AUSTRALIAN GOVERNMENT

PRODUCTIVITY COMMISSION

SUBMISSION

To examine the value, nature and structure of markets for Aboriginal and Torres Strait Islander arts and crafts, and policies to address deficiencies in these markets.

Copyright Law – Indigenous Fine Art Market

Global Perspectives

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THE VALUE OF A GOOD STORY

Protecting Indigenous Culture: A Global Challenge

Australian Copyright Law

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1. INTRODUCTION

I am the General Manager of Warmun Art Centre on Gija Country in the East Kimberley, Western Australia. Warmun is home to the nationally and internationally renowned East Kimberley Indigenous artists Rover Thomas, Queenie McKenzie and Paddy Bedford. Warmun continues be to the home of extraordinary Indigenous art held by major state collecting institutions and private collections.[1] Despite international acclaim and Warmun Artist, Rover Thomas, securing a record-breaking price for a National Gallery of Australia (NGA) acquisition through a Sotheby auction in 2001, Indigenous artists in Warmun Community continue to live in deep structural poverty.[2] Around the world the impact of colonialisation and globalisation has left many Indigenous communities suffering deep structural inequality. The cultural heritage of Indigenous Communities is open to exploitation, that requires a legislated protective response.[3]

The United Nations Human Rights Council established a three year "independent expert in the field of cultural rights,"[4]extended in 2012[5] and 2015.[6] The outcomes are reported annually to the Human Rights Council and to the UN General Assembly.[7] A Special Rapporteur in the field of cultural rights was appointed in 2012. The most recent report "calls for greater recognition of human rights-respecting cultural mixing and syncretism and increased respect for mixed cultural identities, all of which is necessary for the implementation of cultural rights."[8]

The goal of the mandate is to discover best methods in the promotion and protection of cultural rights at the state level and internationally. Work is done in cooperation with intergovernmental and nongovernmental organizations, the United Nations Educational,

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[1] Catherine Massola*, Living the Heritage, not curating the past: A study of Lirrgarn, agency and art in the Warmun Community* (PhD Thesis, University of Sydney, 2016); www.warmunart.com.au.
[2] 'Big rain' ends in bid drought', *The Age* (1 September, 2006) online https://www.theage.com.au/entertainment/art-and-design/big-rain-ends-in-bid-drought-20050901-ge0sj8.html; The National Gallery of Australia paid $788,750 for Rover Thomas' *All that big rain coming from the top side*
[3] Helle Porsdam, 'Law and Humanities: A Cultural Rights Perspective' in *The Transforming Power of Cultural Rights: A Promising Law and Humanities Approach*, (Cambridge University Press, 2019).
[4] Human Rights Council Resolution 10/23, March 26, 2009.
[5] Human Rights Council Resolution 19/6, March 22, 2012, three-year extension.
[6] Human Rights Council Resolution 28/9, April 2015, three-year extension.
[7] UN Human Rights Office of the High Commissioner, "Information on the Mandate": www.ohchr.org/EN/Issues/CulturalRights/Pages/MandateInfo.aspx.
[8] Karima Bennoune, Report of the Special Rapporteur in the field of cultural rights, A/76/178 (United Nations General Assembly, 76th Session, 21 July 2021).

Scientific and Cultural Organization (UNESCO), the Committee on Economic, Social and Cultural Rights (CESCR), alongside the States.[9]

The goal of this thesis is to explore the theoretical foundations of copyright law in Australia as it relates to Indigenous art and culture.[10] The thesis seeks to answer the question – What is it about copyright law that supports the structural barriers to Indigenous Communities realising the economic benefits of artistic success equally and fairly? Does copyright law in Australia protect Indigenous artists from commercial exploitation? The thesis takes a doctrinal and a comparative approach to explore the development of copyright law in Australia, with a view to historical and global trends in so far as the jurisprudence advances the interests of Indigenous artists or not.

The thesis begins by exploring the historical development of an international agenda to define *traditional cultural expression* connected to international frameworks as the sources of law. The influence of a global trend towards recognizing *cultural rights* and the operation of copyright law in Australia is examined. Australia introduced a moral rights regime in response to international pressure and meeting the trade obligations of the Berne Convention as an option to protect cultural integrity.[11]

A literature review explores the core influences of a global intellectual property framework provides context for the scope of options available through existing copyright law and identifies options for reform where gaps remain.

Warmun Art Centre is a remote Indigenous art centre holding the possibility to shift the perspective from Indigenous disadvantage to one of celebration. Warmun community and the artists have made a mark on the national and international mainstream art market. The Warmun community of Gija Country provides a backdrop to exploring the complex barriers that remain to advancing Indigenous self-determination. There remains pragmatism about how copyright law currently serves the interest of Indigenous artists and their communities or not.

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[9] Ibid.
[10] *Copyright Act 1968* (Cth) *(Copyright Act)*.
[11] *Copyright Amendment (Moral Rights) Act* 2000.

A question remains about whether Australia should introduce sui generis copyright legislation that addresses the law gaps to protect traditional cultural expression from commercial exploitation. The thesis concludes with three broad recommendations to advance the role of copyright law in Australia as a protector of Indigenous artists rights. These are; to **educate** Indigenous artists about the law; to **contract** where gaps are founds and exert 'hard law' outcomes where 'soft law' ICIP protocols require; and finally to continue to **advocate** for law reform in the form of introducing sui generis legislation to protect traditional cultural expression, as central to the Australian identity.

2. DEFINITIONS

a) Source of Law

The International Covenant on Economic, Social and Cultural Rights ((ICESCR) 1966) states in Article 15 on the right "to take part in cultural life," "to enjoy the benefits of scientific progress and its applications," and "to benefit from the protection of the moral and material interests" resulting from one's scientific, literary or artistic production." Articles 26 and 27 of the Universal Declaration of Human Rights ((UDHR) 1948) enshrined these rights. The International Covenant on Civil and Political Rights ((ICCPR) 1966) indirectly refers to culture as part of provisions to protect freedom of opinion and expression, privacy, freedom of thought, conscience and religion. [12]

UNESCO instruments include the Universal Declaration on Cultural Diversity (2001), and Article 5 states, "all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms." These instruments are designed to protect cultural diversity through (safeguarding tangible and intangible cultural heritage) and facilitate diversity of cultural expressions.

b) Indigenous People

A number of important provisions and instruments relate to Indigenous people and their culture including the ICCPR Article 27; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); the United Nations Declaration on the Rights of Indigenous Peoples (2007); and the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) of the International Labour Organization.[13]

The international legal framework and the political will of the global community always needs to be embedded into domestic law. There is an inherent tension between the growing global recognition of a 'natural right' as a 'cultural right' and the ability to implement

[12]Report of the Special Rapporteur in the field of cultural rights (n 8), para 21.
[13] Report of the Special Rapporteur in the field of cultural rights, (n 8).

domestic laws as protection. Critical to success is the process of defining the scope and pin-pointing boundaries between the collective and individual rights and international law and domestic law. Establishing definitions assists the process.

c) Traditional Cultural Expression

The term "traditional cultural expression" (TCE) appeared in international forums through the preamble to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) adopted in 2005 by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

i. As a subset of cultural expressions: "Recognising that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values."[14]

ii. Connecting traditional cultural expressions to minorities and indigenous peoples: "Taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development."[15]

The inclusion was symbolic. A legal basis for cultural rights is established by international human rights instruments, where reference is made to culture (directly or indirectly).

d) Impact of the Berne Convention – Global Trade

The Berne Convention is an important international instrument which mandated significant copyright provisions to be implemented in domestic law in order to promote global trade, associated with the Agreement on Trade-Related Aspects of Intellectual Property Rights

[14] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Preamble, recital 13.
[15] Ibid.

(TRIPS Agreement).[16] The Berne Convention required that copyright exists at the moment new work is 'fixed' at the time of creation for a limited term (instead of a registration system). 1976 Tunis Model Law on Copyright for Developing Countries (Model Law)[17] developed provisions in accordance with the Berne Convention aligned to Anglo-Saxon legal methodology.[18] The Model Law does not mention Traditional Cultural Expression (TCE) and refers to "folklore" in the definitions.[19] The Berne Convention is an important document to understand that the evolving definition of TCE at a global and a state level is required to exert individual property rights protections directly linked to global trade. The trade agreements are 'economic' and less about the cultural rights of individuals and a community.

Folklore

Early debates revolved around attempts to define what makes up folklore. India highlighted the need to incorporate *folklore* into provisions included in the inventory of literary and artistic works in Article 2(1) of the Berne Convention, as a part of the 1967 Stockholm Conference.[20] A working Group was established to explore options within the Convention to deal with folklore works.

Article 2(1) of the Berne Convention requires an identifiable author to be included within a

[16] WIPO, 'Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)' https://www.wipo.int/treaties/en/ip/Berne/summary_Berne.html; "Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the principles of national treatment, automatic protection and independence of protection also bind those World Trade Organization (WTO) Members not party to the Berne Convention. In addition, the TRIPS Agreement imposes an obligation of "most-favored-nation treatment", under which advantages accorded by a WTO Member to the nationals of any other country must also be accorded to the nationals of all WTO Members. It is to be noted that the possibility of delayed application of the TRIPS Agreement does not apply to national treatment and most-favored obligations."

[17] WIPO, *'Tunis Model Law on Copyright'* (1976) Copyright 165. "The text of the Tunis Model Law can also be found in this article, as well as a commentary by the Secretary of UNESCO and the International Bureau of WIPO. Adopted to provide developing countries with a text of a model law to assist them when framing or revising their national copyright legislation and to facilitate their adhesion to the Berne Convention and the Universal Copyright Convention, which required that their domestic law conform to the Convention rules."

[18] *Tunis Model Law On Copyright* for developing countries (1976), United Nations Educational, Scientific and Cultural Organization (UNESCO) and World intellectual Property (WIPO). Section 4, "The two basic features of the Model Law are as follows: (i) its provisions are compatible both with the 1971 Paris Act of the Berne Convention (" the Berne Convention ") and with the Universal Copyright Convention as revised in 1971 (" the Universal Convention "); (Ii) its provisions allow for the Anglo-Saxon or the Roman legal approach of the countries for which it is intended."

[19] s.18(iv) as 'all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.'

[20] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Centre for Commercial Law Studies, Queen Mary College and Kluwer: London, 1987) 314.

list of literary or artistic works, whereas folklore is both in the public domain and of unknown author.[21] As an outcome of definition failure, throughout the 80s and 90s, cultural rights began to take center stage in from a 'natural rights' position. Over time the use of the term 'folklore' was replaced by the term Traditional Cultural Expression (TCE) to attempt to develop a level of technical legal precision that would assist Indigenous communities protect their cultural heritage from exploitation.[22] The technical difficulties of definition required that the word 'folklore' was not used, rather general principles were applied.[23].

The tension between an international legal framework and the need for implementation in domestic law means that the legal protection of Traditional Cultural Expression (TCE) is conceived of within domestic copyright law. The first country to implement domestical law for the protection of TCE was Tunisia in 1966.[24] The 1967 Stockholm Diplomatic Conference for the Revision of the Berne Convention for the Protection of Literary and Artistic Works ('the Berne Convention') put refining the definition of TCE within regional copyright systems as a function of international trade obligations (treaties).[25]

Model Law Definitions

The impact of globalisation and the return to independence of colonies in the developing world required that text for model law was developed to enable national copyright legislation

[21] WIPO Records, vol. II, 917 (Minutes of the Main Committee I). Records Of The Intellectual Property Conference Of Stockholm (June 11 To July 14, 1967).
[22] Lily Martinet, 'Traditional Cultural Expressions and International Intellectual Property Law' (2019) 41 (1) *International Journal of Legal Information* 6.
[23] [23] WIPO Records, vol. II, 917 (Minutes of the Main Committee I). Records Of The Intellectual Property Conference Of Stockholm (June 11 To July 14, 1967) 1172-3. The proposal was subject to the following principles:

(i) the work is unpublished;
(ii) the author is unknown;
(iii) there is every ground to presume that the author is a national of a country of the Union;
(iv) if these three conditions are fulfilled, the legislation of that country may designate a competent authority to represent the author;
(v) the competent authority is entitled to protect and enforce the rights of the author in all the countries of the Union;
(vi) (vi) if such an authority is designated by a country, that country shall notify WIPO by means of a declaration in writing giving full information concerning the authority thus designated; WIPO shall then communicate this declaration to all other countries of the Union.

[24] *Tunisian Law on Literary and Artistic Property of 15 June 1889* replaced by Law No. 66-12 (The Law of 1966). Replaced by the Law No. 94-36 in 1994 ('the Law of 1994).
[25] WIPO, Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (WIPO: Geneva, 1971) vol. I, 690–1 (Doc. S/73) and vol. II, 877 (Minutes of Main Committee I).

to participate in global trade Berne Convention obligations associated to copyright.[26] The Model Law explicitly included *folklore* in the list of protected works, going further than the Berne Convention.[27] Model Law requires the protection of national folklore works against exploitation.[28] Martinet argues that Model Law was limited in practice and suffered poor take-up because developing nations saw greater options through signing a trade treaty as the more robust instrument of international law.[29]

The Tunis Model Law contains a definition of *folklore* in section 18(iv).

> ″… means all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.″

Fixation Law

Section 2(1)(iii) provides that works derived from folklore are protected as original works and Section 6 (2) grants protection for an unlimited time. A review by UNESCO and WIPO advised that exceptions are made for the rule of fixation which was introduced in section 5 as moral rights.[30] The fixation rule does not apply by the very nature that cultural heritage is often passed from one generation to another in oral stories and/or dance that have not been recorded.[31] The tension between what was required by the Model Law, recognition of intergenerational transfer of cultural stories and techniques, and what could be delivered by the 'fixation' rules remained a problem due to the tension between western centric individual rights based law and the operation of communal obligations valued by Indigenous People's in their cultural expressions.

[26] WIPO, 'Tunis Model Law on Copyright' (1976) *Copyright* 165. The text of the Tunis Model Law can also be found in this article, as well as a commentary by the Secretary of UNESCO and the International Bureau of WIPO.
[27] s 1(3).
[28] s 6.
[29] Ibid.
[30] WIPO (n 25), 167
[31] Section 5.

Economic Measures

The Berne Convention resulted in pressure for economic measures to be embedded into 'hard' law provisions to combat the risk of commercial exploitation. Section 17 sets out rules requiring 'a work that has fallen into the public domain may be used without restriction, subject to the payment of a fee calculated as a percentage of the receipts produced by the use of the work or its adaptations'.[32] The intent of these sections is to establish a form of state owned and operated regulation of national folklore.[33]

Berne Convention Article 2 (1) requires copyright protection in domestic states for 'literary and artistic works.'[34] Article 2 (3) incorporates "translations, adaptations, arrangements of music and other alterations of literary or artistic works, which shall be protected as original works, without prejudice to the copyright of the original work. Many TCEs would fall within this subject matter of copyright including traditional music, plays, stories, dance, rituals."[35] However, the fixation rule attaches to the individual not the collective and limits the scope of the protection afforded. Copyright protection gives rise to economic rights to prevent the reproduction, adaption and control the commercialiation of TCEs. State based Copyright regimes incorporate moral rights that protect authenticity and misappropriation of TCEs. Copyright law provides for royalties for use and compensation for commercial misuse. These rights potentially allow communities to benefit from economic development.

[32] WIPO (n 25), 179.
[33] Section 17 states, "The user shall pay to the competent authority . . . percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore. The sums collected shall be used for the following purposes: (i) To promote institutions for the benefit of authors [and of performers], such as societies of authors, cooperatives, guilds, etc. (ii) To protect and disseminate national folklore."
[34] According to Article 2(1) of the Berne Convention, "[t]he expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science".
[35] WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (WIPO: Geneva, 2003) 35.

Cultural Rights

As the influence of a natural rights, aligned to *cultural rights*, within a human rights framework of the United National Council grew, so did the role of the WIPO to influence a global and unified agenda in the development of an international IP law framework. The capacity to influence domestic law that would be introduced to meet trade treaty obligations (particularly TRIPS) provided the momentum. The General Assembly of WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2000, to examine the intellectual property issues arising "related to matters of access to genetic resources, the protection of traditional knowledge and expressions of folklore."[36] The ultimate role of the WIPO is to mandate an international legal instrument to protect traditional cultural expressions[37] and traditional knowledge.[38]

The terms "traditional cultural expressions" and "expressions of folklore" are used as interchangeable synonyms, where 'the use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms and does not affect or limit the use of other terms in national or regional laws.'[39] Traditional cultural expression is a subset of cultural expression as a creative outcome of individuals groups and societies.[40] The expression takes on a symbolic meaning of the cultural values in the community. An example of this in Australia is the 'Wandjina' of the Kimbelrey region, the Worrora, Wunumbal and Ngarinyin Aboriginal peoples, The depiction of the Wandjina is a sacred creation spirit and the source of Aboriginal lore and culture of

[36] WIPO uses "traditional cultural expressions" and "expressions of folklore" as interchangeable synonyms, see WIPO, ICG, Glossary of Key Terms Related to Intellectual Property and GR, TK and TCE, WIPO/GRTKF/IC/37/INF/7, July 5, 2018. However, the occurrence of "expressions of folklore" has dropped overtime, as reference to "folklore" is thought to carry a negative connotation.
[37] WIPO/GRTKF/IC/41/INF/7 June 8, 2021, p.43.
[38] WIPO, IGC, IGC Mandate 2018/2019, 2017. https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018- 2019.pdf.
[39] WIPO, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, WIPO/GRTKF/IC/37/7 (July 2018), p.3.
[40] Art. 4.3 of the CCD. The Working Group proposed a provision recommendation.
(a) "In the case of unpublished work where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union."

these people.[41] Cultural content is the source of the connection to copyright law in Australia as traditional cultural expression, and the overlap with human rights law through the drafting of the UNDRIP and CCD. It is the direct connection to cultural belief systems and identity that is a distinguishing factor between traditional cultural expression and traditional knowledge, and intangible cultural heritage.

Collective Ownership

Martinet[42] argues that cultural content assists to "delineate traditional cultural expressions from intangible cultural heritage", where "The Convention for the Safeguarding of the Intangible Cultural Heritage (2003) defines intangible cultural heritage as "practices, representations, expressions, knowledge, skills […] that communities, groups and, in some cases, individuals recognise as part of their cultural heritage."[43] It is important to accept that cultural heritage is transmitted by people connected to land.[44]

Traditional cultural expressions are directly connected to identity and form the basis of a collective cultural sensibility – a community. Traditional cultural expressions are not owned by individuals because they express the identity of the collective and therefore is an essential part of the cultural heritage of the community. Therefor traditional cultural expressions are both collective and anonymous. It is these qualities that put traditional cultural expression in conflict/tension with intellectual property laws, which primarily reflect the individual rights holders (although they can be jointly owned).

Art 27 of the *Universal Declaration of Human Rights* "recognises the interconnectedness of intellectual property with cultural and knowledge rights:

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

[41] Delwyn Everard, 'Safeguarding Cultural Heritage – the Case of the sacred Wandjina', (WIPO Magazine, December 2011) http://www.wipo.int/wipo_magazine/en/2011/06/article_0003.html
[42] Martinet (n 22).
[43] Art. 2.1 of the Convention for the Safeguarding of the Intangible Cultural Heritage.
[44] Ibid 10.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Article 27(2) above identifies the argument that individuals should benefit from their work as the Lockean philosophical underpinning of Western intellectual property rights.[45] This source of philosophy is very influential in Western domestic copyright law regimes to the extent that it limits a similar argument applying to the communal rights of Indigenous peoples over their knowledge and cultural expressions.[46]

Intergenerational Knowledge Transfer

Traditional cultural expressions are transferred from one generation to another and often passed through family lines.[47] The intergenerational transfer to knowledge connected to identity and expression distinguishes traditional cultural expressions other types of cultural expression. The process of transmission creates a deep connection through generations and the strength of these bonds is ultimately why Indigenous people fight for the recognition of culture as part of a response to the development of international intellectual property law. The impact of globalisation has been felt as traditional cultural expression is commodified and misappropriated in multiple examples as follows.

