials often vests legally in the researcher as the author of the material form and the maker of the recording and the film. But TK, TCE and those who own it are not protected. Indigenous people are concerned that they cannot access records or use and publish them without permission of a copyright owner. Another issue is that Indigenous people cannot control who gets to access to material, for example, they cannot control who sees films of sacred ceremony. Furthermore, they cannot control out of context and derogatory use of the materials.

DEEPENING HISTORIES OF PLACE

In 2013, my company worked with the National Film and Sound Archive and the Australian National University on a research project, Deepening Histories of Place. Deepening Histories of Place was a multi-partner project for the collection, recording, storage and use of Indigenous knowledge about place/location. The project included interviewing Indigenous people, filming interviews (video and sound), recording notes, filming Indigenous land and places. It also used existing copyright and archival material. Each partner organisation anticipated using the materials for their own purposes. For instance, the funding body wanted access to final products; the PhD researchers publish a thesis; the film company makes a documentary for distribution and sale and the government departments and universities collect information and knowledge. For example, National parks use materials to create an app for tourism. Archives, including the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Archives, want to collect the 'histories' for preservation.

We created protocols to clearly set out the values of the project and purposes, and set up a framework for the interplay of information and processes for filming on Indigenous lands and national parks; regulating the use of images of deceased people, cultural protocols, copyright and ethics. The most interesting feature about this project was that the ownership of the recordings are vested in the knowledge-holders even though the recordings are made by filmmakers and researchers. To cover this, all rights are assigned to the knowledge-holder in writing. To ensure transparency, the protocols are published on the project website along with the clearance forms so that full information is given to the participants. Copies of the materials are given to the individuals who participate and the community. Specific licenses and permissions are sought for the projects.

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The Deepening History Protocol and clearance forms are now a publically available resource of Indigenous knowledge. The Australian Law Reform Commissions has recognised it as best practice its 2014 Digital Economy and Copyright Review. All resources described in this presentation are free to access and use.[15]

Deepening Histories of Place[16] is a successful model to deal with TK and TCE when recording cultural stories in film and sound, because copyright in the recordings were assigned back to the knowledge-holder, so they are in control of how the information is used. The involvement of the National Film and Sound Archive and the Australian Institute of Aboriginal and Torres Strait Islander Studies means that copies will be held at these leading Australian cultural institutions, and that the access and use are controlled in accordance with the protocols.

Australian Institute of Aboriginal and Torres Strait Islander Studies AIATSIS maintains and preserved a world unique collection of Indigenous items many collected as a result of research, field work and film production including 40,000 hours of recordings, 650,000 photographs and 12,000 manuscripts. The Institute holds a lot of unpublished materials. The challenge for the Institute is to manage access and use processes in accordance with the

obligations to under its establishing law that state that it must not disclose information that 'would be inconsistent with the views or sensitivities of relevant Aboriginal persons or Torres Strait Islanders.'[17] The Institute must also abide by deposit terms, which may restrict access and publication to sacred and secret material or personal material. The Institute's Access and Use Policy manages these obligations. For instance, the Institute manages access to Indigenous Australians who have a demonstrated connection with the materials. Clients wishing to access or use unpublished sensitive materials owned or controlled by AIATSIS, including orphan works, must first obtain permission from the relevant Aboriginal or Torres Strait Islander community, or in the case of personal material, the relevant individual.

There is developing practice within Australia of cultural institutions developing such protocols and practices including the National Museum of Australia and the National Film and Sound Archive. Internationally, work is being undertaken at cultural institutions. For more information see the publication *IP and the Safeguarding of Traditional Cultures: Legal and Practical Options for Museums, Libraries and Archive*" which provide a comprehensive guide for cultural institutions.[18] There is also the WIPO Creative Heritage Training Program which can assist institutions develop policies and practices aimed at dealing with the management of traditional cultural expression and traditional knowledge.

KEY LESSONS IN RECORDS PRACTICE & IP PROTECTION

From this case study on creating records of traditional knowledge and traditional cultural expression I have illustrated the role that copyright and contracts can play in providing positive protection measures. The requirement of material form disfavours Indigenous cultural knowledge-holders who orally transfer traditional knowledge and traditional cultural expression. Using written agreements which transfer ownership to the individual knowledge holder, and also seeking clearance from communities sets up a framework that uses copyright, contracts and protocols as tools to favour Indigenous knowledge-holders. There are still shortfalls in protection of copyright. The still limited time protection of copyright would mean after 70 years of the death of the artist, the work will fall into the public domain. The use of contracts has limitations in that the parties are bound to meet obligations under the contract. It doesn't cover rights against third parties. Indigenous people want protection of their TCE in perpetuity. Furthermore, Indigenous communities can develop their own TCE recording policies and protocols. For example, the Kimberly Land Council[19] developed IP and TK policies in regards to their Aboriginal community. These policies are intended to cover Intellectual Property, Confidential Information, Traditional Knowledge and Cultural Expression. They enable them to feel secure that their IP and TK will not be used in demeaning or inappropriate ways.[20]

