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Intellectual Property in the Dreamtime- Protecting the Cultural Creativity of Indigenous Peoples

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1. Introduction

Until recently, discussion about the intellectual creativity of Indigenous peoples and traditional communities, was conducted under the rubric of “folklore”. For various reasons this term has been replaced by terms such as “Indigenous intellectual property”, the “cultural expressions of Indigenous peoples” and “traditional knowledge”. As is explained below, the term “folklore” is considered to be inappropriate in contemporary discourse. For the purposes of this presentation, where earlier authorities are quoted, the terminology employed by those authors is employed.

(a) "Folklore"

Since the mid 1980s, when WIPO and UNESCO had convened a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property, there has been a lively debate about the terminology which should be used to describe the creations of a cultural community. The representatives of the Spanish-speaking countries at the 1985 meeting of the Group of Experts took the position that "folklore" was an archaism, with the negative connotation of being associated with the creations of lower or superseded civilizations. However, over that objection, the 1985 meeting adopted the following definition:

Folklore (in the broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

This definition was elaborated in the resultant *WIPO/UNESCO Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other*

¹ This paper is available in .pdf format from <http://www.oiprc.ox.ac.uk/EJWP1199.html>

Prejudicial Actions. The misgivings expressed about the negative connotations of the term folklore were deflected by participants at the 1985 meeting who pointed out that "in recent times the term 'folklore' obtained a new meaning and is widely accepted as a term suitable for the purposes of a relevant international treaty".ⁱ

This terminological approach persisted until the conclusion of the World Forum on the Protection of Folklore, convened by WIPO and UNESCO in Phuket in April 1997. That Forum was convened in response to the recommendations in February 1996 of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and the Producers of Phonograms, that arrangements be made for the organization of an international forum to explore "issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore and the harmonisation of different regional interests".ⁱⁱ

At the Forum, a number of speakers referred to the negative connotations and eurocentric definition of the term "folklore". For example, Mrs Mould-Idrissu, in a paper on the African Experience on the preservation and conservation of expressions of folkloreⁱⁱⁱ, observed that the western conception of folklore tended to focus on artistic, literary and performing works, whereas in Africa it was much more broad; encompassing all aspects of cultural heritage.^{iv} For example, she noted that under the Ghanaian Copyright Law of 1985, folklore included scientific knowledge.^v Speakers criticised the western attitude to folklore as something dead to be collected and preserved, rather than part of an evolving living tradition.^{vi} In a statement issued by Indigenous Australian representatives at the Forum, exception was taken to the use of "folklore" as being too narrowly defined and implying an inferiority of the cultural and intellectual property of Indigenous peoples to the dominant culture.^{vii} The Indigenous Australian representatives expressed a preference for the term "Indigenous Cultural and Intellectual Property", which had been coined by Ms Erica Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.^{viii}

(a) ***"Traditional Knowledge"***

The expression "Traditional Knowledge", which is being used at this Roundtable, accommodates the concerns of those observers who criticize the narrowness of "folklore". However, it significantly changes the discourse. Folklore was typically discussed in copyright, or copyright-plus terms.^{ix} Traditional knowledge, would be broad enough to embrace traditional knowledge of plants and animals in medical treatment and as food. In this circumstance the discourse would shift from the environs of copyright to those of patents law^x and biodiversity rights.^{xi} This shift is, in part, an explanation of the suggestions for *sui generis* solutions to the protection of traditional knowledge. Thus Simpson adopts Daes' view that it is inappropriate to subdivide the heritage of Indigenous peoples "as this would imply giving different levels of protection to different elements of heritage".^{xii}

(b) "Intellectual Property"

The criticism that the concept of folklore was derived from Eurocentric precepts is equally applicable to the concept of intellectual property itself. The propertization of traditional knowledge implies, rights such as authorship, ownership, alienation and exploitation. The intellectual property paradigm also involves the incentivization of creativity. If the beliefs and practices of Australian Indigenous Peoples are any guide, authorship may reside in pre-human creator ancestors, such as the Wandjina of the Kimberley region. Authorship, is replaced by a concept of interpretation through initiation. Ownership yields to a concept of custodianship of dreamings, or legends. Alienation, is contradicted by the concept of immutable communal property. Exploitation, is subject to cultural restraints and taboos. Incentivization also has to yield to concerns about spiritual adulteration.