Globalisation

Indigenous peoples cultural expression is important cultural heritage, that governments seek to protect in an international market-place. The mis-use of traditional cultural expression is sometimes conceived of as 'public domain' and therefore open market access without seeking consent to use, which not only impacts on the Indigenous Community of the country, it devalues the national brand. In Australia, Professor Marcia Langton argues that Aboriginality is trivialized and became 'kitsch' in association with tourism campaigns and the tourist market cheapening deep cultural protocols associated with traditional cultural expression derived from dreamtime stories.[48]

[45] John Locke, *Two Treatises on Government* (Butler, 1821) Ch.5, 27.
[46] Natalie Stoianoff, 'Navigating the Landscape of Indigenous Knowledge — A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23, 35.
[47] Horatio Gordon Robley, *Moko; or, Maori tattooing* (Chapman & Hall, 1896) 2.
[48] Marcia Langton, 'What do we mean by wilderness? Wilderness and terra nullius in Australian art' (1996) *The Sydney Papers* 11, 11.

The challenge in Australia is now widely recognised at a global level. Some examples are outlined below. The impact of cultural appropriation requires intellectual property law to pay attention to the nature and form of protection provided within a social and historical context.[49]

TaMoko, French fashion designer Jean-Paul Gautier

- Used the traditional Moko tatoo design of the Maori people in New Zealand as part of an advertising campaign, distorted and mutilated, without referencing the source nor offering any benefit sharing. The tattoo has deep cultural significance to Maori people and the use of the mark in this way is deemed offensive by many.[50]

Nike and Polynesian Tattoos

- Commercialised a women's sportwear line of Polynesian tattoos that are reserved for men. The misappropriation and cultural pillaging which went against customary rules for regulating gender created a storm that resulted in the Nike being forced to withdraw the line of sportwear.[51]

Mike Tyson Eye Tattoo – The Hangover II

- An American tattoo artist acquired the copyright design for Mike Tyson's eye tattoo as an outcome of making the work on Mike Tyson's face, despite the design being inspired by the New Zealand traditional Cultural Expression of TāMoko.[52] The tattoo artist has no relationship to New Zealand or Maori culture and did not seek permission. The artists had a registered copyright of the design. In Hangover II a character gets an exact copy of the Mike Tyson tattoo while drunk. The tattoo artist was able to successfully submit a breach of copyright against Warner Bros for

[49] Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke University Press, 1998) 7; Lily Martinet, 'Traditional Cultural Expressions and International Intellectual Property Law' (2019) 41 (1) *International Journal of Legal Information* 6.
[50] *Cheeky French steal moko* Online report (January 31, 2009) http://www.stuff.co.nz/life-style/44467/Cheeky-French-steal-moko
[51] *Outrage over Nike's use of cultural icon* ABC online (15 August 2015) https://www.abc.net.au/news/2013-08-15/an-samoa-nike-tattoo-row/4888662; Miranda Forsyth and Susan Farran, *Weaving Intellectual Property Policy in Small Island Developing States* (Cambridge: Intersentia, 2015) 231–232.
[52] Linda Nikora et al, 'Renewal and Resistance: Moko in Contemporary New Zealand' (2007) 17 *Journal of Community & Applied Social Psychology* 479.

copying the tattoo in the movie without permission.[53] In theory, the tattoo artist would now be able to sue a traditional Maori TaMoko artist.[54]

Conclusion

Globalisation and colonialization are about power. Who has power the power of a cultural and creative voice protected and who doesn't.[55] Examining where the benefits flow for original work is central to understanding where the power sits. Intellectual property rights enable the rights holders to protect their economic and moral rights and to defend against misappropriation balanced against artistic expression that encourages dynamic cultural exchange?[56]

Balance is needed not exploitation. The impact of commercial exploitation through a cheapened tourist market has assisted in developing the case law to a point. The issue is not one of whether reform is required. Who is protected by the law through an ability to exert rights and who is not? It is more a case on the decision of a path to take.

[53] *Whitmill v. Warner Bros. Entm't, Inc*., n°4:11-cv-00752 (E.D. Mo. Apr. 28, 2011).
[54] Matthew Beasley, 'Who owns your skin: intellectual property law and norms among tattoo artists' (2012) 8 *Southern California Law Review*, 1148.
[55] Linda Brennan and Theresa Savage, 'Cultural consumption and souvenirs: an ethical framework' (2012) 2 *Arts Marketing: An International Journal* 144, 150.
[56] Ibid.

3. COPYRIGHT LAW

a) Indigenous Art Market – Protection of Individual Rights

The Aboriginal art industry in Australia is estimated to be worth $300m.[57] There has been growing concern at the availability of inauthentic products and merchandise for sale across Australia.[58] There are many cases of Indigenous designs being reproduced without permissions resulting in economic loss and where there is cultural misappropriation, great offence resulting in urgent calls for action by Indigenous people.[59] A number of important Australian cases have assisted in defining the extent to which copyright law introduced in alignment with meeting Berne Convention trade agreements operates to protect Australia's TCE.

It is generally recognised that current intellectual property laws in Australia do not adequately protect cultural expression and knowledge.[60] Copyright law in Australia has an alienating impact on Indigenous people.[61] Commentators argue that the individual property rights of a western legal system "allow for the exploitation of Indigenous knowledge by providing monopoly property rights to those who record or write down knowledge in a material form."[62]

b) Case Law

The common law in Australia recognised traditional aboriginal land law for the first time in *Mabo*[63] and required a legislative response to validate elements of traditional aboriginal

[57] The Parliament of the Commonwealth of Australia. *Report on the impact of inauthentic art and craft in the style of First Nations peoples.* House of Representatives Standing Committee on Indigenous Affairs. (Tabled December 2018).
[58] Ibid.
[59] Megan Davis, 'A culture of disrespect: Indigenous peoples and Australian public institutions' (2006) 8 *University of Technology Sydney Law Review* 135, 135.
[60] Terri Janke, *True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self Determination into practice* (Doctor of Philosophy (by Compilation) of The Australian National University) 2019), v.
[61] Ibid, 7.
[62] Terri Janke, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property' (2005) 36(2) *Australian Academic and Research Libraries* 95, 96.
[63] *Mabo and Ors v State of Queensland* (1992) 175 CLR 1.

law.[64] Reproductions of Aboriginal designs that are embedded with deep religious beliefs and cultural identity on products for a tourist market of tea towels, t-shirts and wall hanging are highly problematic. In *Foster v Mountford*[65] an anthropologist collected information from Pitijantjatjara people about there life and secret stories in the 1940s and later sought to publish a book (1976). Pitjantjatjara Council succeeded on the basis of a breech of confidence. The remedy of an injunction was granted on the basis of deep cultutyral significance. Breach of confidence law is narrowly construed and cannot be relied upon to prevent the unauthorised reproduction of Aboriginal *designs* existing in the public domain.

Bulun Bulun v Nejlam Pty Ltd [66]

The case of reproduced 'At the Waterhole' TCE on T-shirt designed by an Aboriginal artist. The artist implemented a copyright infringement case and breaches of the Trade Practices Act 1974 in the Federal Court in Darwin. [67] The Aboriginal artist, Mr Bulun Bulun stated that the works were original and culturally significant to the extent that unauthorised reproduction caused him great suffering.[68] The matter was settled before trial. T-shirts were withdrawn from sale and damages paid. The case is important for the recognition of Aboriginal Artists through the under-takings provided to the court as formal recognition of the existence of those rights, despite a precedent not being set.[69]

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[64] Michael Blakeney, 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' (1995) 9 *European Intellectual Property Review* 442.
[65] (1976–78) 29 FLR 233.
[66] *Bulun Bulun v Nejlam Pty Ltd*, Federal Court of Australia, Darwin, 1989 (unreported). On this case, see Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 11 *European Intellectual Property Review* 346–55.
[67] *Copyright Act 1968* (Cth)
[68] Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 11 *European Intellectual Property Review* 346, 347. "[I] never approved of the reproduction of any of my artworks on T-shirts, and never approved the mass reproduction of any of my artwork, other than the reproduction of photos of my works in art books … Had [the respondents] sought my permission, I would not have given it. My work is closely associated with an affinity for the land. This affinity is at the essence of my religious beliefs. The unauthorized reproduction of artworks is a very sensitive issue in all Aboriginal communities. The impetus for the creation of works remains their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs … It is also the main source of income for my people, both in my tribe and for people of many other tribes … The reproduction has caused me great embarrassment and shame, and I strongly feel that I have been the victim of the theft of an important birthright. I have not painted since I learned about the reproduction of my artworks, and attribute my inactivity as an artist directly to my annoyance and frustration with the actions of the respondents in this matter."
[69] Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 11 *European Intellectual Property Review* 346–55, 347.

Yumbulul v Reserve Bank of Australia.[70]

The Reserve Bank of Australia introduced a commemorative $10 banknote that included a reproduction of elements of a design of a Morning Star Pole created by Terry Yumbulul, an Aboriginal artist. The Reserve Bank held a sub-licence of the copyright work granted to by the Aboriginal Artists Agency Ltd, who had an exclusive licence from the artist. The Indigenous community was deeply offended by the use of the Morning Star Pole design due to the role of poles in Aboriginal community to commemorate the death of respected elders, and inter-clan relationships. People who are charged with making poles under Aboriginal lore are required to ensure that poles are not reproduced in any way that offends cultural obligations. The artist bought a copyright infringement action for an unauthorised reproduction of his artistic work against the Aboriginal Artists Agency Ltd and the Reserve Bank of Australia.

He stated that he did not understand the liscence agreement and that it was invalid due to false, misleading or unconscionable conduct.[71] The Court found the Morning Star Pole to be an original work within the definition of the Copyright Act and the copyright had been validly assigned not by mistake or mis-informed.[72] The case highlighted the mis-match between the Australian copyright system and the protection of artistic work by indigenous people, that incorporates traditional cultural expression, from commercial exploitation, especially works that are derived from community storytelling, lore and traditions.[73]

Judge French specifically highlighted that "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."[74] He highlighted the role of the law reformers and the legislators to enact statutory recognition of Aboriginal communal interests where the material is sacred.[75]

[70] *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.
[71] Ibid 481.
[72] Ibid 484.
[73] Ibid 482.
[74] Ibid 490.
[75] Ibid 492.

***Milpurrurru and Ors v Indofurn Pty Ltd and Ors*[76]**

A Federal Court case that considers the extent to which Australian copyright law will protect the unauthorised reproduction of Aboriginal design. It is important for the exploration of the appropriation of culturally significant motifs that would fall withing the developing understanding of TCE within international law. It is the first case post *Mabo* to explore cultural rights for Indigenous people in Australia.

A series of carpets were manufactured in Vietnam that reproduced the works of a number of established Indigenous artists (three living and five deceased estates) and imported by Indofurn.[77] The National Gallery of Australia (NGA) along with other museums and commissions, owned the artworks which were exhibited nationally and internationally. A publication of the works had been produced with the artists permission by the National Gallery of Australia.[78] The carpets were labelled with a tag that identified the design as Australian Indigenous artists and royalties being paid the artists.[79] No agreement was in place nor were royalties being paid.

The artworks represented Aboriginal dreamtime creation stories of each artist as the subject matter of the artworks. These stories are sacred and significant for these people and their cultural heritage. There is strict Aboriginal lore in place to protect custom and pass on to future generations in the proper way. The artwork tells these stories. Deep offence is created by the mis-representation of these stories and punishment to those who breach this trust inflicted.[80] The artist is held responsible for any breach that has occurred, despite to giving permission. Punishment could include being outcast from the community or refused permission to paint the story in the future.

A successful action of copyright infringement was taken by the artists against *Indofurn* that

[76] (1994–95) 30 IPR 209.
[77] Ibid 209.
[78] Ibid 213.
[79] *Milpurrurru and Ors v Indofurn Pty Ltd and Ors* (1994–95) 30 IPR 209, 248. "These unique wall hangings and rugs have been designed by Aboriginal artists from areas throughout Australia. These artists are paid royalties on every carpet sold … As carpet weaving is not a tradition of the Aboriginal people, the rugs are produced in Vietnam where we can combine the artistic skills of the Aboriginal people with the weaving traditions of the Vietnamese … [W]e have achieved a blending of the talents of these people to produce original artistic creations."
[80] Ibid 214.

stated their rights had been violated under the Copyright Act 1968. In assessing damages Judge von Doussa highlighted the infringement of copyright law in Australia did not recognise the kind of rights that exist for artists under Aboriginal law and custom. There was no intent to commercialise the works therefore the action of *Indofern* did not cause economic loss and wouldn't be accounted for the in the assessment of damages.

The win as a hollow victory for the recognizing traditional cultural expression. In copyright law the measure of damages is related to the depreciated value of the copyright. The award of damages was modest to reflect loss of reputation and loss of 'freshness' of the artwork.[81] In obiter it was stated that damages extended beyond the commercial for Indigenous artists and had caused personal anguish and risk of fractured community relationships, though no damages attributed.

c) Australian Case Law Applied to Traditional Cultural Expression

Milpurrurru recognised the extent to which copyright law may assist in preventing the unauthorised reproduction of Aboriginal designs derived as traditional cultural expression. *Bulun Bulun v Nejlam Pty Ltd* was settled out of court and did not lay down precedent though did provide helpful obiter and the authority of court under-takings to signal a level of protection exists for TCE (an implied victory).

Yumbulul v Reserve Bank of Australia, supports a view that Australian copyright law does not recognise communal ownership and subsidiary claims to traditional cultural expressions in the reproduction and use of culturally significant dreamtime creatin stories. Law reform and legislation was hinted at to fill these gaps for community owned IP for TCEs, by Judge Robert French in obiter.

Milpurrurru accepted copyright ownership existed for TCEs, that was breach and damage occurred beyond commercial interest (distress, embarrassment and anguish) for the individual artist and Indigenous community. In *Bulun Bulun* the court recognised the existence of a

[81] Ibid 243.

fiduciary relationship between the Aboriginal artist and community members as a collective, that imposed director duties to take care and due diligence so the TCE cannot be exploited.

d) The Past

On August 5, 2021 The Productivity Commission in Australia launched an inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts:

> "to examine the value, nature and structure of markets for Aboriginal and Torres Strait Islander arts and crafts, and policies to address deficiencies in these markets.[82] The scope of the inquiry includes both regulatory and non-regulatory responses to the problems in the relevant markets, including education and social marketing measures, labelling and other certification arrangements, industry codes and the role of existing consumer **and intellectual property laws**.*"*[83]

A 2018 Report *on the impact of inauthentic art and craft in the style of First Nations peoples* highlighted the devastating impact of the fake Aboriginal art market to undermine Australian cultural heritage and economic stability of the Indigenous communities to realise sustainability.[84] Australia has a long history of implementing Inquiries that result in a lack of acting on recommendations. A brief overview is provided as a point of reference for a comparative analysis to ask the question – why a lack of actions on multiple recommendations for copyright law reform from outside and within the judiciary (though obiter).

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[82] Launched by Hon Josh Frydenberg MP, pursuant to Parts 2 and 4 of the *Productivity Commission Act 199*. https://www.pc.gov.au/inquiries/current/indigenous-arts/terms-of-reference

[83] Ibid 3.1.

[84] Commonwealth of Australia *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (December 2018). ph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report

1974

- *Foster v Mountford & Rigby Ltd* [85] the first time copyright law was explored as a mechanism to protect sacred cultural expression. However, an injunction achieved on the basis of breach of confidence.
- A working party was established in 1974 by The Commonwealth government to examine the protection of Aboriginal folklore.[86] 'Folklore' is the terminology imported from international contexts and later concern is raised about the implied colonisation of culture as something less and inferior (so the term was generally dropped in a legal sense).[87]

1981

- Report handed down that recommended the introduction of the Aboriginal Folklore Act to protect Indigenous cultural material and art against misuse. The recommendation was not acted on.[88]

1986

- Australian Law Reform Commission (ALRC) study[89] on the recognition of Aboriginal customary laws that recommended a functional methodology in the recognition of Aboriginal customary law and supported sui generis measures for "the use of sacred secret material other than in accordance with custom, secondly, the mutilation, destruction debasement or export of items of folklore, and thirdly, the use of items of folklore for commercial gain without payment of remuneration to traditional owners."[90] No action has been taken.

1994

- Issues Paper released to explore the copyright regime and the protection of Indigenous arts and cultural expression,[91] which saw the establishment of an Inter-Departmental Committee on Indigenous Arts and Cultural Expression to evaluate and consider

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[85] (1976) 14 ALR 71.
[86] The working party's findings are recorded in the Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra, 4 December 1981).
[87] Michael Davis, *Indigenous Peoples and Intellectual Property Rights* (Research paper 20, Social Policy Group, 1996-1997) 19-20.
[88] Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra, 4 December 1981).
[89] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ('*ALRC Report*').
[90] Ibid 470.
[91] Attorney-General's Department, 'Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' (Issues Paper, Commonwealth of Australia, October 1994).

legislative and policy reforms. A 1996 change in government disbanded the reform agenda.

1997-98

- Aboriginal and Torres Strait Islander Commission ('ATSIC') established an Indigenous Reference Group on Indigenous Cultural and Intellectual Property ('IRG').
- ATSIC funded the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') to examine reforms to protection and recognise Indigenous Cultural and Intellectual Property (ICIP).
- *Our Culture Our Future* Report released that recommended sui generis legislation to protect Indigenous cultural and intellectual property.[92]
- The Report has been influential in setting an explicit framework down ICIP in Australia, although there has been no intellectual property legislative reform of Australia's laws.

1999

- National Indigenous Arts Advocacy Association ('NIAAA') introduced a national certification programme 'Label of Authenticity' for Indigenous art.[93] Marks were registered under the *Trade Marks Act 1995* (Cth). The NIAAA was disbanded in 2002 and the authenticity model with it in preference to local community owned methods of authenticity.

90s Case Law

- Three influential copyright cases highlight the extent of the challenge Indigenous people face accessing Western intellectual property laws to protect Indigenous art:
  1. *Yumbulul v Reserve Bank of Australia;*[94]
  2. *Milpurrurru v Indofurn Pty Ltd*; [95]
  3. *Bulun Bulun v R & T Textiles Pty Ltd.*[96]

[92] Terri Janke, AIATSIS and ATSIC, *Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) ('*Our Culture Our Future*').
[93] Aboriginal Education Board of Studies NSW, *The Label of Authenticity and the Collaboration Mark* http://ab-ed.boardofstudies.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/protection-the-issues/the-label-of-authenticity-and-the-collaboration-mark .
[94] [1991] FCA 332; (1991) 21 IPR 481.
[95] [1994] FCA 975; (1994) 54 FCR 240.
[96] [1998] FCA 1082; (1998) 86 FCR 244.

- The theme of the case law in Australia is that Western copyright law protects the *individual* rights of Indigenous artists, and while recognising communal interests does not protect the *community* held rights of Indigenous communities.[97] Community held rights over images or stories are not found in copyright law. The law recognises a fiduciary relationship between artist and community exists, so the action can only be against another community member and their 'duty of care' not the 'actual' party who mis-uses without permission.[98]

2003

- Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth) introduced to recognise a communal right and did not proceed.[99]

2006

- The Law Reform Commission of Western Australia's report ('*LRCWA Report*') [100] and a related background paper highlighted the failure of Western "intellectual property laws to protect the intellectual and cultural products of Indigenous people based on the divergent world view related to ownership." [101]
- Roy highlights the "fundamental differences and irreconcilable worldviews between Indigenous and non-Indigenous peoples on cultural and intellectual property form the basis of 131 recommendations."[102]
- No recommendations have been enacted based on the constitutional framework in which intellectual Property law operates in Australia as a legislative power within the commonwealth.[103]. The Commonwealth is required to act.
- States have power to legislate protection through environmental law and the context of natural resources.