CONCLUSION: NATIONAL INDIGENOUS CULTURAL AUTHORITY

Using existing laws, protocols and contracts provide ways to protect TCE. However there are gaps which will require legislation. Indigenous Australians call for laws that recognise their rights to cultural knowledge and expression. However, being only 2% of the population, there is no political will for changes to law. We need to now act to fix this problem by bringing in structures and processes that assist the management of these rights. The solution should include laws and processes which recognise the authority of the group to 'maintain, control and protect'[21] what can be shared, and provide assistance to identified custodians. I have written about a proposal for a consistent national framework - National Indigenous Cultural Authority in my paper *Beyond Guarding Ground*[22]. The NICA model proposes the creation of an independent organisation that can support the facilitation of Indigenous Cultural and Intellectual Property (ICIP) rights by providing tools, contracts, monitoring and codes/protocols, as well as implementation of a certification process using a registered trade mark, to allow consumer identification of NICA endorsed cultural products and services. The model for a NICA recognises the rights of Aboriginal and Torres Strait Islander Peoples to manage their ICIP, through free, prior and informed consent, and on mutually agreed terms, consistent with the United Nations Declaration on the Rights of Indigenous Peoples. This is a suggested solution jurisdictions in all countries should consider. I believe that a National Indigenous Cultural Authority can achieve a balance between protecting TCE rights and allow sharing on agreed terms. Furthermore, it is a framework that can empower Indigenous people both culturally and economically. In this way, Indigenous people can benefit from systems of IP protection which incentivise and reward their sharing, continual innovation and practice of their cultures.

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1 *Milpurrurru v Indofurn* [1994] FCA 1544. I was a recent graduate and helped the legal team working on the appeal case, coordinated by the National Indigenous Arts Advocacy Association. See: Terri Janke, *Minding Culture, Case Studies on Intellectual Property and Traditional Cultural Expressions*, (World Intellectual Property Organisation, 2003).

2 Then known as the Aboriginal Artists Management Association, an organisation established to provide advocacy services for Aboriginal and Torres Strait Islander Artists, now defunct.

3 Richard Crane, Northern Aboriginal Legal Aid Services Ltd, Solicitor for applicants.

4 Patricia Adjei, Indigenous Communications Coordinator, Copyright Agency – Viscopy, Email correspondence, 24 March 2015. See website <https://viscopy.net.au/indigenous/>.

5 Patricia Adjei, Indigenous Communications Coordinator, Copyright Agency – Viscopy, Commuinications with Terri Janke, 22 March 201, pointed to a number of complaints she has received about non-Indigenous artists and fashion designers mimicking styles from well-known deceased Aboriginal artists. The original words had been altered so it was not a clear case of copying.

6 Andrew Taylor, 'Hotel Designer denies copying Aboriginal paintings'. *Sydney Morning Herald*, 17 February 2013. <http://www.smh.com.au/entertainment/art-and-design/hotel-designer-denies-copying-aboriginal-paintings-20130216-2ejo7.html>.

7 Ibid.

8 Bibi Barba, Email correspondence with Terri Janke, 19 March 2015.

9 Australia Council of the Arts, *Protocols for Working with Indigenous Artists* (2015) Corporate Policies and Frameworks <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>. Terri Janke and Company wrote a set of five booklets for the Australia Council on Indigenous Artform Protocols, Visual Arts, Writing, Music, Media and Performing Arts, 2003 and 2007.

10 Terri Janke and Company, *Visual Arts: Protocols for Producing Indigenous Australian Visual Arts* (Australian Council for the Arts, 2nd ed, 2007).

11 Brenda Croft, Hetti Perkins, the Harold Mitchell Foundation and the Australia Council of the Arts, *Australian Indigenous Art Commission = commande publique d'art aborigine*: *Musée du Quai Branly* (Art & Australia, 2006).

12 Terri Janke and Company worked on the project with assistance from French Lawyer, Alexia Moissonie.

13 *Bulun Bulun v R & T Textiles [1998] ALR 157 (Textiles)*. This case recognised that the Aboriginal artist has a fiduciary duty to the community to deal with his or her copyright consistently with their cultural obligations.

14 Henrietta Fourmile (Marrie), 'Who owns the Past? Aborigines as Captives of the Archives' (1998) 13(1) *Aboriginal History*, 1989, 1 – 8.

15 National Film and Sound Archive and Australian National University, *Homepage* (17 April 2013) The Deepening Histories of Place Project <http://www.deepeninghistories.anu.edu.au/>.

16 National Film and Sound Archive and Australian National University, *Ethical Protocols* (17 April 2013) The Deepening Histories of Place Project <http://www.deepeninghistories.anu.edu.au/ethical-protocols/>.

17 *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) s 41.

18 World Intellectual Property Organization, *IP and Museums, Libraries and Archives* (December 2010) WIPO Policy <http://www.wipo.int/tk/en/resources/museums.html>.

19 Terri Janke and Company, 'Intellectual Property and Traditional Knowledge Policy' (2011) *Kimberley Land Council and the KLC Research, Ethics and Access Committee.*

20 Ibid.

21 *United Nation Declaration on the Rights of Indigenous Peoples* art 31.

22 Terri Janke, 'Beyond Guarding Ground' (2011) *Terri Janke and Company Pty Ltd*.

Las III
Gail Mabo
Acrylic on canvas
460mm x 1220mm