Another problem with the intellectual property discourse is that it is often considered rather too sectional. "Underpinning the concept of Indigenous intellectual property is a holistic view that cultural products are intimately connected to Dreamings, ceremony, sacred sites and objects and also land".^{xiii}

(c) "Traditional Peoples"

In the debate about the protection of traditional knowledge, the implied beneficiaries of this protection are traditional peoples. Invariably, these are referred to as "Indigenous Peoples". A definitional issue related to the delineation of the content of traditional knowledge, is defining the groups or communities who can assert property rights over this knowledge.

The definition which appears to enjoy widest support, is that of Dr Martinez Cobo^{xiv} who describes indigenous communities, peoples and nations as "those which, having historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories or parts of them". However, it should be acknowledged that a number of representatives of these groups have asserted that the diversity of the worlds indigenous peoples renders problematic an all-embracing definition and that efforts by the international community to develop a binding, all-inclusive definition are a diversion of energies.

Dr Erica-Martin Daes identifies four factors^{xv} which provide practical definitional guidance:

- (a) priority in time with respect to the occupation and use of a specific territory;
- (b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) self-identification, as well as self-recognition by other groups; and
- (d) an experience of subjugation, marginalisation, dispossession, exclusion, or discrimination, whether or not these conditions persist.

A perceived corollary to an acceptable definition of the concept “Indigenous Peoples” is the expectation that as peoples they will be able to avail themselves of the protections conferred by international instruments such as the UN Charter, which in Article 1 refers to “the principle of equal rights and self determination of peoples” and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which similarly refer to the “right of all peoples to self-determination”. However, as General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, subsequently provided, the rights of peoples are subordinated to the sovereignty of states. This statist interpretation of the rights of peoples has been a barrier to the recognition of various political and property rights, including intellectual property rights, of Indigenous Peoples and traditional communities.

2. Why Protect Traditional Knowledge?

Alan Jabbour suggested a taxonomy of four "inchoate" concerns or anxieties which have led to international proposals for the protection of folklore.^{xvi} First, a concern for the authentication of folklore in the face of the economic, psychological and cultural threat from alien sources. Secondly the expropriation, not only of physical objects, but also the documentary and photographic record of traditional societies. Thirdly, the issue of compensation for appropriation and cultural harm. Fourthly, the issue of nurture, or cultural health.

In Australia, these concerns have been manifested in five main areas: (a) the infringement of the copyright of individual artists; (b) the copying of works not authorised by aboriginal groups and communities; (c) the appropriation of Aboriginal images and themes; (d) the culturally inappropriate use of Aboriginal images and styles by non-Aboriginal creators; and (e) the uncompensated expropriation of traditional knowledge.

Each of these problems is addressed below, together with a consideration of the efficacy of existing intellectual property law to provide a remedy.

(a) Copyright Infringements

There are numerous instances of the designs of Australian Aboriginal artists being reproduced without their permission. The Australian Copyright Act 1968 provides a remedy to artists whose works have been copied without authorisation. The first case which attracted significant attention concerned the 1989 action brought by John Bulun Bulun and 13 other artists to obtain compensation concerning the unauthorised reproduction of their works on T-shirts.^{xvii} The case attracted some attention as it came immediately after the Bicentennial celebrations and injunctions and an out of court settlement of \$150,000 was obtained in this matter.^{xviii} A more recent reported case, concerning the unauthorised copying of the designs of Aboriginal artists was *Milpurrurru v. Indofurn Pty Ltd*^{xix} This concerned the importation by a Perth-based company of carpets manufactured in Vietnam, upon which were reproduced the designs of George Milpurruru, Banduk Marika, Tim Payungka Tjapangati and five deceased Aboriginal Artists. These designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The defendants in this case

were obliged to pay substantial damages.^{xx} This case inspired a travelling exhibition, in 1996: *Copyrites, Aboriginal Arts in the Age of Reproductive Technologies*, which contained numerous examples of the illicit exploitation of the work of Aboriginal Artists.^{xxi}

(b) Copying Not Authorised by Aboriginal Groups and Communities

Although, the Australian Copyright Act provides a remedy in relation to the unauthorised copying of the works owned or licensed by individual creators it does not recognise the communal harm which may result from the unauthorised reproduction of Aboriginal designs.