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[97] Kimberlee Weatherall, 'Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs' (2001) 64 *Modern Law Review* 215.
[98] *Bulun Bulun v R & T Textiles Pty Ltd* [1998] FCA 1082; (1998) 86 FCR 244. Kirby J's in dissent obiter in Western Australia v Ward (2002) 213 CLR 1, 247–8, identified the recognition of intellectual property connected to incidents of native title. Kirby J commented "it must also be accepted that the established laws of intellectual property are ill-equipped to provide full protection' of Indigenous knowledge and culture." at 248.
[99] Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27 *University of New South Wales Law Journal* 585.
[100] Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture,* Final Report No 94 (2006) ('*LRCWA Report*').
[101] Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law', (*LRCWA Report*, Background Paper No 12, January 2006) 451–506.
[102] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 Adelaide Law Review 315, 351–2; WIPO Intergovernmental Committee, Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain, 5th session, (9 July 2003).
[103] *Commonwealth Constitution* s 51(xviii).

2009

- Terri Janke proposes a National Indigenous Cultural Authority was proposed "to facilitate consent and payment of royalties; to develop standards of appropriate use to guard cultural integrity, and to enforce Indigenous cultural and intellectual property rights."[104] No progress.

2018

- Report on the impact of inauthentic art and craft in the style of First Nations peoples.[105]

2021

- Productivity Commission launch an inquiry "into the nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in these markets;" and the Minister for Indigenous Australians, the Hon Ken Wyatt AM MP said, "We know that a significant and increasing proportion of products in the 'style' of Aboriginal and Torres Strait Islander arts and crafts that are sold in Australia are imitations, which mislead consumers and provide no economic benefit to their communities." [106]

e) The Future

Anderson argues that case law and judicial developments aligned to Indigenous culture and intellectual property through copyright recognition (originality) at a point in time put Australia in a leading place globally.[107] She argues the judiciary can only go so far in developing case law before the legislators need to step-in and Australia seems to have lost it leading position by inaction, where Australian domestic law remains disjointed and unable to provide robust recognition of Indigenous cultural expression and associated rights, despite

[104] Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company Pty Ltd, 2009) 6.
[105] House of Representatives Standing Committee on Indigenous Affairs (Cth), *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (Final report, December 2018).
[106] Productivity Commission, Media Release, Productivity Commission to investigate Aboriginal and Torres Strait Islander Visual Arts and Crafts, (Thursday 5 August, 2021). https://minister.infrastructure.gov.au/fletcher/media-release/productivity-commission-investigate-aboriginal-and-torres-strait-islander-visual-arts-and-crafts?
[107] Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill', (2004) 27 *UNSW Law Journal* 585, 589.

numerous recommendations from law reform from multiple inquiries over time as outlined above.

Indigenous people seek self-determination.[108] The *Our Culture Our Future* report highlighted that self-determination "the right to own and control Indigenous cultural and intellectual property."[109] The term Indigenous Culture Intellectual Property (ICIP) has developed as an ad hoc term that sets a framework for Indigenous communities to contract the gaps that exist through implementing protocols and 'soft law' guidelines. Terri Janke has been a main proponent of this perspective since the late 90s and over the course of multiple reports.[110] Janke believes that the right to control your own destiny as an Indigenous community is intrinsically linked to control over cultural expressions and knowledge, whatever this looks like in a western legal system.[111]

Janke's view aligns with Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which states that Indigenous people have the right to self-determination and underpins many of Australia's international obligations to human rights treaties. Australia has endorsed UNDRIP in 2009, yet no new domestic laws have been introduced. Australia is currently dependent on 'soft law' provisions and the growing influence if ICIP protocols. [112]

Hard law provisions are not in existence in Australia to meet these international obligations within existing copyright legislation and the ICIP Protocols are used to limit access to funding through government bodies for people who do not comply with national expectations in copying Indigenous art and themes.[113] Indigenous communities in Australia require the

[108] Larissa Behrendt, 'Indigenous Self-Determination in the Age of Globalisation' (2001) 3 *Balayi: Culture, Law and Colonialism* 1, 2.
[109] Terri Janke and Michael Frankel and Company, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report prepared for the Australian Institute for Aboriginal and Torres Strat Islander Commission, 1998), xx.
[110] Terri Janke and Peter Dawson, *New Tracks: Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System* (Issues Paper commissioned by the Australia Council for the Arts, Aboriginal and Torres Strait Islanders Arts Board, 31 May 2012).
[111] Janke (n 62) 31.
[112] Ibid 32.
[113] Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2016) 8(27) *Indigenous Law Bulletin* 17, 18.

opportunity to legally exert their cultural rights and maintain cultural integrity over expression and identity.[114]

Conclusion

Over twenty years of reports and case law have highlighted some major challenges in Australia for the protection of traditional cultural expression of Indigenous artists. There has been a failure to implement 'hard law' at the same time as a trend towards introducing 'soft law' ICIP guidelines to deter exploitative behaviors.[115] The challenges in Australia mirror the global trend for Indigenous communities to seek greater protection from their governments in addressing the economic and social impacts of colonialisation. Australia did copyright law reform in the form of introducing a moral rights regime in 2000.[116]

[114] Kimberley Weatherall, 'Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs' (2001) 64(2) *Modern Law Review* 215, 222.
[115] Australia Council, *Protocols for using First Nations Cultural and Intellectual Property (ICIP) in the Arts,* (Dr Terri Janke and Company. The principles used in this document are based on the True Tracks® Principles, September 2021).
[116] *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth).

4. MORAL RIGHTS

a) Cultural Integrity

Terri Janke argues a case for the use of the term *cultural integrity* as a descriptor for maintaining the cultural significance of traditional cultural expressions.[117] Cultural integrity is maintained by Indigenous people through diverse cultural practices. The role of copyright law is to protect against derogatory and demeaning treatment, where the "unauthorised or inaccurate reproductions of Indigenous art can cause deep offence and damage to an artist and his or her community."[118] Copyright law has achieved some protection of Indigenous artists in recognizing a copyright exists as 'original' work to be protected.[119]

The harm is done to Indigenous artists from misappropriate and derogatory, not limited to the economic damage of a lost revenue stream, and considered more importantly the loss of reputation in the community from other members of the Indigenous community who have given permission to tell the story.[120] It is important to note that the primary purpose of the Copyright Act is to protect the exclusive economic rights of an *individual creator*, so no provisions were made for the protection of 'cultural integrity' as community owned, which is very much more important to Indigenous artists and their communities than the economic benefits.[121]

b) Political Background

Moral rights law in Australia had the capacity to protect cultural integrity with the introduction of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*

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[117] Terri Janke, *True Tracks: Respecting Indigenous knowledge and culture* (p. 37)(New South Publishing. Kindle Edition 2021).
[118] Cate Banks, 'The More things Change the More they Stay the Same: The New Moral Rights Legislation And Indigenous Creators' (2000) 9(2), *Griffith Law Review* 334, 334.
[119] *John Bulun Bulun v R & T Textiles Ply Ltd* (1998) 3 AILR 547.
[120] *Terry Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, 490. "Mr Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank. It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations. And it may also be that 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. But to say this is not to say that there has been established in the case any cause of action."
[121] Janke (no 109) 54.

(Cth). The Bill was introduced in draft format to address the challenge of community ownership in copyright law highlighted by the previous case law.[122]

Jane Anderson argues:

> "The Australian context, the emphasis on 'community' and communal ownership presents considerable difficulties for the utility of this approach. Simply put, the differing needs, articulations, political representations and definitions of Indigenous 'communities' within Australia seriously compromise a singular legislative solution to the issue of community rights."[123]

The Bill was not introduced. Michael Blakeney[124] traced the Australian government failure to respond to recommendations of the Myer Review and address the gaps of the current moral rights law in that "the right to integrity and prohibition of derogatory treatment of an artistic work embodying traditional ritual knowledge should be extended to include a treatment that causes cultural harm to the clan'[125] The Review highlights a failure of opportunity despite 20 years of recommendations so questions remain on the effectiveness of rights law in Australia to provide protection for the *cultural integrity* of traditional cultural expression, which currently will depend on the individual artists being able to asset those rights through the fiduciary duty held on trust to the community.[126] There is no stand-alone legislation.

c) What Are Moral Rights?

The French introduced the idea of a moral right for creatives called a *droit moral* (moral right),[127] recognizing the personality of the individual creator as a 'non-economic' right. English common law did not recognise moral rights, that are attached to the creator as an

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[122] *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, 490. French J, "Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works that are essentially communal in origin."
[123] Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) U*niversity of New South Wales Law Journal* 585, 587.
[124] Michael Blakeney, 'Protecting the Knowledge And Cultural Expressions Of Aboriginal Peoples' (2015) 39(2) *University of Western Australia Law Review* 180, 202-204.
[125] Report of the Commonwealth by the Contemporary Visual Arts and Craft Inquiry, Canberra, Commonwealth Government, 2002, 21, at 154.
[126] *Bulun Bulun v R & T Textiles Pty Ltd* (2002) 213 CLR 1, 60.
[127] Sam Ricketson, 'Moral Rights and the Droit de Suite: International Conditions and the Australian Obligations' (1990) 3 *Entertainment Law Review* 78,79.

outcome of the connection between the personality and the work as "an emanation or manifestation of his (the artist's) personality or his spiritual child."[128] Moral rights exist independently of the economic rights of copyright.[129] The unique personality of the creator is attached to a unique object and part if the artists personality exists in the world, deserving of being protected.[130]

Moral rights were introduced to Australian law as a concept imported from Europe in the development of the Berne Convention designed to protect intellectual property as part of global trade.[131] Common law countries believed the moral rights terms to be "too vague and incapable of conveying any clear meaning in British Law."[132] The language of *honor* and *reputation* derived from the common law of defamation rather than vague terms of *moral* or *spiritual rights*.[133] The possibility for injury from the exploitation of moral rights in a public domain is more than economic.[134] The positioning of moral rights within a common law system of defamation is important to note for the length of time it took to develop legislative reforms (from 1926 to the introduction of the legislation in 2000). Cate Banks describes this process in three stages: Foreignness,[135] International Obligations[136] and Economic Impact. [137]

Different countries have developed the protection of these rights according to the civil law

[128] Christopher Aide, 'A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right' (1990) 48 *University of Toronto Faculty of Law Review* 211.
[129] Sam Ricketson, (1987) *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986,* (The Eastern Press, 1987), 456.
[130] Martin Roeder, 'The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators.' (1940 53(4) *Harvard Law Review* 554.
[131] Cate Banks, 'Lost in Translation: A History Of Moral Rights In Australian Law 1928-2000 (Part Two)' (2008) 2 *Legal History* 99, 100; William Harrison Moore, Report of the Australian Delegate to the Parliament of the Commonwealth of Australia on the International Copyright Conference (1928) Command 31 Canberra at 6
[132] Ibid.
[133] Sam Ricketson, 'Moral Rights and the Droit de Suite: International Conditions and the Australian Obligations' (1990) 3 *Entertainment Law Review* 78,79.
[134] Mark Roeder, 'The Doctrine of Moral Right: A Study in the Law of Creators, Authors and Creators' (1940) 53 *Harvard Law Review* 557.
[135] Cate Banks, Lost in Translation: A History of Moral Rights In Australian Law 1928-2000 (Part Two), *Legal History* (2008) Vol. 2, 99-126, 100-106. Overcoming the resistance to a concept unknown to common law
[136] Ibid, p.106-110. growing global recognition of the need to introduce moral rights frameworks to meet international obligations of trade agreements and the Berne Convention that seeks to protect two rights: The right of authorship and the right of integrity; Sylvia Martin and Paul Bick, *Moral Rights for Artists: A Report Prepared for the Australia Council* (1983), 18.
[137] Ibid 110-125. Where the introduction of the Copyright Act predominantly addressed economic interests and therefore the Moral Rights amendments would be positioned within a legal framework preferencing economic interests; Fiona Macmillan, 'Copyright and Culture: A Perspective on Corporate Power' (1998) 3 *Media and Arts Law Review* 7, 81. This also helps to explain why debates about the subject and the object were sidelined.

and common law framework of each country.[138] Civil law countries generally have an existing framework for moral rights whereas common law countries like Australia tend to attempt to shoehorn moral rights into existing parallel frameworks like defamation.

d) Moral Rights in Australia

The *Copyright Amendment (Moral Rights) Act* 2000 (Cth) came into effect introducing a moral rights regime into Australia to meet international obligations through legislating domestic law.[139] Moral rights are considered an aberration of common law doctrine and a legal conceptual challenge remains in Australia, which in part explains the limited case law available to provide clarity.[140]

The amendment provided three separate rights within the *Copyright Act* 1968 as follows:

i. right to attribution;[141]
ii. right against false attribution;[142]
iii. right of integrity.[143]

Remedies include damages, declaratory relief, injunctive relief, orders for a public apology, and orders that false attribution or derogatory treatment be removed or reversed.[144] The Act applies to literary, dramatic, musical and artistic works and cinematograph film in which copyright subsists.[145] Moral rights are conferred only on individuals in addition to other rights the creator may have within the Copyright Act.[146] Consent provisions enable a creator to

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[138] Brian Carey. 'Moral Rights in Australian Law' (1992), Working Paper Number 4, The Macquarie Management Papers.
[139] Commonwealth of Australia (1959), Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth. Commonwealth Government Printer (The Spicer Report); Copyright Law Review Committee (1988) Report on Moral Rights, Australian Government Publishing Service; Attorney-General's Department (1994) Proposed Moral Rights Legislation for Copyright Creators -- Discussion Paper, Australian Government Publishing Service.
[140] Cate Banks, 'The More Things Change The More They Stay The Same The New Moral Rights Legislation And Indigenous Creators' (2000) 9(20) *Griffith Law Review* 334.
[141] s 193
[142] s 195 ACO
[143] s 195 AI
[144] s 195 AZA
[145] s 189.
[146] s 190

waive moral rights.[147]

e) Moral Rights - Indigenous Art

The unauthorsised use of Indigenous art impacts beyond the immediate economic because the creative output as traditional cultural expression is deeply linked to community and the permissions to tell certain stories in a particular way. The *Bulun Bulun* case was an original copyright action to raise the issue of a breach of integrity and the *Trade Practices Act 1974* (Cth) on the basis of the reproduction of his art-work on t-shirts sold without gaining permission.[148] The matters were settle with the manufacturer and retailer. However, the impact of the shame the artist felt as an outcome of this action put his community relationships in jeopardy over the longer term and impacted on his desire to continue to be an artist or have the permissions to tell the stories that was required from community.[149]

Johnny Bulun Bulun said:

> "This reproduction has caused me great embarrassment and shame and I strongly feel that I have been the victim of the theft of an important right. I have not painted since 1 learned about the reproduction of my art works ... My work is closely associated with an affinity for the land. This affinity is the essence of my religious beliefs. The unauthorised reproduction of art works is very sensitive issue in all Indigenous communities."[150]

Terry Yumbulul's copyright action against the Reserve Bank of Australia for use of the 'morning star pole' told a similar story of the artist stress and breakdown of Aboriginal community relationships due to significant community criticism from within the for agreeing to the reproduction of the pole on the bank.[151] It was argued that the artist did not fully understand the agreement when it was executed and the implications for his cultural obligations were not considered.

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[147] *Copyright Amendment (Moral Rights) Act 2000* (Cth) s195AW-AWB; s 195AXJ, s195AXK.
[148] *John Bulun Bulun v R & T Textiles Ply Ltd* (1998) 3 AILR 547.
[149] Craig Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14 *European Intellectual Property Review* 228.
[150] Ibid 228. An affidavit sworn by Johnny Bulun Bulun cited.
[151] *Terry Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

Recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin is not provided for by Australia's copyright law.[152] The harm is recognised but not accounted for.

Judge von Doussa in *Milpurrurru v Indofurn Pty Ltd* said

> "The evidence discloses the likelihood that the unauthorised reproduction of the artworks has caused anger and offence to those owners, and the potential for them to suffer humiliation and repercussions in their cultural environment."[153]

These cases establish that a violation of the integrity of the work, that is inappropriate and/or unauthorized use will cause harm to the Indigenous artist and their community.

f) The Law

The Right of Integrity

A right of integrity is the right to protect the work from derogatory treatment because the work is an embodiment of the creator's personality and should not be distorted. The right of integrity is significant for Indigenous communities because it offers the opportunity to legally recognise "a sacred, spiritual and impenetrable bond between the Indigenous artist and their work" as expressed directly in multiple copyright cases for Indigenous works.[154] Appropriation occurs when a sacred image of Indigenous art reproduced as a t-towel, t-shirts or carpets.

Two elements:

1. Derogatory treatment
2. Prejudicial to the author's honour or reputation.

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[152] Ibid 490.
[153] *Milpurrurru v Indofurn Pty Ltd* (1994) 30 FCR 240 at 272.
[154] Terri Janke and Michael Frankel and Company, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, (Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998).

Modern Australian case law does exist and therefore jurisprudence development relies on imprecise tests for "derogatory treatment' and 'prejudicial to the author's honour or reputation."[155]

Derogatory Treatment

The Act defines derogatory treatment with respect to the various forms as a material distortion, mutilation and/or material alteration.[156] Derogatory treatment of artistic works is not extended beyond the physical and "includes any exhibition in public of the work that is prejudicial to the author's honour or reputation, because of the manner or place in which the exhibition occurs."[157] It is anticipated that this provision could prove to be significant for Indigenous creators to define the scope of unauthorized modification. Is putting an image on a t-towel captured or enough?

The defence of *relevant industry practice* to derogatory treatment is a vague notion.[158] While the issue of *what* is derogatory treatment is unclear. It is the second limb of the integrity provision which requires further attention.

In the *Fernandez v Perez* musician artist "Pitbull" who delivered an audio sample to Mr Fernandez (a DJ and promoter) to promote a tour on radio.[159] The audio sample featured both of the parties' names. The tour was cancelled, and Fernandez replaced the lyrics of Pitbull's song. Mr Perez made a claim his work was subjected to derogatory treatment. 'Derogatory' defined by the Court as *material distortion, mutilation or alteration of the work that is prejudicial to the author's honour or reputation.*[160]

Prejudicial To Honour and Reputation

The scope of 'derogatory treatment' is 'the doing of anything else' to the work that is

[155] Cate Banks, 'The More Things Change The More They Stay The Same The New Moral Rights Legislation And Indigenous Creators' (2000) 9(2) *Griffith Law Review* 334.
[156] Section 195AJ (literary, dramatic or musical work), s 195AK (artistic work), s 195AL (cinematograph film),
[157] s 195AK.
[158] Ibid.
[159] [2012] NSWSC 1242.
[160] Ibid.

prejudicial to the author's *honour or reputation*.[161] The Act does not define honour or reputation. It is left to the court to construe these terms and create the scope for 'integrity' through other common law jurisdictions and the process of legislative interpretation.

In Britain a complainant must establish that the derogatory treatment *is "*a distortion or mutilation that prejudices honour or reputation" not merely that the artist believes it.[162] The outcome is a lack of clarity on how the test will evolve in Australia. In particular what 'treatment' is considered prejudicial to honour as a subjective or objective test. Commentator looking for answers turn to defamation law.[163]

A question must be asked, if the test is to objectively assess, who is the judge involving Indigenous work? Is it the Indigenous Community, the artist (who is part of this community) or the general public? Will the judiciary seek the views of the Indigenous community as an objective measure in construing 'treatment' and align to the broader community?[164] The fundamental question here is how the scope of the test will be defined withing a Western legal system to account for Indigenous 'moral ownership' as a community attached to self-identity.