The claim of communal proprietorship in sacred images was rejected by the Federal Court in *Yumbulul v. Reserve Bank of Australia*^{xxii} That case concerned an attempt by representatives of the Galpu Clan to prevent the reproduction by the Reserve Bank, of the design of a Morning Star Pole on a commemorative banknote. The pole had been created by a member of the clan who had obtained his authority and knowledge to create the pole through initiation and revelatory ceremonies. The Galpu asserted that the communal obligation of the artist was such that he owed an obligation to the clan to prevent the design of the pole from being used in any way which was culturally offensive Although sympathetic to this argument, the trial Judge considered that the artist who had created the pole had successfully disposed of his intellectual property rights in it through a legally binding agreement. He lamented 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”,^{xxiii} and concluded by recommending that “the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators”.^{xxiv}

A related issue to the failure of the courts to recognise communal proprietorship of traditional works is their failure to compensate communal harm.^{xxv} In *Milpururru*, mentioned above, the court awarded damages for breach of copyright to a number of Aboriginal artists whose designs were wrongfully reproduced on carpets. The court agreed that this was a particularly egregious breach of copyright, involving a culturally demeaning use of the infringed works. However, the court considered itself unable to compensate the communities whose images were used in culturally inappropriate ways, as ‘the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories’.^{xxvi}

Indeed a major problem, which has been identified in analysing traditional knowledge and cultural expression in conventional intellectual property terms, is the observation that “indigenous peoples do not view their heritage in terms of property at all...but in terms of community and individual responsibility. Possessing a song, story or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected”.^{xxvii}

The most recent Australian case concerned with the communal rights of an Aboriginal people in Australia, *Bulun Bulun & Anor v. R & T Textiles Pty Ltd*,^{xxviii} arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr John Bulun Bulun, in his work "Magpie Geese and Water Lillies at the Waterhole". The proceedings were commenced on 27 February 1997 by Mr Bulun Bulun and by Mr George Milpurrurru. Both applicants were members of the Ganalbingu people. Ganalbingu country is situated in Arnhem Land in the Northern Territory of Australia. Mr Bulun Bulun sued as legal owner of the copyright in the painting and sought remedies for infringement under the Australian Copyright Act 1968. Mr Milpurrurru brought the proceedings in his own name and as a representative of the Ganalbingu claiming that they were the equitable owners of the copyright subsisting in the painting.

Upon commencement of the proceedings, the respondents admitted to infringement of Mr Bulun Bulun's copyright and consented to permanent injunctions against future infringement. In its defence to Mr Milpurruru's actions the respondent pleaded that as Mr Bulun Bulun's claim had been satisfied, it was unnecessary to consider the question of the equitable ownership of the copyright. Mr Milpurrurru sought to continue the action as a test case on the communal intellectual property rights of indigenous Australian peoples.

The Ganalbingu people are divided into two groups, according to their geographic distribution. Mr bulun Bulun was the most senior person of the "bottom" Ganalbingu. He was second in seniority to Mr Milpurrurru, who was a "top" Ganalbingu. The waterhole depicted in Mr Milpurrurru's painting was Djulibinyamurr which was the principal totemic well for the artist's clan. It was described as the place from which Barnda, the long-necked turtle creator ancestor of the Ganalbingu people, emerged. Mr Bulun Bulun's affidavit explained that his ancestors were granted responsibility by Barnda to maintain and preserve all of the Mayardin (corpus of ritual knowledge) associated with the Ganalbingu land. Part of the artist's responsibility as "Djungayi" or manager of the Mayardin, was to create paintings in accordance with the laws and rituals of the Ganalbingu people. He claimed that the unauthorised reproduction "threatens the whole system and ways that underpin the stability and continuance of [the artist's] society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor".^{xxix} Mr Bulun Bulun explained that all of the traditional owners of the Ganalbingu land would have to agree on any exploitation of art works depicting sacred sites such as the waterhole. With the settlement of Mr Bulun Bulun's claim for copyright infringement, Mr Milpurrurru's representative action sought to vindicate the communal intellectual property rights of the Ganalbingu people, arising from the copyright infringement. The principal questions for the court to address were whether the communal interests of traditional Aboriginal owners in cultural artworks, recognised under Aboriginal law, created binding legal or equitable obligations on persons outside the relevant Aboriginal community.

The assertion by the Ganalbingu of rights in equity depended upon there being a trust impressed upon expressions of ritual knowledge, such as the "Magpie Geese and Water Lillies at the Waterhole" . The Court acknowledged that amongst African tribal communities, tribal property was regarded as being held on trust by the customary

head of a tribal group.^{xxx} However, in the instant case the court considered there to be no evidence of an express or implied trust created in respect of Mr Bulun Bulun's art. This was an issue of intention and the court found no evidence of any practice among the Ganalbingu whereby artworks were held in trust.