> "These problems stem from the differences between the concerns of moral rights legislation and the concerns of Indigenous communities. Moral rights legislation is drafted upon the basis of individual rights and is predicated on 20th century concepts of authorship and authorial integrity. Where Indigenous communities are concerned, any dealing with any Indigenous intellectual and cultural material is within the bounds determined by customary law."[165]

Indigenous artists are not given permission to misuse cultural knowledge and they do not have authority to reproduce outside of a customary permissions system.[166] The right of

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[161] s 195AK.
[162] *Pasterfield v Denham* [1999] FSR 168, 182.
[163] Sam Ricketson (1987) The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, at para 8.110 (explaining that these terms were preferred to the wider concept of 'moral or spiritual interest of the author').
[164] Aden Ridgeway, Commonwealth of Australia, Parliamentary Debates, Senate Hansard, no 18, 7 December 2000, 21072.
[165] Australian Copyright Council, Submission to Our Culture: Our Future, October 1997.
[166] Terri Janke (1998) *Our Culture, Our Future* 55.

integrity as a codified moral right within Australian law now is one of the most important for Indigenous creators due to the recognition of a place for redress where a third party breeching the fiduciary duty of an Indigenous artist to their community in the telling of their stories.

The Right of Attribution

The right of attribution of authorship defines who made the work. authorship may be any reasonable form of identification, [167]

The Rights Against False Attribution

The Act provides fight against false attribution of authorship where it is misleading or deceptive.[168] A common place in which this provision applies to Indigenous people is where non-Indigenous work (fake Indigenous art) is attributed as Indigenous when it is not. The vast damage done by false attribution of Indigenous work to non-Indigenous artists is not covered by the Moral Rights regime because the right is attached to the individual artists and not the community.[169]

Duration

The right of integrity is enforceable for the duration of the copyright for a work (the life of the creator plus 70 years).[170] The time limitations of copyright law does not adequately recognise the 'longevity of Indigenous folkloric works'.[171] The challenges of time limitations for copyright protection for Indigenous communities is well documented and includes fears of exploitation and continuing colonisation that maintains impoverishment. [172]

[167] s 193-94.
[168] s 195AE.
[169] Anna Henderson, 'Commonwealth vows to stamp out fake Aboriginal art made in 'sweatshops' ABC online 2 Sep 2020 https://www.abc.net.au/news/2020-09-02/federal-government-moves-to-protect-indigenous-art-from-fakes/12621362
[170] s 195AM, Duration of moral rights.
[171] UNESCO & WIPO (1985) Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Actions.
[172] Kamal Puri, 'Cultural Ownership and Intellectual Property Rights Post Mabo: Putting Ideas into Action' (1995) 9 *Intellectual Property Journal* 318.

Beneficiaries

Moral Rights only vest to individuals and this limitation in the scope of the right does not recognise the permission structure at the heart of traditional cultural expression in Australia as community owned. The Act follows in the doctrinal tradition of Western law which favours individual rights, private property, and economic rights.

To some degree the process of making screen art (collaborative and jointly owned) and a product fixated to film, may provide a place for Indigenous community owned and operated art centres to contract in the same way the film community has responded. Developing bespoke contact templates may be an option while there is no stand-alone legislation, and the sector is dependent on ICIP protocols and soft law.[173]

Section 10(1) of the *Copyright Act 1968* (Cth) requires onus of proof of collaboration by the joint authors in the production of the work. Commentators believe the limitation of this provision excludes Indigenous communities from obtaining relief under the Act.[174] There may be options for Indigenous artists to actively exert 'hard law' provisions by following the contracting practices of other artists who engage in collaborative practice and in particular draw on the *Joint Authorship Doctrine* in contracting relationships.[175]

Consent Provisions

Section 195 AW provides that a copyright holder can consent to use of their work in a manner that would otherwise be a moral rights infringement. The film industry believed that a moral right regime would be unworkable without the option for waivers. As an outcome moral rights in Australia are treated as if they are economic rather than personal because they can be waived for the financial reward of a fee. The bargaining position of creators impacts on being able to provide free informed consent. Remote Indigenous Communities have limited access to resources and information in order to waiver rights that do exist.

[173] For an overview of the ability to achieve contact outcomes see Laura Biron and Elena Cooper, 'Authorship, Aesthetics and The Artworld: Reforming Copyright's Joint Authorship Doctrine' (2016) 35(1) *Law and Philosophy* 55

[174] Cate Banks, 'The More Things Change The More They Stay The Same: The New Moral Rights Legislation and Indigenous Creators' (2000) 9(2) *Griffith Law Review* (2000) 334.

[175] Laura Biron And Elena Cooper, 'Authorship, Aesthetics and The Artworld: Reforming Copyright's Joint Authorship Doctrine (2016) 35(1) *Law and Philosophy* 55.

There is a trend in the mainstream arts community where creators have lost control/ownership of copyright and as an outcome of power imbalance in the negotiation process waive their moral rights in existing and future works.[176] The reduced bargaining power of Indigenous creators is well documented, alongside the coercive tactics used by unscrupulous art dealers in remote communities where deep poverty is entrenched.[177] The inequality of bargaining power is likely a systemic problem of the creative sector generally and more deeply entrenched within Indigenous communities and therefore not easy to remedy.[178]

Indigenous creators, who are employed to create may find themselves in an environment where the employer can rely on the defence of a consent connected to works made in the course employment.[179] A concern has been raised about whether it will be an industry practice to employ Indigenous creators from impoverished remote communities as a way of subverting the need for free informed consent.[180]

The Notion of Reasonableness

The defense of reasonableness is an objective test to the relevant industry standard;[181] and considers the difficulty or expense which would not have been incurred but for the infringement.[182] Factors that also impact include work product or as services provided.[183] Indigenous creators and artists are likely not very well protected by these provisions given the extensive exploitation by commercial interests against very low numbers of cases in the case law.[184]

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[176] Ian Collie, 'Multimedia and Moral Rights' (1994*) Arts and Entertainment Law Review* 94, 98.
[177] Michael Reid (2000) 'The Pirates of Provenance', *Weekend Australian*, 1-2 April, p 38.
[178] Simon Lake, 'Moral Rights' -- Beware the Waiver Mongers' (1997) 16 *Communications Law Bulletin* 4, 6.
[179] Cate Banks, 'The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators' (2000) 9(2) *Griffith Law Review* 334, 338.
[180] Ibid
[181] ss 195AR(2)(e), 195AR(3)(f), 195AS(2)(e), 195AS(3)(f).
[182] Sections 195AR(2)(g), 195AR(3)(h).
[183] Section 195AR(2)(h)(i) and (ii).
[184] Commonwealth Government of Australia, (1996-97) Research Paper 20: Indigenous Peoples and Intellectual Property Rights, Department of Parliamentary Library.

g) Public Relations and The Law

The uncertainty of the moral rights regime legislated in Australia and the lack of case law in 20 years to provide certainty has created an environment ripe for reputation damage to companies and individuals who act against Indigenous artists, given the broad uptake of Reconciliation Action Plans (RAPs) by Corporate Australia. There is also a growing trend by government funders to require stakeholders to meet ICIP Protocols in working with Indigenous communities. There are three moral rights cases outlined below attracting media attention with the high risk of reputation damage to those involved. It is possible to argue that the Moral Rights regime in Australia acts as a deterrent to commercial exploitation.

Three Moral Rights cases which caught the attention of the press resolved outside of court.[185]

1. National Gallery of Australia

Col Madigan, the principal architect of the Gallery, protested proposed a multi-storey glass enclosure to the front entrance renovations to the National Gallery of Australia in 2001. Madigan strongly objected and a consultation process was implemented in order to avoid a moral rights infringement, despite there being no legal requirement. Discussion resulted in a mutually acceptable position in order to start the renovations.

2. The Garden of Australian Dreams

The 2003 Carroll Report recommended the Garden of Australian Dreams thon the National Museum of Australia be updated. The Garden is described as a 'symbolic landscape' featuring a montage of images and concepts including the dingo fence, explorer's tracks, a map of the linguistic boundaries of Indigenous Australia. The word 'home' repeated 100 times in different languages. The Carroll Report's proposed to add lawn, trees, reproductions of Aboriginal rock art and the addition of a sundial to the Garden. Richard Weller, the landscape architect threatened to take action against infringement of his moral rights on the basis that the changes were 'offensive to [his] artistic integrity' and '[made] a complete

[185] Rachel Chua, Australian Government Solicitor, 'The Moral of the Story: Moral Rights in Australia over Seven Years' (January, 2008) – The article provides the cited examples abridged.

mockery of the entire process by which the [Garden] was chosen and created.'[186] The proposal was never implemented.

3. Pig 'n' Whistle pub

The owner of the Pig 'n' Whistle pub at Seidler's Riverside Centre in Brisbane installed a glass fence and canopy to protect customers from the wind and also included a trumpet-playing pig in neon light signage. Harry Seidler, the high-profile architect took legal action in 2003 arguing that he considered the changes offensive to the building's geometry and the signage 'vulgar' and claimed an infringement of his moral rights. The matter was settled out of Court in confidence and required the removal of acknowledgement that Seidler was involved in the design of the building.

Conclusion

Copyright law in Australia recognises the moral right of integrity which attributes to artists a number of rights including, the right to stop others from altering their works where the alteration is harmful to their reputation.[187] Moral rights offer a path for the recognition of communal ownership beyond the established equitable constructive trust, that flows from the fiduciary duty of artists to the community to protect cultural integrity within traditional cultural expression works from misappropriation and exploitation.[188] Australia is waiting for a test case. Uncertainty about the gap between what is promised by Moral Right law and and what the jurisprudence will deliver to Indigenous people to protect their cultural heritage remains to be decided.[189]

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[186] Edward Elgar, *The Garden of Australian Dreams: The Moral Rights of Landscape Architects New Directions In Copyright Law*, (2006), Vol. 3, Fiona MacMillan and Kathy Bowrey, eds (Cheltenham),134, 135, cited from G. Safe, 'All's Not Well in Garden of Dreams', *The Australian*, 19 July 2003, 10.
[187] *The Copyright Amendment (Moral Rights) Act 2000* (Cth), which amends the Copyright Act 1968 (Cth), came into force on 21 December 2000.
[188] Sam Ricketson, 'The Case for Moral Rights' (1995) (October) *Intellectual Property Forum*, 38.
[189] Banks (n 131).

5. LITERATURE REVIEW

a) Human Rights

Indigenous People

In 2007, the United National Declaration of the Rights of Indigenous People (UNDRIP) was adopted by all Countries that make up the UN General Assembly except Australia, New Zealand, Canada and the US. The Australian position change with a change of government in 2009. Article 31 of the UNDRIP recognises Indigenous Cultural and Intellectual Property (ICIP) referred to as 'cultural heritage, traditional knowledge and traditional expression.'[190]

International efforts to develop an instrument that protects traditional knowledge is being developed by the Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC).[191] The protection of the traditional knowledge of Indigenous people is a global challenge post-colonization as Countries realise the loss of opportunity to preserve national heritage and to enhance the economic well-being on Indigenous people through cultural preservation.[192] There is currently no international legal framework to protect traditional knowledge[193] despite the misappropriation of indigenous knowledge being a recognised global problem.[194]

Australia - Gija Country in the East Kimberley

Drahos has written extensively about what he terms the cosmology of Indigenous communities in Australia and the 'dreamtime' stories and connection to a complex

[190] UNDRIP Resolution 61/295, 13 September 2007 Article 31.
[191] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore The Protection of Traditional Knowledge: Draft Articles WIPO/GRTKF/IC/37 (31 August 2018).
[192] Donald Acemoglu, Simon Johnson and James Robinson, 'Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution', (2002) *Quarterly Journal of Economics*, 117, 123.
[193] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore The Protection of Traditional Knowledge: Updated Draft Gap Analysis WIPO/GRTKF/IC/37/6 (20 July 2018) at 20.
[194] World Intellectual Property Organization Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (April 2001) 70 and 86; and Brendan Tobin *The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives From Andean and Pacific Island Countries* (World Intellectual Property Organization and United Nations University, 2013) 7.

knowledge tradition that benefits community enabling survival.[195] One of the most consistent and well know 'dreamtime' stories held and told in different ways is the Serpent Snake Dreaming. The dream takes form in different ways across Australia.[196] The extreme of climate of the Kimberley brings a dreamtime spirit in the story of a rainbow serpent that protects and also punishes for straying away too far from community. There are many times people travelling from Europe under-estimate the danger and die broken down on a back track unable to survive alone.[197] At times, Indigenous communities have also lost people.[198] The extreme heat is contrasted by big rains and storms of the summertime wet season. The Landscape become green as rivers run as the heat rises. Jack Britten is a Gija artist of Warmun, who paints his Country Rainbow Serpent dreaming in the Bungle Bungles.[199] The Gija people of Warmun in the East Kimberley of Western Australia have maintained a continuous culture for over 65,000 year, (that we know of), in an extraordinarily extreme and brutal environment, which can only be achieved with sophisticated culture and lore structures as the foundation of the community survival.[200]

Warmun is nationally and internationally recognised for artistic excellence because the artists paint their stories from Country.[201] Artist have permission to paint only those stories they have permission to tell, passed on from ancestors.

> 'The social environments in which stories are born and told are mutable, as are the physical landscapes from which they emerge. Solid rocks wears away, is covered

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[195] Peter Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, 2014).
[196] William Stanner, 'On Aboriginal Religion', *Oceania Monograph*, XXXI (1961), 81, 88–94.
[197] Tourist lost in Kimberley. *The West Australian*. Sat, 22, November 2014. https://thewest.com.au/news/australia/tourist-lost-in-kimberley-ng-ya-381360
[198] Erin Parke, Aboriginal 'spirit man' called in to try to find teenager Tristan Frank missing in the outback ABC Kimberley, Fri 29 Jan 2021 https://www.abc.net.au/news/2021-01-29/missing-teenager-tristan-frank-remote-western-australia/13096576
[199]Jack Britten Joolama - Big Storm Over the Bungle Bungle Range, c.1996, Ochre (natural earth pigment) on canvas, 61 x 80cm. http://www.aboriginaldream.com/index.php?option=com_virtuemart&view=productdetails&virtuemart_product_id=270&virtuemart_category_id=27 "The Rainbow Serpent came from beneath the ground and created huge ridges, mountains and gorges as it pushed upward, and is a common motif in the art and mythology of Aboriginal Australia'. The monsoonal rains and big storms of Northern Australia are said to be created by the unpredictable Rainbow Serpent. This mythology is closely linked to land, water, life, social relationships and fertility. It is known both as a benevolent protector of its people and as a malevolent punisher of law breakers."
[200] Catherine Massola*, Living the Heritage, not curating the past: A study of Lirrgarn, agency and art in the Warmun Community*. (PhD Thesis, University of Sydney, 2016).
[201] Ibid; Rover Thomas, *I Want to Paint,* (Hystesbury Pty Ltd, Holmes a Court Gallery, 2003); Anna Crane, *Garnkiny, Constellations of Meaning* (Warmun Art Centre, 2014).

over, cracked open or shears off at the hands of human or spiritual agents or of the onslaught of weather. In this piece, Ralph Juli speaks of how easily dynamics, individuals and structures of power can take advantage of the instability of knowledge systems to deny Aboriginal people their rights to land and their ancestral inheritance. It is extraordinary than that Gija people have held on to and nurtured their stories down countless generations and found in art, new ways off passing on and keeping strong the vast intellectual, spiritual and cultural legacy they constitute.

The painting and writing in 'Garnkiny – Constellations of Meaning' are about one story – that of the Moon man, Garnkiny or Jawoorranyji. This is what Rusty Peters calls 'a big story' an idea echoed in Thomas Saunders' essay about the narrative specifically as it is told in the far western reaches of Gija Country. I interpret this to refer not only to the massive expanse of the country over which the moon appears to us at night, but also that it concerns some of the most primary of human experiences; death and mortality, love, and sex, jealousy and desire, transgression and obligation. It is also painted by some of Warmun's most revered artosts such as the late Queenie Mckenzie, Hector Jandany and Mick Jawalji and living painters Rusty Peters, Mabel Juli, Phyllis Thomas and Patrick Mung Mung."[202]

However, despite widespread recognition and high value in the mainstream art market, Gija community artists, post colonization, suffer deep structural poverty in alignment with all remote Indigenous communities in Australia.[203]

In the Universal Periodic Review of Australia's Human Rights record two themes emerged around the performance of Australia and these were treatment of refugees and the significant disadvantage experienced by Australia's indigenous Community.[204] Australia made voluntary pledges expressed as five pillars in a 2017 to the UN Council including the pledge to "advance the human rights of Indigenous peoples around the globe, including by: actively engaging with multilateral processes affecting Indigenous peoples; supporting the UN

[202] Anna Crane, *Garnkiny, Constellations of Meaning* (Warmun Art Centre, 2014), 2.
[203] Jon Altman, 'Alleviating poverty in remote Indigenous Australia: The role of the hybrid economy' (2007) *Development Bulletin* No. 72.
[204] Sarah Joseph, 'On the Ground at Australia's Universal Periodic Review." (2015) *The Conversation,* November 12. https://theconversation.com/on-the-ground-at-australias-universal-periodicreview-50525

Declaration on the Rights of Indigenous Peoples (UNDRIP)."[205] Australia highlighted the value in protecting traditional knowledge from misappropriation in the draft articles of the WIPO-IGC.[206] Australia has consistently resisted the separation of traditional knowledge including traditional cultural expression (folklore) from existing IP legislations and broad-based construction of the definitions that address the misappropriation (in all of its forms).[207]

b) Utilitarian Doctrine

Indigenous land rights are *derived* from real property rights established by *Mabo.*[208] The concept of *terra nullius,* where the land belonged to no one before colonization was overturned. Indigenous land rights are enshrined in Native Title Legislation at federal and state levels. However, individual land ownership is not recognised in Indigenous culture. Important cultural dreamtime stories are deeply embedded on the land within Aboriginal culture as a mechanism to enable these communities to have survived for over 65,000 years.

The concept of land ownership cannot be separated from culture and involve complex cultural permissions derived from the regional elder groups. These complex cultural traditions have operated to establish 'real' property rights in native title, yet communal ownership of the stories and therefore protection is not currently recognised by copyright law in Australia. Despite a win in *Milpurrurru v Indofurn Pty Ltd (*Carpets Case – copyright breach),[209] a series of cases;*[210], Bulun Bulun & Anor v. R & T Textiles Pty Ltd (*fiduciary relationship)*[211]*, *Yumbulul v Reserve Bank of Australia*[212] (communal ownership) and *Western Australia v Ward*[213], Australia has failed to offer Indigenous people protection for their cultural knowledge through Native Title legislation and the current IP framework in

[205] Permanent Mission of Australia to the United Nations. 2017. Candidature of Australia to the Human Rights Council, 2018–2020: Voluntary Pledges and Commitments Pursuant to General Assembly Resolution 60/251. GA Res A/72/212 (24 July 2017) 2–8.
[206] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection Of Traditional Knowledge: Table of Written Comments on Revised Objectives and Principles* WIPO/GRTKF/IC/11/5(B) (18 May 2007) at [annex, at 2].
[207] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection of Traditional Knowledge: Factual Extraction* WIPO/GRTKF/IC/12/5(b) (18 February 2008) 11.
[208] *Mabo v Queensland* (No 2) [1992] HCA 23.
[209] [1994] FCA 975.
[210] [1994] FCA 975.
[211] [1998] FCA 1082.
[212] (1991) 2 *Intellectual Property Reports* 481.
[213] [2002] HCA 28.

Australia.

Commentators advise “it is clear that existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate for the protection of indigenous peoples’ heritage but inherently unsuitable.”[214] The trial Judge in *Yumbulul v Reserve Bank of Australia* bemoaned that “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.”[215]

Dennis Mccarthy[216] argues the tension between Indigenous customary law and intellectual property is best explored by identifying the different foundations of the two systems. Intellectual property as a traditional legal term and methodology to express the interests of the artist creator through vesting a property right over that creation.[217] Property rights in this scheme are conceived of as are a "bundle of rights" in that the owner acquires as enforceable rights against others, or against the world.[218] Intellectual property is categorised as static and confined to the "sole and despotic dominion of humankind", which is really to say that it is not land that can be felt and touched.[219] Indigenous communities do not disconnect the land and spirituality with such ease.

In *Western Australia v Ward* the Full Court said: ‘‘Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation ***to land*** of the kind that can be the subject of a determination of native title.’’[220]

Judge von Doussa in *Bulun Bulun v R & T Textiles Pty Ltd* noted that that “the ownership of

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[214] Erica Daes ‘Discrimination Against Indigenous Peoples’ (1991) 2 *Intellectual Property Reports* 481 at 490
[215] *Yumbulul v Reserve Bank of Australia* (1991) 2 *Intellectual Property Reports* 481, 492.
[216]Nopera Dennis McCarthy,”Indigenous Customary Law and International Intellectual Property: Ascertaining an Effective Indigenous Definition for Misappropriation of Traditional Knowledge. (2020) 51(4) *Victoria University of Wellington Law Review*, 597.
[217] Yumbulul v Reserve Bank of Australia (1991) 2 Intellectual Property Reports 481, 492.
[218] See Waitangi Tribunal Ko Aotearoa Thnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity - Te Taumata Tuatahi (Wai 262, 2011) [Ko Aotearoa Tnei: Te Taumata Tuatahi]; Terri Janke, Indigenous Knowledge: Issues for protection and management - Discussion Paper (IP Australia and the Department of Industry, Innovation and Science, 2018).
[219] William Carey Jones (ed*) Commentaries on the Laws of England by Sir William Blackstone* (BancroftWhitney, San Francisco, 1915) 707.
[220] *Western Australia v Ward* (2000) 99 FCR 316, 483.

land and ownership of artistic works are separate statutory and common law institutions as a fundamental principle of the Australian legal system."[221]

There are areas of the general law and statute that do afford protection to Indigenous cultural knowledge matters and particular reference is made to cases decided in copyright, fiduciary duties[222] and morale rights[223]. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, (Kirby J dissenting) held;

> "… that in so far as claims to a right to maintain, protect and prevent the misuse of cultural knowledge went beyond a right to deny or control access to land or waters, they were not rights protected by the NTA. [60], [644] Kirby J was of the opinion that the right to protect cultural knowledge that was inherently related to the land according to Aboriginal beliefs was sufficiently connected to the area to be a right ''in relation to'' land or waters for the purpose of s 223(1) of the NTA."[224]

c) IP Law Doctrine

Foundation Principles

A person's right to property in common law is characterized as a fundamental right. William Blackstone said, "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property."[225] Real property is protected on the basis of the impact of the tragedy of the common,[226] which provides for exclusive rights over the land to incentivize the maintenance of the land for exclusive enjoyment.[227] Intellectual property is differentiated as non-physical and where the property rights attach to the physical manifestation of the expression of ideas. 'Intellectual property is different. It does not

[221] (1998) 86 FCR 244 at 256.
[222] *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71; [1978] FSR 582; *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.
[223] Pt IX (ss 189-195AZO) of the *Copyright Act 1968* (Cth)
[224] *Western Australia v Ward* (2000) 99 FCR 316 at 483 [580].
[225] William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol II, bk II, ch 1, 2.
[226] William Lloyd, Two Lectures on the Checks to Population (1833). A term popularised by economist William Forster Lloyd in relation to overgrazing on common land.
[227] Robert Cooter and Thomas Ulen, *Law and Economics* (4th edn, Boston: Pearson Addison Wesley, c. 2004).

deteriorate through use; that is, IP rights are non-rivalrous and non-excludable.'[228] IP law protects the holder's legal rights by assigning and enforcing control of the reproduction of the physical manifestation those ideas in whatever form it takes – art, writing, performance.

History

Australia imported the foundation of Intellectual Property law from Europe through the English framework introduced by the *Statute of Monopolies* (1624) (patents) and the Statute of Anne (1710) (copyright). The *Statute of the Monopolies* permitted monopolies to creator of intellectual property (inventors) and limited the capacity to gain a right to existing public domain rights.

The United Kingdom - The Statute of Anne (1710)

Initially, the history of intellectual property law was predominantly focused on protecting inventors and less on protecting writers of literature. This changed with the invention of the printing press as the social/economic impact of the capacity to reproduce knowledge and distribute to the masses became clearer. *The Statute of Anne (1710)* is believed to be the first statute of modern copyright. The statute begins:

> "Whereas printers, booksellers, and other persons have lately frequently taken the liberty of printing, reprinting, and publishing books without the consent of the authors and proprietors … to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write use books, be it enacted …" (Great Britain, *Statute of Anne*, 1710)

The statute provided protected by granting to the author a fourteen-year copyright monopoly to reproduce (renewal while alive). English case law that followed affirmed the authors inherent right to control distribution, independent of the statute.[229] European countries, including Belgium, Holland, Italy, and Switzerland, implemented versions of the model set

[228] Mark Davison et al, *Australian Intellectual Property Law* (Cambridge University Press, 2020), 22.
[229] *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201.

by England.[230] The Berne Convention treaty and the Trade-Related Aspects of Intellectual Property (TRIPS 1994) agreement means that the scope of intellectual property protection is global and interconnected.

Different legal systems have evolved in protecting intellectual and refinement requires ongoing review of the moral justifications that underpin the scope and degree to which intellectual property rights are available for creators. The most influential philosophies in the development of intellectual property law are personality-based, utilitarian, and Lockean. For the purposes of this paper the focus will be on the philosophical driver of the development of IP Law in Australia.

d) Australia

The development of intellectual property law is uniquely influenced by two parallel moral justifications; *utilitarian based arguments* that focus on incentivising and encouraging new cultural work through appropriate regulations and protections; and the *natural rights based arguments* that focused on protecting inherent individual rights to create for the inherent social, cultural and economic goals of copyright protection. The impact of the doctrinal tension on the law is a dynamic and flexible operation of Australia copyright law within an international community.

> "[T]he Australian tradition in intellectual property law is more explicitly utilitarian: in the sense of seeking to maximise social welfare, rather than focusing on [intellectual property] as having intrinsic value and hence merit. In this context, maximising social welfare involves maximising the difference between the social value of [intellectual property] created and used, and the social cost of its creation, including the cost of administering the system of intellectual property rights itself." [231]

[230] Mark Davison et al, *Australian Intellectual Property Law* (Cambridge University Press, 2020) 22.
[231] Intellectual Property and Competition Review Committee, Review of Intellectual Property Legislation under the Competition Principles Agreement (Final Report, 2000) 32.

i. Utilitarian arguments

The typical utilitarian influenced framework for intellectual property is incentive-based on the belief that a necessary pre-condition the creation of intellectual labour is granting limited rights of ownership to creators. [232] The labour cost of time must be accounted for an protected as the foundation of invention/creation and therefore protection is directly connected to the economic value of labour and the output has social utility. If there is not economic benefit creators will not produce. Copyright provides and incentive for third part investment in the production and dissemination for works that benefit society, moderated by the capital market and movement of funds to serve this interest.

Ice TV v Nine Network Australia[233] affirmed the influence of incentive theory in the development of Australian IP law stating 'that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public'.[234] Incentive theory recognises the cost of production and the need for investors to have an opportunity to secure returns. If cultural objects are not provided with legal protection people would simply not invest in their creation and the market would be reduced and the quality poorer. Empirical evidence provides that a 'no-protection rule' results in secrecy, restricted markets, and lost opportunities.[235]

Copyright provides a "legal means by which those who invest time and labour in producing cultural and informational goods can be confident that they will not only be able to recoup that investment, but also to reap a profit proportional to the popularity of their work."[236] Copyright enables the mass production model to operate and rectifies any market failure. [237]

ii. Natural Rights Arguments

Natural rights are a form of universal right as the philosophical concept formed during the Age of Enlightenment (Hobbes) where rights are held as part of the natural order of the

[232] Adam Moore, 'A Lockean Theory of Intellectual Property Revisited' (2012) 49 *San Diego Law Review* 1069.
[233] (2009) 239 CLR 458.
[234] Ibid 471, French CJ, Crennan and Kiefel JJ.
[235] Sean O'Connor, 'Creators, Innovators, and Appropriation Mechanisms' (2015) 22 *George Mason Law* 973.
[236] Lionel Bently et al, *Intellectual Property Law*, 5th edn, (Oxford University Press, 2018) 42.
[237] Christopher Arup, 'Innovation, policy strategies and law' (1990) 12 *Law and Policy* 247, 248–9.

Universe held by an individual as an intrinsic right for the public good.[238] The 'right' is recognised because it is conceived of within the mind of the creator. A formation of the natural rights theory is referenced to the decision of *Millar v Taylor*,[239] which state that 'it is not agreeable to natural Justice that a stranger should reap the pecuniary produce of another's work'.[240]

Natural rights theory is embodied at an international level in art 27(2) of the Universal Declaration of Human Rights, which states, 'Everyone has the right to protection of the moral and material interests resulting from scientific, literary or artistic production of which [she or] he is the author'.[241] Natural rights require the law to recognise the exclusive ownership of intellectual property of the creator and to take the work is equivalent to theft. Natural rights are not so focused on the economic protection of new work, they are focused in the individually conceived of rights as a creator. Copyright is a positive law to reinforce the right of the individual as a self-evident ethical precept'.[242]

Natural rights philosophy means that the objective of codified law is to have a solitary purpose in recognising an individual rights;[243] and to provide a precise formation of this right. The right exists in the conscience of the man/woman and are equal to the rights of 'real property'.[244] Natural rights based legal systems result in stronger protection for creators and holders of copyright than incentive-based systems that are utilitarian in function. A natural rights conception of copyright leads protection for creators as copyright owners that is perpetual and unqualified, compared to an incentive-based (utilitarian) conception reframed by the economic considerations of market operation.[245] In Australia a utilitarian approach has dominated the reading of IP law which is typical of common law jurisdictions of British decent that have not favoured natural rights theories in the development of law and where copyright is primarily codified by statute, which raises "difficulties in recognising legal

[238] Mark Davison et al, *Australian Intellectual Property Law* (Cambridge University Press, 2016) 29.
[239] (1769) 4 Burr 2303, 98 ER 201.
[240] Ibid 218, Wiles J.
[241] United Nations GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).
[242] Lionel Bently et al, *Intellectual Property Law*, 5th edn, (Oxford University Press, 2018) 42.
[243] Georg Hegel, (1821), *Elements of the Philosophy of Right*, Allen Wood (ed.), (Cambridge University Press, 1991).
[244] Francis Kase, *Copyright Thought in Continental Europe: Its Development, Legal Theories and Philosophy* (South Hackensack: FB Rothman & Co, 1971); Horatio Spector, 'An outline of a theory justifying intellectual property and intellectual property rights' (1989) 8 *European Intellectual Property Review* 270.
[245] *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201, 218–22 (Aston J), 252 (Mansfield CJ).

concepts drawn from Indigenous customs, such as communal ownership, that are not recognised by statute."[246]

iii. Propiertarianism

Australian Academic, Peter Drahos has written extensively and critically about the influence of a natural and a utilitarian 'rights' based approached, (that places a different focus on the individual creator operating is a societal structure), to the development of intellectual property law in Australia as a theory of Justice which supports the development of the propriertarianism creed.[247]

The three core beliefs of proprietarianism are highlighted by Drahos as;

1. The moral superiority of property rights over other interests and beliefs;
2. A belief in the first connection thesis;
3. The existence of negative norms.

Impact of Proprietarianism on Copyright Law

Drahos argues that the end result of proprietarian is to transfer public domain knowledge into private hands. Drahos explored the US case of *Jeweler's Circular Pub. Co. v. Keystone Pub. Co*[248] case where the compilation of a directory of jewelry trademarks. Following in UK tradition, the judgement focused on expending labour in preparation of the information, where no-one has the right to appropriate the fruits of another's labour – the 'sweat of the brow' doctrine.[249] In these examples where the outcome is a collection of facts, reports, the requirement for originality as a threshold test is set very low.[250]

The goal of the originality threshold is to require an author to expend creative effort in order to secure the copyright protection. The requirement sets the boundary for the intellectual

[246] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513, 525.
[247] Peter Drahos, *A philosophy of Intellectual Property*(Australian National University, eText, 2016) Chapter 9, Intellectual Property: For Instrumentalism, Against Proprietarianism, 231-265.
[248] 281 F 83 (CA2 1922).
[249] 281 F 83, 88 (CA2 1922).
[250] *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.* [1964] 1 All E.R., 465. Football betting cards.

commons and limits the type of information available for copyright protection. Facts ae not available for copyright protection. If the originality bar is set to low then facts and other types of information collated in a certain way can be recycled as copyright works creating a negative community.

> "In this negative community many more information exchanges which involve facts become the object of copyright surveillance and enforcement. Copyright comes to function as a private tax on basic information exchanges."[251]

While in Australia 'sweat of the brow' is no longer protected by copyright in Australia[252] the doctrine remains influential and particularly in terms of the influence of 'big data' collections held by corporate organizations that has drives a push towards sui generis legislation.[253]

The shift in philosophical tension and the limiting of the 'sweat of the brow' doctrine over time provides a framework to look at the influence of market power within what Drahos describes and the proprietarianism creed because it is the market forces ownership of data that requires copyright protection in order to commercialise for benefit and has been limited by law, therefore the drive has shifted to a legislative structure that is separate yet connected, provides a reference for the shifts in power that may successfully secure a sui generis legislative approach for *traditional cultural expression* in recognising the failure to adequately protect.

Conclusion

Australia is party to a number of international human rights instruments as outlined. These legal frameworks value the right of an individual to protect their cultural heritage as a natural right connected to self-identity. Copyright law in Australia has developed on the basis of the heavy influenced by Lochean utilitarian perspectives where the individual is incentivized to create by the law acting to protect the economic value of create as labour (sweat of the brow). Indigenous communities have built a cultural lore system and traditional cultural expression

[251] Drahos (n 247) 243.
[252] *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458
[253] European Commission, Amended proposal for a Council Directive on the legal protection of databases, OJ 1993 C308/1, 15 November 1993; see also J. Morton, 'Draft EC Directive on the Protection of Electronic Databases: Comfort after Feist', 8(2) *Computer Law and Practice* 38 (1992).

deeply connected to land and conceive of their responsibilities and ownership more broadly, as intergenerational and community owned. Copyright law in Australia does not recognise community ownership. The challenge of this mismatch in philosophy to drive the basis of law/lore will not go away. The choice is only to decide on which path to take.

6. INDIGENOUS CULTURE IN AUSTRALIA

a) Poverty in Remote Indigenous Communities

The 2016 Income, Poverty and Inequality Report identified that "although Indigenous incomes are growing steadily in urban areas, Indigenous cash poverty rates in very remote areas rose significantly" from already high levels between 2011 and 2016 in an environment where Indigenous Australian's already earn significantly less.[254] Altman and Biddle reported "the median personal incomes of Aboriginal and Torres Strait Islander people were just 62% of that of non-Indigenous Australians."[255] The ANU Paper calls for urgent policy action required to limit the growing frequency of poverty in remote Indigenous communities. The data represents 'more than just contemporary socioeconomic position', rather it expresses the 'exclusion from a relative share of Australian society's resources and opportunities.'[256]

Many commentators believe that the deep structural poverty and systematic deprivation of access to economic resources experienced by many Indigenous people is an outcome of colonialisation, including dispossession and the impact of state-based violence.[257]

> "Aboriginal people, families, households and communities do not just happen to be poor. Just like socioeconomic advantage, socioeconomic deprivation accrues and accumulates across and into the life and related health chances of individuals, families and communities."[258]

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[254] Francis Markham and Nicholas Biddle, Australian National University, Centre for Aboriginal Economic Policy Research ANU College of Arts & Social Sciences, 2016, CENSUS PAPER NO. 2. "Although Indigenous incomes are growing steadily in urban areas, where median disposable equivalised household income rose by $57 per week in real terms between 2011 and 2016, median disposable equivalised household income in very remote areas fell by $12 per week over the same period. Changes in the difference in the incomes of Indigenous and non-Indigenous Australians followed a similar pattern, with income gaps shrinking in urban areas while growing rapidly in very remote areas."

[255] Jon Altman and Nicolas Biddle (2014). 'Refiguring Indigenous economies: a 21st-century perspective', in Ville S & Withers G (eds), *The Cambridge economic history of Australia*, (Melbourne, Cambridge University Press, 2014) 530–554.

[256] Maggie Walter and Chris Andersen, *Indigenous statistics: a quantitative research methodology*, (Left Coast Press, Walnut Creek, CA, 2013) 91.

[257] Maggie Walter, 'Aboriginality, poverty and health: exploring the connections'. In: Anderson I, Baum F & Bentley M (eds), *Beyond bandaids: exploring the underlying social determinants of Indigenous health*, (Cooperative Research Centre for Aboriginal Health, Casuarina, NT, 2007) 77–90; Boyd Hunter, 'The Aboriginal legacy' in Ville S & Withers G (eds), *The Cambridge economic history of Australia, Cambridge* (University Press, Melbourne, 2014) 73–96.

[258] Ibid Walter 81.

Altman[259] makes an argument against the current dominance of economic liberalism and developed a 'hybrid model' of economic development for Indigenous people, that recognises three avenues to develop resources – the state, the market and customary practices. The role of customary practices is to both substitute the external market (for example gathering food and hunting) and also recognisees customary practices as its own market (in the production of art and fees paid for environmental service.

The Hybrid Model recognises that there are very limited opportunities for remote communities to access the external markets of a modern economy and an outcome is to create poverty traps. Altman highlights that despite a public perception of high investment on Indigenous people, the truth is there has been consistent under-expenditure as the norm, "leaving a legacy of neglect in poor housing, limited social and physical infrastructure at remote communities, and poor access to financial services."[260]

b) The Indigenous Art Economy

There is no comprehensive and reliable data on the size and scale of the Indigenous art market. A number of studies have estimated the size to be $100-$200 million[261] and more recently in excess of $300-$500 million. Indigenous art practices in Australia are derived from "one of the longest continuous traditions of art in the world, dating back at least fifty millennia."[262] The longevity of the art practice embedded deeply into cultural practices passed on from one generation to the next has transformed spiritual and religious expression into the mainstream art worlds, where it has been commodified based on this deep authenticity.[263] Indigenous art moved from being thought of as primitive into a place of high regard as its own intercultural marketplace.[264] Growth started from the 1980s and developed

[259] Jon Altman, 'Alleviating poverty in remote Indigenous Australia: The role of the hybrid economy' (2017) *Development Bulletin* No. 72.
[260] Ibid 2.
[261] Hans Hoegh-Guldberg, *A Preliminary Assessment for the Cultural Ministers Council Statistics Working Group* (Oberon, 2002).
[262] Wally Caruana, *Aboriginal Art* (Thames and Hudson. London, 2003) 7.
[263] Tim Acker et al, *Aboriginal and Torres Strait Islander Art Economies Project: Literature Review.* The Cooperative Research Centre for Remote Economic Participation Working Paper CW010. (Ninti One Limited, Alice Springs, 2013).
[264] Martin Thomas. 'Aboriginal Art and the Ethnographic Turn' (2010) 45 (46). *New Literatures Review: Culturalisms* 69.

into a high value Australian trade that grew exponentially.[265] Subsequently the Indigenous Art market has created substantial wealth for collector-investors.[266]

However, the wealth creation has not flowed equally and consistently back into the artists and communities.