In an extensive *obiter dictum* in this test case, the court was prepared to impose fiduciary obligations upon Mr Bulun Bulun, as a tribal artist, to his people. The factors and relationships giving rise to fiduciary obligations under equity law do not admit of easy definition.^{xxxi}

The Australian law on the subsistence of a fiduciary relationship expressly follows the Canadian jurisprudence in this area. As to the latter, La Forest J had stated that the question whether a fiduciary relationship existed depends on "whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue".^{xxxii}

In the instant case, the Court found the subsistence of a fiduciary relationship between Mr Bulun Bulun and the Ganalbingu people. This relationship was said to arise from the trust and confidence by his people that his artistic creativity would be exercised to preserve the integrity of the law, custom, culture and ritual knowledge of the Ganalbingu. The court concluded that this finding did not treat the law and custom of the Ganalbingu as part of the Australian legal system, rather it treated these matters as part of the factual matrix, characterising the relationship as one of mutual trust and confidence from which fiduciary obligations arose. Thus the fiduciary obligation imposed on Mr Bulun Bulun was "not to exploit the artistic work in such a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work."

However, in dismissing the representative action of Mr Milpururru against the respondents, the court ruled that the rights of the Ganalbingu were confined to a right in personam against Mr Bulun Bulun to enforce his copyright in works against third party infringers. In the present case, as Mr Bulun Bulun had successfully enforced his copyright, there was no occasion for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship. The Court speculated that had Mr Bulun Bulun failed to take action to enforce his copyright, the beneficiaries might have been able to sue the infringer in their own names. This did not mean that the Ganalbingu had an equitable interest in the copyright in the artistic work, but were the beneficiaries of the fiduciary obligations owed to them by Mr Bulun Bulun.

(c) *Simulation of Aboriginal Images by Non-Aboriginal Creators*

A controversial issue in recent years has been the creation of works or products:

(a) which are claimed to be produced by Aboriginal creators or which are got up in the style of Aboriginal schools of art; (b) by people who think that they are Aboriginal creators; (c) or which are allegedly inspired by Aboriginal spirits or muses.

In relation to works which are falsely claimed to be produced by Aboriginal persons, the Trade Practices Act 1974 and the prohibitions against fraudulent

misrepresentations would seem to provide an adequate remedy. On the other hand, products usually created for the lower end of the tourist market with what appear to be Aboriginal designs, may not currently infringe the law. However, in this area of trade, the use of sensitive themes on items such as tea towels, may cause offence.^{xxxiii} Because of Trade Practices Act problems, some traders pass their work off as “Aboriginal-style” or “Aboriginal inspired”. This sort of qualification may well avoid Trade Practices Act liability, but it remains as a dilution of the repute of genuine Aboriginal creations. A particular problem which has arisen in a couple of instances in Western Australia, is that of works produced by persons who assert that they are of Aboriginal descent or who claim to be inspired by an Aboriginal muse. In the first category are the books of Colin Johnson, written under the name of ‘Mudrooroo Nyoongar’ and the books of Leon Carmen written as those of an Aboriginal woman, ‘Wanda Koolmatrie’. Similarly, the Western Australian artist, Elizabeth Durack, painting under the pseudonym, ‘Eddie Burrup’ claims to have assimilated an Aboriginal persons for her art. These impostures, range from the malicious to the misguided, but each has been criticised as offensive to Aboriginal Peoples^{xxxiv}

(d) *Culturally Offensive Use of Aboriginal Images and Themes*

The adoption of Aboriginal themes and motifs in products has sometimes caused harm to those Aboriginal Peoples for whom those matters have great spiritual and cultural significance. The National Indigenous Arts Advocacy Association, Inc (NIAAA) reported the use of the use of the Wandjina spirit as a logo for a surfboard company.^{xxxv} The Wandjina are the Creation Ancestors of the Kimberley Aboriginal People and their painted images are found in the rock galleries in that region. The question of authorship is impossible to resolve as it is believed that the paintings were done by the Wandjina.^{xxxvi} In any event, the antiquity of these images means that their authorship is unknown. Wandjina images may be retouched or painted today, provided that appropriate deference is given to the ancient spirits. The Kimberley Aborigines believe that inappropriate treatment of these images will cause death and devastation.^{xxxvii} However, there is currently no law to prevent the use of these images by commercial enterprises.^{xxxviii}

In *Foster v Mountford*^{xxxix} an anthropology text, *Nomads of the Desert*, which was written to document the life of the Pitjantjatjara People, reproduced images which were forbidden to uninitiated members of the Pitjantjatjara. The court in this case was prepared to grant an injunction to prevent the book being distributed in the Northern Territory because the author had been shown these sacred matters in confidence.^{xl}

However, Aboriginal Peoples have no right equivalent to those which are conferred under the action of blasphemy. The NIAAA Report refers to a story used in the television series ‘Heartlands’ which belonged to a Western Australian Aboriginal community, but which was represented as coming from New South Wales.^{xli} Because the story was in the public domain, the relevant community had no rights to prevent the transmission of this programme. The law does not currently recognise the proprietary interests of Aboriginal peoples in their Dreamings, stories, sacred images or dances.