> *"*None of this money-mad speculation connects to the remote world of Aboriginal settlements, which gain little from the global art trade, but are among the most vulnerable to its adverse effects."*[267]*

Further to this, the high-end Indigenous art market was not clearly defined between the low-end mass-produced tourist product, which created an environment rich for commercial exploitation that challenges market integrity with the introduction of 'fake' product and 'inspired' by Aboriginal culture.[268] The outcome is to challenge Australia's Copyright Law and protection for Indigenous Cultural Expression.[269]

c) Indigenous Art Centres

Australia has over 100 Indigenous art centres that are operated and controlled by the community supported by both State Federal Funding models.[270] Art sales are very often the only source of non-government funds.[271] Government support is framed from the perspective of socio-cultural needs of the community and less about the art production. Community owned remote Indigenous art centres provide social well-being, rural revitalisation, build

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[265] Bronwyn Coate, *An Economic Analysis of the Auction Market for Australian Art: Evidence of Indigenous Difference and Creative Achievement.* (PhD Thesis. School of Economics, Finance and Marketing, College of Business. RMIT University. Melbourne, 2009).
[266] John Oster, 'Movements in Aboriginal Art' (2009) 28(2) *Diogenes* 69.
[267] Ben Genocchio *Dollar Dreaming: Inside the Aboriginal Art World* (Hardie Grant Books. Melbourne, 2008) 216.
[268] Bronwyn Coate. *An Economic Analysis of the Auction Market for Australian Art: Evidence of Indigenous Difference and Creative Achievement.* (PhD Thesis. School of Economics, Finance and Marketing, College of Business. RMIT University. Melbourne, 2009).
[269] Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions: The Carpets Case: M*, Payunka, Marika & Others v Indofurn*. (World Intellectual Property Organization. Geneva, Switzerland, 2001).
[270] Commonwealth of Australia, *Indigenous art centre strategy and action plan.* (Department of Communications, Information Technology and the Arts. Canberra, 2004).
[271] Commonwealth of Australia, *At the Heart of Art: A snapshot of Aboriginal and Torres Strait Islander corporations in the visual arts sector.* (Office of the Registrar of Indigenous Corporations and Bureau of Statistics. Canberra, 2012).

economic benefits and community engagement that enhances social cohesion and validates Indigenous identity. [272] The primary challenge for how the market for Indigenous Art has been established is that the Indigenous Communities that produce the art do not control the primary market direct to collectors (investors). Published research related to artists working in remote-areas and their direct connection to private art dealerships is unavailable.[273] It is estimated that "the current value of private primary production is possibly 50% of all primary production (paintings); further, it is possible that over 80% of fine art canvasses being sold overseas are produced in private enterprises.*"*[274]

d) Warmun Art Centre

Warmun Art Centre is located in the East Kimberley and was founded in 1998 by nationally celebrated artists Rover Thomas, Queenie McKenzie, Madigan Thomas and Hector Jandany.[275] The art centre is 100% owned by the Gija Community. Warmun Art Centre celebrates and encourages the expression of Gija culture.

> *"*Art Centres are only for Art, that's what I've been told. But in Aboriginal way, you can't separate language, dance, song, country, story and traditional knowledge from art. Everything connects, art cannot stand alone, that's the thing we really have to fight for.*"*
>
> Gabriel Nodea, Former Chairman of Warmun Art Centre.[276]

The Gija artists of Warmun Art Centre are some of the most renowned in Australia. Warmun Artists are exhibited nationally and internationally, and their work is held by important Collections including but not limited to the Art Gallery of Western Australia, Art Gallery of New South Wales, the National Gallery of Australia and National Gallery of Victoria and the Musée du Quai Branly in Paris. Currently there are over 60 artists represented. The Warmun Art Centre also holds one of the most significant collections of historical cultural material in

[272] Julia McHenry. 'A Place for the Arts in Rural Revitalisation and the Social Wellbeing of Australian Rural Communities' (2009) 19(1) *Rural Society* 60.
[273] Tim Acker et al, *Aboriginal and Torres Strait Islander Art Economies Project: Literature Review.* The Cooperative Research Centre for Remote Economic Participation Working Paper CW010 (Ninti One Limited, 2013).
[274] Ibid 15.
[275] warmunart.com.au/about/history/
[276] Cited – Warmun Art Centre website www.warmun.art.com.au

the country. The Warmun Community Collection was the subject of a PhD thesis in anthropology, which explores how the people of Warmun *live their heritage rather than curate their past*.[277]

Warmun Art Centre is recognised as one of the leading Indigenous Art Centre in the country for the number of very high-profile artists it has produced and the deep connection between art on the walls, Gija culture and the dreamtime storytelling. There are currently over 60 established and emerging artists from Warmun, who carry on the artistic traditions of the founders.

> "The Art Centre has always had as a primary goal the conservation of culturally and socially significant objects and knowledge systems and has fostered the production of art as a powerful means of cultural continuity, transmission and innovation.*"*[278]

In order to position this thesis as an exploration of a real world and a working Indigenous Art Centre operating with nationally and internationally recognised excellence in art practice, it is important to profile some of Warmun Art Centre's leading artists from the open-source material available in their own words and from those close to the artists.

i. Rover Thomas

> 'The exhibition, *I Want to Paint*, is a tribute to one of Autralia's great artists. His painting is distinctive, and the deceptively simple use of form and pigments are at once stark representations of the country he painted and stunning examples of contemporary art…. It is our intention that these selected works speak for themselves as great paintings by an artist who simply, loved to pain."[279]

ii. Queenie McKenzie

> 'Queenie McKenzie was a remarkable Australian living treasure, an Aboriginal woman whose lif story is embedded in the vast East Kimberley landscape of far northwestern Australia. The telling of her story was deliberately created as a journey

[277] Catherine Massola*, Living the Heritage, not curating the past: A study of Lirrgarn, agency and art in the Warmun Community*. (PhD Thesis, University of Sydney, 2016).
[278] Warmun Art Centre www.warmun.art.com.au
[279] Janet Holmes a Court in Rover Thomas*, I Want to Paint*, Exhibition Catalogue (Heytesbury Pty Ltd, 2003) 44.

that the reader could take with Queenie to he beloved Texas Downs, the land where her cultural legacy resides."[280]

"Every rock, every hill, every water, I know dat place backwards and forwards, up and down, inside out. It's my country and I got names for every place."[281]

iii. Mabel Juli

"On a trip to Springvale in May 2014, Mabel pointed out three rocks. In the Ngarrangarni (dreaming), these were the women the moon called 'mother' because they were of Nyajarri skin. Her brother Rusty Peters tells this story below and says that the Moon was so upset with the angry way the Nyaajarri women soke to him that the words he spoke made them transform into stone. They stand up close to the Moon place at the Little Phantom River."[282]

iv. Paddy Bedford

"What I love about Paddy's work is the space that it occupies, that the space in painting which acts between the horizontal and the vertical. At the same time a slippage occurs between figure and ground which allows the viewer to receive and experience a glimpse of creation itself." [283]

"The antidote is well known and has been repeated many time. 'I am a millionaire. I am a millionaire.' Shouted the old man in Kununurra after he received the money for the sale of his first painting. This scene, witnessed by Dr Eric Kjellgren of the Metropolitian Museum in New York, has become part of the growing legend of this Australian artist. Now some five years later, Paddy Beford has had several exhibitions throughout the country and travelled to most capital cities to attend openings. In more than one way, Paddy has assumed the role of millionaire."[284]

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[280] Jennifer Joi Field, *The Life of Queenie McKenzie – Written in the Land* (Melbourne Books, 2008), 10.
[281] Queenie McKenzie in Jennifer Joi Field, *The Life of Queenie McKenzie – Written in the Land*, (Melbourne Books, 2008), 48.
[282] Anna Crane, *Garnkiny, Constellations of Meaning* (Warmun Art Centre, 2014), 48.
[283] Peter Adsett in Paddy Bedford, *Walkng the Line* (Paddy Bedford and Jirrawun Arts, 2003) 12.
[284] Dr George Petitjean in Paddy Bedford, *Walkng the Line*, (Paddy Bedford and Jirrawun Arts, 2003) 5.

v. Lena Nyadbi

> "Lena Nyadbi's country calls for her to paint and she knows it intimately. She is most happy when she visits her country, that country knows her and she can speak to that place and of her *leeyan* for Jimbirla (Spearhead) Country and Dayiwul (Barramundi) Country; her inner feeling for her father's and mother's country, the places where she is now boss for that country."[285]
>
> "That old man [Hector Jandany] he told me – always paint your country – and that's what I bin doin."[286]

e) Repositioning Remote Indigenous Communities and Cultural Hubs

i. Defining Indigenous Art

Hadley[287] argues that copyright law creates a double art movement in Australia, where Indigenous art practice is simultaneously accepted as legitimate within the scope of the act (eg; the framing of originality) and concurrently rejected as unique in the application of artistic practice through deeply held cultural beliefs. Hadley says that this 'inclusion' and 'exclusion' tension is not binary and can be found by reviewing the legal, political and social context in the development of the law to date.[288]

The classification and therefor definition of Indigenous Art hinges on 'authenticity' where only true Indigenous communities are believed to be able to create art directly linked to traditional cultural expression.[289] However, this idea is deeply problematic to Indigenous people because 'authenticity' is imposed and/or decided by outside market forces for the art and these do not correspond neatly to the production of Indigenous art throughout the

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[285] Maggie Fletcher in Lena Nyadbi, *Painting my Country Ways* (Warmun Art Aboriginal Coproation and Niagara Galleries, 2010) 4.
[286] Lena Nyadbi, *Painting my Country Ways (*Warmun Art Aboriginal Corporation and Niagara Galleries, 2010), 6.
[287] Marie Hadley, 'The Double Movements that Define Copyright Law and Indigenous Art in Australia' (2010) 9(1) *Indigenous Law Journal* 47.
[288] Note in this paper Hadley reviewed four indigenous art cases to highlight the impact of this proposed double movement of 'exclusion' and 'inclusion'; *Bulun Bulun v. Nejlam Pty Ltd*, *Yumbulul, Milpurrurru* and *Bulun Bulun v. R & T Textiles.*
[289] Christopher Kendall & Sarah Meddin, 'Accessorising Aboriginality: Heritage Piracy and the Failure of Intellectual Property Regimes to Safeguard Indigenous Culture" (2004) 16(1) *Bond Law Review* 166, 179.

network of Indigenous art centres.[290] Indigenous communities do not want what it means to be Aboriginal imposed.[291] As an outcome a shift towards defining Indigenous Art as work that "is produced by a self identifying indigenous person whose work embodies knowledge that is part of the cultural traditions of a community."[292] Within this framework the identity of an Indigenous Artists is aligned to those who develop their ideas and implement practice from to preserve and transmit intergenerational understandings.[293]

There is criticism of this approach from within Indigenous communities and some people critical of the broad scope of the definition on the basis that urban Indigenous artists are not connected to their old people in the same way and should not make this claim.[294] It is also true that much of the copyright case law has developed from Indigenous art produced in remote areas within locally placed cultural norms. This is ultimately because each location has a particular connection with ancestors of the past and these close cultural ties are equally part of cultural affirmation and control everyday life. The social bonds are strong.[295]

The process of creating artwork holds an important social function to communicate the themes, beliefs, customs from one generation to another for an individual community.[296] Indigenous artists have strict rules about how to tell stories in the right way.[297] The right to tell certain stories is owned by community members based on their connection to the land, kinship and gender.[298]

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[290] Stephen Gray, 'Black Enough? Urban and Non-traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art' (1996) 7(3) *Culture and Policy* 29, 34; Marcia Langton, 'Aboriginal Art and Film: The Politics of Representation' (2005) 6 *Rouge*, online.
[291] Trevor James & Viscopy [Visual Arts Copyright Collecting Agency], 'Supporting Indigenous Artists: Finding a Way Forward'(2006) 6(18) *Law Bulletin* 7.
[292] Daniel Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPS Compatible Approach' (2005) *Michigan State Law Review* 137, 140.
[293] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Twelfth Session, The Protection of Traditional Knowledge: Revised Objectives and Principles [WIPO/GRTKF/IC/12/5(c)] (Geneva: WIPO, 2008) at Article 5; James Kane, 'Custodians of Traditional Knowledge Under the WIPO Draft Principles and Objective' (2009) 20 *Australian Intellectual Property Journal* 24, 31.
[294] Lorraine Gibson, 'Art, Culture and Ambiguity in Wilcannia, New South Wales' (2008) 19(3) *The Australian Journal of Anthropology* 294, 297.
[295] Ibid
[296] Margaret Martin, 'What's in a Painting? The Cultural Harm of Unauthorised Reproduction: Milpurrurru & Ors v. Indofurn Pty Ltd & Ors' (1995) 17 *Sydney Law Revie*w 59.
[297] Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective* (Sydney: Australian Copyright Council, March 1997), supra note 2 at paras 13-14.
[298]Stephen Gray, 'In Black and White or Beyond the Pale? The 'Authenticity' Debate and Protection for Aboriginal Culture' (2001) 15 *Australian Feminist Law Journal Australia* , 108.

Artist who paint someone else's dreaming without permission, will be met with sanctions and there is deep suspicion that to break culture lore will bring bad energy.[299]

"In the olden days, you'd get a spear."[300]

It is also recognised that within these structural rules Indigenous Artists have their own originality.[301] Cate Massola documented that it is common for Warmun to paint country, where landscape is connected to memory from the *Ngarranggarni* (Gija Dreamtime) and the connection to a history of colonialisation.[302] Warmun artists known and respected for their use of natural ochre on canvas, that represents their country, where the unique colours and ochre textures delineate their Country, in both geographic and cultural terms like an aerial map.[303] Former stockman and renowned Warmun artist, Churchill Cann collected ochre while droving as a stockman as a way to keep and hold his country. In this way Churchill continued to move through his country while he painted in his mind's eye.[304]

Indigenous art in Australia can best be defined as cultural capital, in which ever form it takes.[305] Currently the cultural capital of Indigenous art is not protected by the historic and current operation of the Copyright Act. There are multiple ways that Indigenous people interpret their cultural themes and protect sacred knowledge unique to the country on which they live. Australian copyright law offers no specific protection for Indigenous art, though some commentators believe that moral rights offer redress for harm suffered by Indigenous artists for reproduction without permission.[306] However their remains a fundamental

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[299] Christine Nicholls, *From Appreciation to Appropriation: Indigenous Images and Influences in Australian Visual Art* (Adelaide: Flinders University, 2000) at 8 in Ben Goldsmith, 'A Positive Unsettlement: The Story of Sakshi Anmatyerre' (2000) 9(2) *Griffith Law Review* 321, 330; Ali Gripper, 'Tribal Law That Keeps Lili's Dots in Check' *Sydney Morning Herald* (26 September, 2000).
[300] Dickie Tatayra in Debra Jopson, 'Misused Spirits of Creation Returned to Proper Custodians' *Sydney Morning Herald* (7 March 2001) 7.
[301] Margaret Martin, 'What's in a Painting? The Cultural Harm of Unauthorised Reproduction: Milpurrurru & Ors v. Indofurn Pty Ltd & Ors' (1995) 17 *Sydney Law Review* 591, 593; Kenneth Maddock, 'Copyright and Traditional Designs-An Aboriginal Dilemma' (1988) 2(34) *Aboriginal Law Bulletin* 8, 8.
[302] Catherine Massola, *Living the Heritage, not curating the past: A study of Lirrgarn, agency and art in the Warmun Community* (PhD Thesis, The University of Sydney, 2016) 80.
[303] Ibid 75
[304] Ibid 80.
[305] Lorraine Gibson, 'Art, Culture and Ambiguity in Wilcannia, New South Wales' (2008) 19(3) The *Australian Journal of Anthropology* 294, 297.
[306] Patricia Loughlan, "'The Ravages of Public Use': Aboriginal Art and Moral Rights" (2002) 7(1) *Media Arts Law Review* 17 at 17-26, online: University of Melbourne < http://aw.unimelb.edu.au/CMCL/malr/ 7-1-2%20Ravages%20ofh20Public%20Use%20Revised%20formatted%20for%20web.pdf>

philosophical incompatibility between the operation of the Copyright Act and the artistic practices of Indigenous artists in remote communities.[307]

ii. Primitive Art – Folklore

One of the challenges that Indigenous artists overcame in Australia to have their work recognised as 'original' given the basis of drawing upon pre-existing tradition in community.[308] The Working Party on Aboriginal Folklore made commentary that Indigenous artists would struggle to meet this threshold.[309] The Working Party noted that attributing individual ownership would be difficult because the communal ownership of design may not be alienated or transferred.[310] As an outcome, it was postulated that indigenous art is folklore and not copyright on the basis that "to acknowledge the full copyright of an individual artist would be to deny the contribution of continuing living folklore to the artistic work."[311] In this case the use of indigenous design without permission is not a private right and outside the remit of copyright law.

Hadley argues that this is an example of Indigenous art being seen as something less and excluded from copyright protection, which finds its roots in the political and social context of the time.[312] Hadley references the writing of Spencer and Gillen's, *The Native Tribes of Australia, in which Sigmund Freud calls the Australian Aborigine a "most backward and wretched"* primitive man, that "assumes a peculiar interest for us, for we can recognise in their psychic life the well-preserved, early stage of our own development."[313] The crux of these arguments is that creativity is missing as the superior requirement for a private right to exist.

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[307] Kathleen Birrell, 'Authorship and the Dreaming': Indigenous Culture and Intellectual Property Law'(October 2005) 23(2) *Copyright Report* 32, 32.
[308] *Copyright Act* (Cth) s 32.
[309] Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Department of Home Affairs and Environment: 1981) [Aboriginal Folklore Report] at 13; see also in this Report: "a person making copies of an artistic work by an Aboriginal artist might be able to claim that the work was not protected by copyright. This would be because the work was based on a traditional Aboriginal design and was not therefore an "original" artistic work within the meaning of the Act" at 45.
[310] Ibid 13.
[311] Ibid 9.
[312] Marie Hadley, 'The Double Movements that Define Copyright Law and Indigenous Art in Australia' (2010) 9(1) *Indigenous Law Journal* 47, 60; Robin Bell, 'Protection of Aboriginal Folklore'(1985) 1(17) *Aboriginal Law Bulletin* 8, 58.
[313] Sigmund Freud, *Totem and Taboo: Resemblances Between the Psychic Lives of Savages and Neurotics* (London: Routledge & K. Paul, 1919) 2.

Hadley argues that the Aboriginal Folklore Bill is a representation of the operation of inclusion and exclusion, the double movement, in law related to Indigenous artists because it excluded indigenous people as artists at the same time as including indigenous cultural product as capable of being exploited and requiring protection.[314]

Hadley writes;

> "The nature of the Aboriginal Folklore Report, as concurrently exclusive of indigenous artists as artists and yet inclusive of the value of folklore as a product, is symbolic of the dualism that underlies the double movements of inclusion and exclusion in the relationship between indigenous art and copyright in Australia. Inclusion of the value of indigeneity in this political discourse is evident, but it is ultimately abrogated by an assumption of indigenous inferiority."[315]

f) Distinguishing Fine Art

The development of Warmun Art Centre follows the shift in perception of aboriginal artists' recognition from one of primitive folklore excluded from concepts of originality towards acceptance as a labour of originality of high value to art collectors and public institutions. Rover Thomas is the original founder and one of the most famous of Warmun Artists. His early work while painting in Warmun was distributed through Waringarri Art Centre in Kununurra. In 1990 Rover Thomas was featured in the Venice Bienniale and represented Australia to international acclaim.[316] Rover Thomas held his first solo show at the National Gallery of Australia in 1994.[317] The Warmun Art Centre was officially registered as a

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[314] *The Aboriginal Folklore Bill* was not passed in Australia. The Report suggested the option to amend s.32 of the Copyright Act to specifically include works based on folk- * lore as original works, see Department of Home Affairs and Environment, supra note 64, 45.

[315] Marie Hadley, 'The Double Movements that Define Copyright Law and Indigenous Art in Australia' (2010) 9(1) *Indigenous Law Journal* 47, 60; Robin Bell, 'Protection of Aboriginal Folklore'(1985) 1(17) *Aboriginal Law Bulletin* 8, 8.

[316] See https://www.awm.gov.au/visit/exhibitions/incanberra/roverthomas Rover Thomas - Killing Times Rover Thomas was one of the first two Aboriginal artists to represent Australia at the Venice Biennale. He was an important elder in Aboriginal communities and a central figure in the art of the region. Ruby Plains Massacre 1 is part of a series of works by Rover Thomas about the 'Killing Times' in the East Kimberley region of Western Australia from the 1880s to the 1920s.

[317] https://www.artgallery.nsw.gov.au/collection/artists/thomas-rover/

business in 1998[318] and by 2001 Rover Thomas sold a painting to the National Gallery of Australia through Sotheby's for a controversial record price of $785,500.[319]

The recognition of indigenous art as fine art represented through the story of Rover Thomas and the development of Warmun Art Centre was mirrored nationally with rising popularity for the art produced and the assumption of the primitivity (in law) of Indigenous art as described by the previous reports became difficult to maintain (Appendix I).[320] Indigenous art was being recognised internationally and becoming part of Australia's national identity as a driver of cultural tourism in the 80s.[321] Central themes of the tourism campaigns during this time were pristine beaches, untouched rainforests and indigenous culture and continued to be supported by state tourism marketing campaigns during the 90s.[322]

However the increased profile and creation of a tourist market also expanded opportunity for exploitation of cultural product and unauthorized use of traditional designs to meet tourist demand for 'cheap' product estimated to be valued in excess of $25 million annually.[323] The political landscape changed and the link between positive outcomes from tourism and the recognition of the value of Australian cultural heritage, as the sale of indigenous art product grew, required the issue of intellectual property rights to be explored.[324]

In *Bulun Bulun v. Nejlam* the representation of sacred waterholes by an Indigenous artist was reproduced onto T-Shirts and action taken through the Copyright Act and the Trade Practices Act and in this way artist began to exert their rights despite the previous rhetoric of exclusion.[325] This case established as a matter of public record through the affidavit evidence

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[318] https://warmunart.com.au/about/timeline/
[319], 'Big rain' ends in bid drought', *The Age (*1 September, 2005) https://www.theage.com.au/entertainment/art-and-design/big-rain-ends-in-bid-drought-20050901-ge0sj8.html
[320] Susan McCulloch & Emily McCulloch Childs, McCulloch 's *Contemporary Aboriginal Art: The Complete Guide*, 3d ed. (McCulloch & McCulloch Australian Art Books, Fitzroy, Victoria, Australia, 2008); Kathy Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?' (2009) 13(2) *Australian Indigenous Law Report* 35.
[321] Carol Simondson, 'Tourism, Primitivism and Power: An Analysis of Some Advertising Literature of the Australian Tourism Industry' (1995) 7(1-2) *Olive Pink Society Bulletin* 22, 22-27.
[322] Ibid.
[323] Peter Brokensha & Hans Hoegh Guldberg, *Cultural Tourism in Australia: A Report on Cultural Tourism* (Canberra: Australian Government Publishing Service, 1992) at 3-6.
[324] Michael Simons, 'Aboriginal Heritage Art and Moral Right' (2000) 27(2) *Annuals of Tourism Research* 412, 413.
[325] Colin Golvan, 'The Protection of At the Waterhole by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights' in Andrew Kenyon, Megan Richardson & Sam Ricketson, eds, *Landmarks in Australian Intellectual Property Law* (Port Melbourne: Cambridge University Press, 2009) at 191-208.

an artistic process that was both original and creative, at the same time as being linked to communal ownership.[326] Experts provided evidence of the growing recognition of the mainstream inclusion of Indigenous art as fine art including.[327] Bulun's evidence was accepted in so far as it was endorsed by independent external experts who were non-Indigenous.

Communal Rights

The seminal copyright cases of the 90s created an environment of growing recognition that Indigenous artists hold both private rights through the Copyright Act as original creators of fine art and also communal rights held by their community. In 2003, The Indigenous Communal Moral Rights Bill was introduced as a "means to protect unauthorised and derogatory treatment of works that embody community images or knowledge."[328] The Bill is designed to provide indigenous communities with the rights of attribution, the right not to be falsely attributed and the right to a cause of action if traditional culture is "is subjected to inappropriate, derogatory or culturally insensitive use."[329]

Attorney General Philip Ruddock stated that the Bill will "will assist in protecting the integrity and sanctity of indigenous culture."[330] The Bill was not introduced due to a sustained negative, that required participation in the framework to be voluntary, making it impossible for the opportunity for an infringement to be actionable. Commentators believed that people who did not want to respect Indigenous culture would simply opt-out and any legislation would be

[326] Ibid at 197. "Many of my paintings feature waterhole settings, and these are an important part of my Dreaming, and all the animals in these paintings are part of that Dreaming ... The story is generally concerned with the travel of the long-necked turtle to Garmedi, and by tradition I am allowed to paint [that part of the story] ... According to tradition, the long-necked turtle continued its journey, and other artists paint the onward journey. The many different versions of the waterhole story ... are indicative of the range of possibilities in telling the traditional story."; Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 10 *European Intellectual Property Review* 346, 348 - "My father ... painted the dreaming stories of our tribe, the Gunilbingu, including the waterhole scenes. He painted such scenes in his own way. I do not have any of his works, and have never tried to copy any of them."
[327] Experts included Margaret West, then curator of the Northern Territory Museum of Arts and Sciences, Peter Cooke and Charles Godjuwa, both art advisers, Kerry Steinberg, a Sydney Gallery operator, and Wally Caruana, curator of Aboriginal art at the Australian National Gallery.
[328] Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27 (3) *University of New South Wales Law Journal* at 585-604.
[329] Ian McDonald, *Indigenous Communal Moral Rights* (Redfem: Australian Copyright Council, 2003) at 1.
[330] Hon. Philip Ruddock, "Copyright: Unlucky for Some" (Australian Centre for Intellectual Property and Agriculture Conference, Brisbane, Australia, 13 February 2004), in Matthew Rimmer, "Australian Icons: Authenticity Marks and Identity Politics" (2004) 3 *Indigenous Law Journal* 139, 150.

ineffectual.[331] It was also the case that there would need to be a written agreement in place and this structure excluded options for infringement notices to those who may want to exploit and are unknown to community members, which is more normally the case.[332]

Hadley argues that there is a paradox within governments that is born from an unwillingness to develop legal principles that address this 'inclusion' and 'exclusion' dynamic of the law – where Indigenous artists are included to a point of originality and excluded to the point of protecting the interests of those *outside* an indigenous community over those *within* it.[333]

Conclusion

It is hard to argue against the position that Hadley[334] makes as the general Manager of an Indigenous Art Centre that represents artists who are celebrated all over the world, yet not protected from exploitation by the laws in the country they live and who continue to live in extreme poverty that would cause shame and embarrassment if not hidden in remote Australia.

It is not that these artists are not celebrated and referred nationally and internationally. Rover Thomas broke the record for the highest investment n an acquisition by the NGA in 2001 (at the time). internationally. Lena Nyadbi's work *Baramundi Dreaming* is on the rooftop of Musee de Quai Branly in Paris, where over seven million people see it a year from the Eiffel Tower.[335]

Politicians are quick to stand alongside Lena in the celebration of this global recognition of the rich and deep cultural connection of first nation people as the longest living continuous culture in the world, yet the political will to enact protective measures to meet international human

[331] Jane Anderson, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) *International Law Bulletin* 8, online: *Australasian Legal Information Institute* < http://www.austlii.edu.aulaul journals/ILB/2004/15.html>.
[332] Ian McDonald, 'Indigenous Communal Moral Rights Back on the Agenda' (2003) 16(4) *Australian Intellectual Property Law Bulleti*n 47, 47.
[333] Hadley (n 318) 74.
[334] Hadley (n 318).
[335] Nick Miller, 'Dreamtime art celebrated on rooftops of Paris' *Sydney Morning Herald* (online, 7 June, 2013) https://www.smh.com.au/world/dreamtime-art-celebrated-on-rooftops-of-paris-20130607-2ntpf.html

rights instruments Australia has signed, that bolster current copyright law failure for Indigenous artists in Australia, remains elusive.[336] Why?

[336] Charles Miranda in Paris, 'Aboriginal art gives Paris, France, an Eiffel from Eiffel Tower,' *News Corp Australia Network* (online 7 June 2013) https://www.news.com.au/travel/travel-updates/aboriginal-art-gives-paris-france-an-eiffel-from-eiffel-tower-/news-story/4789ea83854ae89e3178ffa96a0d8e63

7. SUI GENERIS LEGISLATION

a) Protection of Traditional Cultural Expression – A Regional Framework

Australia is a member the Pacific Islands community. Many of these many Island Nations were impacted by colonialisation's and the failure of imported copyright law to recognise traditional cultural expression as a parallel import from UK derived legal systems. Nations include the Cook Islands, Fiji, the Federated States of Micronesia, New Zealand, Kiribati, Nauru, Niue, Palau, Papua New Guinea, the Republic of Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu.

The UNESCO Pacific Regional Office developed a framework alongside the Pacific Island forum Secretariat incorporating the *Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002* ('*Model Law*'), that establishes;

- traditional cultural rights (ss 6–12);
- moral rights (s 13) for cultural knowledge and expressions;
- the need for prior informed consent (pt 4);
- a structured process for applications for use and identifying the traditional owners (ss 15–19);
- authorised user agreements (ss 20–4);
- an enforcement regime covering civil and criminal actions and defences (ss 26–34) and;
- a Cultural Authority to oversee the entire regime (ss 36–7).[337]

Steps have been taken by Fiji and Palau to implement the *Model Law* with the introduction of draft Bills representing sui generis legislation to protect traditional knowledge and cultural expressions. [338]

[337] Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and UNESCO Pacific Regional Office, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002) <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsofCulture20021.pdf>

[338] Pacific Islands Forum Secretariat, *Traditional Knowledge Implementation Action Plan (2009)*, 2 [3]: <http://www.forumsec.org.fj/resources/uploads/attachments/documents/Traditional%20Knowledge%20Action%20Plan%202009.pdf>

b) Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention)

One hundred and sixty-one states are party to the ICH Convention recognising "recognises 'the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development."[339] Australia is not party to the Convention alongside other developed nationals including New Zealand, Canada, the United Kingdom and the United States.[340]

ICH Convention Article 1 highlights the purpose of the convention is to safeguard and ensure respect for intangible cultural heritage belonging to communities, groups and individuals; raise awareness of the importance of intangible cultural heritage locally, nationally, and internationally; provide international cooperation and assistance for the protection of intangible cultural heritage.

Article 2 (1) provides a definition of 'intangible cultural heritage' that means;

> *"*the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human

[339] *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 1 (entered into force 20 April 2006) ('*ICH Convention*').
[340] The Australian Human Rights Commission recommended that Australia ratify the *ICH Convention*. For further details see Australian Human Rights Commission, 'Ratification of 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage', Submission to Department of Environment, Water, Heritage and the Arts, *Inquiry into the Ratification of the 2003 UNESCO Convention Safeguarding Intangible Cultural Heritage*, 24 September 2008, 3 <https://www.humanrights.gov.au/submission-ratification-2003-unesco-convention-safeguarding-intangible-cultural-heritage-2008#Heading166>.

rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."

Article 2 (2) defines the scope of 'intangible cultural heritage' as:

(a) "oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(b) performing arts;
(c) social practices, rituals and festive events;
(d) knowledge and practices concerning nature and the universe;
(e) traditional craftsmanship."

Defining Indigenous cultural expression is fraught with debate and complex assessments in order to reach universality.[341] The ICH Framework focuses on safeguarding 'intangible cultural heritage' and provides for the states to identify and define the elements.[342] It is important to note that a major element of the *ICH Convention* is the connection with state parties and the monitoring responsibility of state parties through the establishment of intergovernmental committees charged with 'safeguarding' and overarching promoting for heritage and planning purposes. [343]

c) United Nations Declaration on the Rights of Indigenous People (UNDRIP)

Subsequent to initial resistance Australia ratified the UNDRIP in 2009. However, the political will to implement meaningful steps with legislative force to has been missing.[344] The framework set out requires that Indigenous people have access to a compensation process "with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[345]

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[341] Robynne Quiggin, 'Protecting Culture' in Larissa Behrendt, Chris Cunneen and Terri Libesman (eds), *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 207; WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)' (WIPO, April 2001); WIPO Intergovernmental Committee, *The Protection Of Traditional Cultural Expressions: Draft Gap Analysis*, 13th sess, WIPO/GRTKF/IC/13/5(b) Rev (11 October 2008).
[342] *ICH Convention* Article 2.3
[343] Ibid Article 5.
[344] *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 11.1. '…the right of Indigenous people 'to practise and revitalise their cultural traditions and customs.'
[345] *ICH Convention* Article 11.2.

Article 31 of the *UNDRIP* reflects the international agenda of the WIPO Intergovernmental Committee to draft agreed international "provisions for the protection of traditional knowledge and traditional cultural expressions."[346]

WIPO suggests that sui generis legislative regimes are a requirement to meet the obligations of Article 31. Many states have acted to adopt sui generis legislation (eg: Brazil, Peru, Panama, the Philippines) and draw on the suite of Model Law provisions containing property right provisions.[347]

The centre theme of WIPO is developing the ideal of universal human rights where the protection of 'cultural rights' is central to identity.[348] Australia does not need to be innovative in developing a sui generis framework for protection of traditional cultural expression. A body of work currently exists internationally and through the WIPO. Australia has some complementary legislation in place already.

d) Current Legislative Frameworks – Cultural Heritage

Tangible Heritage

i. Aboriginal and Torres Strait Islander Heritage Protection Act

A hub and spoke model of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*ATSIHP Act*') seeks to protect our Indigenous cultural heritage. The Commonwealth set out legislative intent "to take legal action where State or Territory laws

[346] *UNDRIP* Article 31; (i)" 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. (ii) In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights."
[347] *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* (UNESCO and WIPO, 1982); Pacific *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*.
[348] *ICH Convention*: art 2(1)–(2); *UNDRIP* art 46(1); 'intangible cultural heritage' definition; Christoph Antons, 'The International Debate about Traditional Knowledge and Approaches in the Asia-Pacific Region' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, 2009) 39, 47.

were inadequate, not enforced or non-existent."[349] States and territories are required to implement a planning and environment regime either through their own sui generis legislation or existing heritage acts and is not an alternative to the operation of land claim processes.[350] The Act is designed to protect land and objects that are significant to Aboriginal people.[351] The act recognises the connection between land and culture that is of deep significance to aboriginal people. There is an option to seek a declaration from the Minister.

ii. Protection of Movable Cultural Heritage Act

Australia maintains obligations under the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* through the *Protection of Movable Cultural Heritage Act 1986* (Cth).

The Act controls the acquisition and movement of culturally significant objects. In order to be captured by the scope of the legislation an object must be culturally significant to Aboriginal people, not created for sale, at least thirty years old and not represented in a community or public collection.[352] The intent of the legislation is to provide that Australia holds adequate cultural property in public and community collections.

Intangible Cultural Expressions

As previously discussed, there is limited protection for traditional cultural expressions (folklore, Indigenous art and handicrafts and music and performance) though the *Copyright Act 1968* (Cth). Copyright cases of the 1990s established that Individual artist are protected by the Act for original work (derived from community). However, the community in which the artists hold a fiduciary duty to protect cultural content, is not protected. Australian case law demonstrated the failure of the Copyright Act to recognise communal ownership inherent in traditional cultural expression.

[349] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1984, 2129 (Clyde Holding).
[350] Ibid
[351] Section 4.
[352] *Protection of Movable Cultural Heritage Regulations 1987* (Cth), schedule 1 part 1.

There are no specific provisions within the copyright Act which adequately represent the way in which Indigenous artists are trained in community or the permission structures associated with the telling of stories connected to Country. Many commentators believe that this failure of the current copyright legislative framework is a case for Australia to implement sui generis legislation for the protection of communal expressions in perpetuity.[353]

e) Sui Generis Legislation in Australia

While it is recognised that delineating the scope of traditional cultural expression and traditional knowledge is complex and connected.[354] There remains significant challenges because of increasing levels exploitation, inappropriate commercialisation and commodification by nonindigenous people.[355] There is an ongoing problem with the benefits of the commercial success of Indigenous artists not flowing evenly or fairly back to those artists or communities.[356]

Cultural misappropriation is devastating to traditional owners who can lose all interest in claiming corrupted traditional cultural expression, given the sacred nature of the traditional expressions and cultural custodian protocols. The challenge of enforcing rights for contemporary indigenous artist represents the contradiction between the different value system of a Western legal system and communal ownership for example the shift in the recognition of originality for Indigenous artists who draw on historical communal references.[357]

However, the broader challenge with Indigenous cultural expression is the failure of Western copyright law to recognise perpetual rights because of the basis of property rights as

[353] Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia- The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745; Sabine Sand, 'Sui Generis laws for the protection of indigenous expressions of culture and traditional knowledge' (2003) 22 (2) *University of Queensland Law Journal 188*.
[354] World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - Final Report on National Experiences with the Legal Protection of Expressions of Folklore (2002) 91.
[355] Shelley Wright, 'Aboriginal Cultural Heritage in Australia' (1995) *University of British Columbia Law Review* (Special Issue)
[356] Department of Communications, Information Technology and the Arts (Australia), Report of the Contemporary Visual Arts and Crafts Inquiry (2002) 116. The Australian Aboriginal arts and craft industry had an estimated retail sales figure of a least USD $130 million in 2002, yet by comparison, traditional owners received only $30 million of this turnover.
[357] *University of London Press Ltd v University Tutorial Press Ltd* [I912] 2 Ch 601; *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 248.

individual private rights and having limited operation after the death of the owner (70 years). Indigenous cultural expression is fundamental to individual and collective identity rather than a lesser property right. Many commentators argue it is the connection to Indigenous identity that forms the foundation of a perspective to enshrine this 'natural right' within sui generis legislation.[358]

The impact of the imposition of Western intelligentsia on the loss of traditional cultural knowledge is well researched.[359] There is growing discontent from the elder group within community on the disruption of cultural knowledge transference, which are often maintained through oral storytelling tradition, supported by painting of the stories as a allegory record.[360]

Warmun Art Centre owns one of the most significant community collections of historical and sacred material in the country. It is a collection gathered over time by the Sisters of the Catholic School and returned to community ownership in the 80s. An AIATSIS research project to collect the stories associated to the community collection in partnership with the University of Melbourne was secured in 2020.

In order to secure this funding Warmun Art Centre and the University of Melbourne worked together in a two-way model to meet the *Guidelines for Ethical Research in Australian Indigenous Studies.*[361] These guidelines create a place of respect for indigenous people and their 'inherent right to self-determination ... and to control and maintain their culture and heritage'.[362] The Gija Community of the East Kimberley, through a formal partnership with the University of Melbourne, has demonstrated self-effacacy in starting the process of documenting their knowledge and culture through formalised structures.

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[358] Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia- The Case for Sui Generis Legislation' (2015) 41(3) Monash University Law Review 745.
[359] IP Australia, *Indigenous Knowledge Consultation: How should Australia Protect Indigenous Knowledge?* (25 May 2015) <http://www.ipaustralia.gov.au/about-us/public-consultations/Indigenous_Knowledge_Consultation/
[360] Digital Learning Futures*, Listening to Wujal Wujal TOs* (2010) <http://www.learningfutures.com.au/listening-wujal-wujal-tos> .
[361] Gabriel Nodea and Robyn Sloggett, 'Two-Way Learning, Sharing Conservation Education at the Warmun Art Centre and the Grimwade Centre', *Conservation Perspectives* 36.2 (Draft 11 July, 2021 approved, publish to follow, Getty publications online).
[362] AIATSIS, 'Guidelines for Ethical Research in Australian Indigenous Studies' (revised 2nd ed, 2012) 3.

It is expected that the collection of this data in community and development of a community owned database provides a level of Intellectual Property Protection working within established ethical guidelines and reduces the opportunity for misappropriation without recourse. The creation of a complete digital database within community supports the protection and access regimes over Indigenous knowledge and cultural property using contract law and the use of voluntary ICIP protocols with Partner organisations.[363]

It is always wise to proceed with caution as there are examples of universities and researchers exploiting access and/or the relationships becoming more complex through commercialisation.[364] The attributes of successful partnership models with Indigenous Communities include; *equality of negotiation ability*, *informed by free prior consent* and satisfactory *benefit-sharing* arrangements.

Traditional Cultural Expression AND Traditional Knowledge

Western Intellectual Property law tends to delineate *traditional cultural expression* as 'art' works for copyright and *traditional knowledge* as patent available associated to biodiversity and knowledge of flora and fauna (cultural conservation techniques).[365] The secondary nature of the protection of biodiversity fails to recognise this deep connection. An example of Warmun Art Centre, where the artists are famous for the use of white ochre, (white gold), in painting the dreaming of Gija Country.

There are significant conservation rituals associated with the collection of white ochre. The veins of the white ochre locations are only told to a few and those that collect are only allowed to collect until they need to drink water. Community members cannot continue to collect white ochre after you drink water by Indigenous lore. This rule of the Gija people and the collection of white ochre limits the amount people can take in one trip. Gija people so not break these rules.

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[363] Paul Marshall and Anthony Watson, 'Partnership Engagement towards the Commercialisation of Indigenous Traditional Knowledge' (Speech delivered at the Indigenous Knowledge Forum, Sydney, 2 August 2012) <http://www.indigenousknowledgeforum.org/index.php/forums/2012-forum/presentations> .

[364] Ibid, A case study is includes an example of Griffith University and the Jarlmadangah Burru who secured a patent for obtained patents traditional knowledge that is yet to be commercialised as the next step.

[365]Gary D Meyers and Olasupo A Owoeye, 'Intellectual Property Law and the Protection of Indigenous Australian Traditional Knowledge in Natural Resources' (2013) 22(2) *Journal of Law, Information and Science* 56.

Model Law

The key elements outlined by the provisions of the *Model Law* found in the Pacific *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* recognise the previous work of WIPO Intergovernmental Committee that separated the focus into Traditional Knowledge, Genetic Resources, and Traditional Cultural Expressions/Folklore. Subject matters "cut[s] across conventional branches of intellectual property law and do[es] not fit into existing WIPO bodies",[366] and the result is to make a case for a new governance structure within WIPO to manage the complexity, where the need for international agreement has required complex negotiations over an extended time and the opportunity for resolution in the short term is limited.[367]

The argument for sui generis legislation in Australia is the outcome of a failure of WIPO to pull together a level of unity. The three subject matter instruments morphed along the lines of an outcomes-based focus. Traditional cultural expressions have 'taken a new economic and cultural significance within a globalized information society'.[368] The subject matters of craft, storytelling, symbols and art aligns with copyright, designs and trademark law. Traditional knowledge subject matters include traditional medicinal practices, plant uses, and land

[366] IP Australia, *Indigenous Knowledge Consultation: How should Australia Protect Indigenous Knowledge?* (25 May 2015) <http://www.ipaustralia.gov.au/about-us/public-consultations/Indigenous_Knowledge_Consultation/> . The University of Technology Sydney 'White Paper' prepared for the New South Wales Office of Environment and Heritage: Natalie Stoianoff, Ann Cahill and Evana Wright, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, University of Technology Sydney and North West Local Land Services, 30 September 2014) <http://www.ipaustralia.gov.au/pdfs/UTS> ('*UTS Submission*'). 'Knowledge Resource(s)' is defined in the *UTS Submission* to mean 'bodies of knowledge held by Aboriginal Communities relating to the use, care and understanding of Country and the resources found on Country. Knowledge Resources include cultural heritage, traditional knowledge and traditional Cultural Expressions, as well as manifestations of Aboriginal sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. Knowledge resources include "law knowledge" and "cultural knowledge" of an Aboriginal Community and knowledge of observing ecological interactions between plants, animals, medicines, foods and seasonal cycles which relate to genetic resources. Genetic resources may exhibit different properties in different locations and environments': at 61–2. For a full listing of defined terms, see 60–3.

[367] WIPO Intergovernmental Committee, *Elements For The New Mandate — Proposal By The European Community And Its Member States*, 14th sess, WIPO/GRTKF/IC/14/11 (July 3, 2009) annex.

[368] Ibid.

management, where 'genetic resources and views such local and Indigenous knowledge through the lens of the patent system'.[369]

The structural delineation of 'traditional cultural expression' and the 'traditional knowledge' does not reflect the complex interaction of Indigenous culture as highlighted by the process of collecting white ochre by Gija artists in the Kimberley and other Indigenous communities.[370] Use of terminology *cultural expression* is a term of very broad scope in the context of the knowledge in Indigenous culture at the same time as being a process of upholding, communicating, consuming and transmitting that knowledge.[371]

It is not a clear path to segregate the three subject matters as they have been defined by the WIPO Intergovernmental Committee. The subject matters are holistic and intertwined. The collection of white ochre on Gija country is an example of the use of traditional knowledge about the finding white ochre laid out in a dream, and the rules of collection which provide a natural conservation process.

The WIPO process of negotiation to delineate over almost 15 years and the introduction of separate instruments being reinforced through the European Union would require the introduction of two separate regimes in Australia (if this path was followed).[372] It is arguable in the Australian context that a single sui generis framework for TCE and TK in Australia that follows a principle-based methodology developed in consultation with Indigenous Communities.[373]

Janke recommends a sui generis regime in which the definitions are developed with broad community consultations with reference to recognising international developments and the work of the WIPO Intergovernmental Committee; rights in perpetuity; protection aligned

[369] Patricia Adjei and Natalie Stoianoff, 'The World Intellectual Property Organisation (WIPO) and the Intergovernmental Committee: Developments on Traditional Knowledge and Cultural Expressions' (2013) 92 *Intellectual Property Forum* 37, 37–8. See also Indigenous Knowledge Forum Organising Committee, *Report on the Indigenous Knowledge Forum 2012* (31 October 2012) 4, 38.
[370] Adjei and Stoianoff, above n 364, 38.
[371] Ibid.
[372] WIPO General Assembly, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, 41st (21st Extraordinary) sess, WO/GA/41/15 (1 August 2012) 5.
[373] Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia- The Case for Sui Generis Legislation' (2015) 41(3) Monash University Law Review 745, 748.

with customary law irrespective of considerations of being 'novel' or 'original' under current intellectual property laws; protection of intangible cultural heritage (where they have not been expressed in material form); prohibition if wilful distortion and misrepresentation of traditional cultural expression and special provisions for sacred material; bolstering the provision and the implementation of free, prior and informed consent within a framework of building benefit sharing options.[374]

Much of the work done by Terri Janke has been used to develop a robust protocol landscape. In September 2020, the Australia Council launched the Indigenous Cultural Intellectual Property (ICIP) Protocols which need to be in place to access Australia Council funding.[375] In this regard, the impact of these 'soft' law provisions forces the issue. Creative project projects will not be funded by the Federal government unless these ICIP protocol frameworks have been adhered too and are contracted as part of the professional process of developing the idea in the early stages.

A challenge of a sui generis legislative framework will be to examine the interaction with existing legislation and in particular how law extends and/or limits the operation of current moral rights legislation. A question to ask is whether there is an option to extend the moral rights ownership to communities (beyond the current individual framework). The impact of current fair dealing provisions could be to extend to traditional and customary use and also sacred material.[376]

f) Impact of Colononialisaton

There is a body of research recognising the deep negative impact of colonisation for first nations people, (dispossession, marginalisation, structural poverty), as already discussed there is a very strong case to make the introduction of sui generis legislation is socio-economically and symbolically important as a pathway to redressing previous wrongs. Despite that some commentators believe it is possible to argue within the current legislation for better

[374] Terri Janke, AIATSIS and ATSIC, *Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) ('*Our Culture Our Future*'), Chapter 18.
[375] Media Release The Australia Council has today released updated *Protocols for using First Nations Cultural and Intellectual Property in the Arts.* September 29, 2020. https://australiacouncil.gov.au/news/media-releases/new-protocols-on-first-nations-cultural-and-intellectual-property/
[376] Natalie Stoianoff and Alpana Roy, note 350.

outcomes,[377] there remains too much hard data that Indigenous Otherness[378] exists and cannot be ignored so it legitimising difference is important to acknowledging the distinctive elements of Australia's Indigenous (First Nation) People's.

Many commentators also argue that there is a fundamental problem with imposing a 'western' legal system and method of law that has its basis in individual rights over the top of communities that have developed cultural protocols from a focus on the power of the community as centre. [379] The real challenge is how to achieve the appropriate level of recognition and protection. There a four general approaches to the challenge at a global level.

Bowrey[380] argues that cultural product is part of the community heritage (subject to customary laws) where communal and individual responsibilities are entrenched, where strictly private property rights are created through Western intellectual property frameworks. The right to exclude others is central to provisions that create recognition and protection for Indigenous cultural expression and exclusion is central to Western IP law, so the IP framework is best suited to deal with the challenges. It is on this basis that Stoianoff and Roy argue the case for sui generis IP legislation as a fit for purpose approach compared to the other options (commercial trade legislation) and also follows the point of view of the WIPO Intergovernmental Committee.[381]

Why Treat Indigenous Australian Separately?

The *LRCWA Report* explored the legitimacy of separation as a basis for inform equality and can stand alone under Australian law and international law.*[382]*

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[377] Kathy Bowrey, 'International Trade in Indigenous Cultural Heritage: an Australian Perspective' in Christoph Beat Graber, Karolina Kuprecht and Jessica Christine Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar Publishing, 2012), 423. Demonstrates that intellectual property laws can be used to protect Indigenous knowledge and culture; Kathy Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?' (2009) 13(2) *Australian Indigenous Law Review* 35.
[378] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 315, 321–30.
[379] Jane Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar, 2009). 40–3.
[380] Bowrey (n 377) 423.
[381] Ibid Note 350.
[382] Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture,* Final Report No 94 (2006) ('*LRCWA Report*'), 10 – cited

These reasons include:

- "members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish;
- that the bias and disadvantage experienced by Aboriginal people makes them more unequal than any other social or cultural group in Australia;
- that Aboriginal Australians do not access mainstream services at the same rate as other Australians therefore requiring targeted service provision;
- that Aboriginal people are often subject to two laws and may be punished twice for the same offence; and
- that Aboriginal people suffer such underlying systemic discrimination in the criminal Justice system that they have become the most disproportionately imprisoned culture in Australia."[383]

The Report argues a case for 'legitimate differentiated treatment based on the unique place of Indigenous Australians as First Nations peoples.[384] The justice experienced by indigenous Australiana through the 'laws and policies of successive parliaments and governments' ... that 'have inflicted profound grief, suffering and loss' is at the heart of corrective Justice. [385] The wrong caused to Indigenous Australian's can be acknowledged finally by putting in place a system to correct the wrong.[386] The introduction of sui generis legislation would be part of the path to reconciliation in Australia and redress the intergenerational loss of knowledge created through displacement from land and set a path for rebuilding in the future. [387]

[383] Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report No 94 (2006) ('LRCWA Report') – cited Stoianoff, Natalie and Roy, Alpana, 'Indigenous Knowledge and Culture in Australia- The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745, 749.
[384] Ibid at 9-10.
[385] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–73 (Kevin Rudd).
[386] Stephen R Munzer, 'Corrective Justice and Intellectual Property Rights in Traditional Knowledge' in Annabelle Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (Cambridge University Press, 2012) 58, 61–2.
[387] Ibid 62.

Conclusion: Action not Inquiry

Australian remote Indigenous communities are the source of the oldest continuous culture in the world and are celebrated internationally and in demand as a high-value cultural product in a global market, yet remote artists and their communities live in deep structural poverty. These communities have become more disadvantaged. The benefits of global recognition and celebration have not flowed equally or fairly into these communities.

Something is deeply wrong and unjust about this outcome. It is not a situation that can be allowed to continue as a hidden shame at the heart of our global reputations as one of the wealthiest countries in a Western democracy.

A failure of political will has resulted in global exploitation through the well documented fake indigenous art market. In September 2021 the Productivity Commission launched another inquiry. Inquiry is not required. Action is necessary as the path to Indigenous Australians and our cultural heritage being protected.

The recommendations of multiple reports over many have been systematically ignored.

CONCLUSION

Protecting the *traditional cultural expression* of Indigenous communities is a global challenge, of all states signed to the Berne Convention and other related human rights instruments. There have been times when Australia led the way in developing copyright jurisprudence from an anglo-saxon legal system that is focused on individual rights.

Australia was one of the first countries to recognise the 'originality' of individual Indigenous artists *traditional cultural expression* and provide protection through existing copyright legislation. However significant gaps remain in the operation of copyright law to protect communal ownership of traditional cultural expression (in perpetuity).

Over twenty years of Australia Independent Inquiry Reports, (from stakeholder groups), have consistently recommended the introduction of sui generis legislation to address the copyright protections required for *traditional cultural expression* in Australia, yet no action has been taken. WIPO have worked at a global level to refine definitions and develop Model Law frameworks available and in form global agreement on the scope and boundaries of a Model Law framework as best practice. WIPO actions have failed to gain traction.

The law takes time to move and shift in response to community expectations globally and within Australia. Meanwhile, remote Indigenous communities in Australia continue to live in extreme poverty with limited access to resources.

In parallel, remote Indigenous communities are the only source of rich bodies of *traditional cultural expression*, which significantly contributed to launching Australia as a global tourist destination and built a hybrid economy. The economic benefits of the high-value Indigenous art market do not flow equally or directly into the hands of the creators and their communities, as evidenced by the Warmun Art Centre story. The data suggests the reverse is happening. Remote Indigenous Communities in Australia are moving backwards and not forwards on all external social and economic measures of success.

1. **Recommendation: EDUCATE**

The best first response is to ***educate*** Indigenous artists directly on their existing rights and to build the legal capacity of Indigenous artists to exert existing copyright protections to the highest level available through this knowledge. All knowledge is power. Indigenous artists must be educated on current copyright law regimes and support provided for communities to exert these rights in business relationships ***at every level they exist*** - copyright, fiduciary duties, contract law (joint authorship doctrine) and moral rights.

The education of Indigenous communities on their legal copyright protections should be an active government agenda which is federally funded and aligned to driving the economic sustainability of Indigenous Art practices nationally. The ***educate*** outcome can be achieved through the current network of over 100 Indigenous community owned art centres.

2. **Recommendation: CONTRACT**

As I started to write this thesis the Productivity Commission launched another inquiry to examine the indigenous art market and structural barriers to the flow of economic benefits to communities, which includes the impact of known gaps in existing copyright law. It is my view that greater engagement is required by those *in power* and who control the flow of money, to actively *step in to moderate these gaps* until the law catches up.

Government funding bodies and public institutions can take a leading position, as many already are, by rolling out 'soft law' guidelines in the form of Indigenous Cultural Intellectual Property (ICIP) Protocols associated to securing government funding. This is the approach taken by the Australia Council in launching new ICIP Protocols in September 2020. The funding guidelines require ICIP protocols are met within 'hard-law' contracted agreements.

In this way a business culture of accountability is set to empower Indigenous Communities to demand contract rights directly, (where copyright law fails), with current/future partner organisation as part of a business process expectation. The contracting of 'hard law' rights as part of the business model is a *plug-in* to bolster existing business structures built into art centres data- management systems. There would be new processes for writing the traditional

cultural expression as work product *owned* by the Indigenous *owned and operated* art centres (depending on the CRM system – most art centres use SAM (Story, Art, Money)).

3. Recommendation: ADVOCATE

Many Indigenous artists and their communities are not motivated by expressing their art to gain the economic benefits that should flow from success. A western legal system for copyright law based on Lochean principles of incentivising Labour simply does not align at a deep philosophical level. Art is spirituality, connection to elders of the past and of the future as the oldest living continuous culture in the world, through an oral storytelling tradition passed through intergenerational transfer of knowledge.

Moral rights law is an influential framework to create public profile and tension to develop the case law jurisprudence in response to the misappropriation of *traditional cultural expression.* Moral rights currently act as a public relations platform to encourage mediated dispute resolution. However, Indigenous Communities and their legal representatives should identify an appropriate ***test case*** to explore the scope of moral rights law in Australia and actively participate in creating hard-law precedent to be laid down.

Greater engagement in copyright law by Indigenous communities exerting influence through the soft law trend of ICIP protocols will create momentum to build the political will to introduce the required sui generis legislation. The introduction of sui generis legislation is an important action in redressing the structural barrier to Indigenous Communities becoming economically sustainable within a Western democratic capitalist economy, *in their own right (self-determined)*, as part of an Australian reconciliation agenda with First Nation people.

As a concluding comment, this thesis, *The Value of a Good Story, Protecting Indigenous Culture: A Global Challenge, Australian Copyright Law,* will be adapted as a report and submitted to the Productivity Commission Inquiry to make commentary, in the search to influence a more equitable outcome for all Indigenous Australians, where protecting the cultural integrity of our First Nation People is fundamental to *being* Australian.

It is simply *un*Australian to continue to fail to act.

APPENDIX I - WARMUN ART CENTRE – TIMELINE
www.warmunart.com.au

1994

Rover Thomas is featured in a solo show at the National Gallery of Australia's *Roads Cross* exhibition.

26 October 1998

Warmun Art Centre is officially registered as a business in Warmun Community.

1999 – 2001

Sales grew from $0 (1998) to $650,000 in 2001.

2000

WAC won the 'Arts and Media' category of the WA Indigenous Business Award.

July 2001

All that big rain coming from top side (1991), a painting by Rover Thomas, sold by Sotheby's to the National Gallery of Australia for a record $786,500.

2003

The National Gallery of Victoria's touring exhibition *Rover Thomas: I Want To Paint* features works from the Janet Holmes à Court collection.

21 June 2005

WAC separately incorporated as Warmun Art Aboriginal Corporation under the Commonwealth Aboriginal Councils and Associations Act 1976.

June 2006

Opening of the Musée du Quai Branly in Paris, featuring commissioned artwork by Warmun artist Lena Nyadbi, gaining local and international media coverage for the Art Centre and artist.

2007

Sales exceed $1 million for the first time in Warmun Art history.

2007 – 2008

New $1.65 million gallery premises built from a combination of Federal and State funding, and WAC's savings.

2008

WAC won the 'Aboriginal Business of the Year' as part of the East Kimberley Aboriginal Achievement Awards.

2010

Jirrawun Arts, an Aboriginal art company in Wyndham, closed its doors; causing many of its well-known Gija artists and members to paint for Warmun Art Centre, adding to its high profile.

2010

Warmun artist Peggy Patrick is awarded a Member of the Order of Australia (AM) for her contributions to culture and for bringing Indigenous and non-Indigenous Australians together.

March 2011

Warmun declared a Natural Disaster Zone when Turkey Creek burst its banks and floods destroyed the community, causing emergency evacuation. Many paintings destroyed, damaged beyond repair and / or missing.

2011

Immediately after the flood, WAC artists continue to rebuild the business, and paint through assistance from Warringari Arts in Kununurra.

2013

The Musée du Quai Branly re-engages Lena Nyadbi by commissioning her *Dayiwul Ngarranggarni* (Barramundi Dreaming) artwork on the roof of the museum, which is spectacularly visible from atop the Eiffel Tower.

2013

Lena Nyadbi wins the East Kimberley Aboriginal Achievement Award for 'Outstanding contribution towards Art & Culture.'

2014

WAC and the Centre for Cultural Materials Conservation (CCMC) at the University of Melbourne forge an ongoing partnership; restoring artworks and building a Gija 'two-way' learning program for university students and Warmun community members.

2014

Lena Nyadbi wins the West Australian of the Year – Aboriginal Award.

2015

Warmun Art Centre has an unprecedented four finalists for the National Aboriginal and Torres Strait Islander Art Award (NATSIAA 2015) with artworks by Mabel Juli, Phyllis Thomas, Rammey Ramsey and Rusty Peters being shortlisted.

2016

Jirrawun Wirnan takes place at Warmun Art Centre; an official handover ceremony from Jirrawun Arts to Warmun Art.

2017

The Warmun Art 2018 Business Plan takes shape. There are over 70 artists actively involved with the Centre, with a record number of participants in over 25 events and exhibitions throughout the financial year.

2018

Warmun Art Centre celebrates its 20th anniversary and looks forward to continuing its important artistic and cultural legacy.

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