Related to the culturally offensive use of Aboriginal themes is the misrepresentation of Aboriginal cultural life. A recent spectacular instance of this concerns the publication in 1990 of the book *Mutant Message Down Under*, by American author, Marlo Morgan. This book contained an account of Morgan's alleged travels among 'cannibalistic' Western Australian Aboriginal tribes. The book was on the US best sellers list for 25 weeks and was shortlisted for the 1995 American Booksellers Book of the Year, and the author merchandised CDs and videos to promote the work and her form of new age spiritualism. Following a detailed investigation for the Kimberley Law Centre, it was revealed that the author had never visited Australia. And she confessed that the work was a hoax.

(e) ***The Uncompensated Expropriation of Traditional Knowledge***

The traditional medical knowledge of Indigenous peoples throughout the world has played an important role in identifying biological resources worthy of commercial exploitation. The search for new pharmaceuticals from naturally occurring biological material has been guided by ethnobiological data.^{xlii} In Western Australia, for example, there has been considerable discussion about the commercial exploitation of Smokebush as an anti-Aids drug, which had apparently been identified by Aboriginal Peoples as having therapeutic attributes.^{xliii} The recent passion for environmental sensitivity in Western countries has resulted in a heightened interest in natural products. Australia has a burgeoning "bush tucker" industry guided by the Australian Native Bushfood Industry Committee.^{xliv} Research into these products has been guided by the knowledge of Indigenous Peoples. Pharmaceutical, biotechnology and personal care companies, such as 'The Bodyshop' have focussed their attention and their advertising, upon plants and animals which have been demonstrated by Indigenous Peoples to have beneficial qualities. This has saved those companies considerable expense in obtaining that knowledge through their own investigations. A dramatic example of this is the Merck agreement. In 1991, Merck, a multinational pharmaceutical company, entered into a bioprospecting agreement with the Costa Rican Association Instituto Nacional de Biodiversidad (INBio) a non profit organisation. Under the agreement, over a two year period, Merck received 10,000 plant samples^{xlv}. The samples were supplied with information about their traditional use. Merck has paid a reported US \$1.35 million for the 10,000 samples, and has agreed to pay a royalty of between 2% - 3%^{xlvi}. Currently, three of the drugs that Merck sells earn over US \$1 billion each. If one of the 10,000 samples becomes a billion dollar drug then Merck has agreed to pay 20 - 30 million dollars in royalties. Conceivably, the royalties from the 10,000 samples could earn Costa Rica well in excess of US \$100 million per annum. This is clear evidence of the commercial value which the pharmaceutical industry places on indigenous peoples intellectual property. In 1995 the estimated market value of pharmaceutical derivatives from indigenous peoples traditional medicine is US \$43 billion^{xlvii} world wide. Under current intellectual property law, there is no obligation for companies which utilize the traditional medical knowledge of Aboriginal Peoples to provide any compensation to recognise their equity in the commercial application of this knowledge.

To be patentable, an invention has to be novel, involving an addition to the existing state of relevant technology. Novelty is assessed by reference to the prior art. Novelty will be destroyed by prior publication. A problem with the patent claims of

Indigenous Peoples in relation to traditional medical remedies, is that it has been the practice of ethnobotanists and ethnopharmacologists to publish accounts of the uses of plants by indigenous peoples.^{xlviii} Another obstacle to the recognition of the contribution of Aboriginal Peoples to the development of new drugs, are the fairly strict rules that apply to the concept of joint invention. Joint inventorship typically requires that each of the joint inventors must have contributed to the inventive conception, “working toward the same end and producing an invention by their aggregate efforts”.^{xlix} It is not necessary that they did not work physically together at the same time and that each did not make the same type or amount of contribution. However, both must work on the same subject matter and make some contribution to the inventive thought and to the final result.¹

The economic factor has played an important role in agitation for the protection of traditional cultural works. As in other areas of piracy and counterfeiting, Ralph Oman, has highlighted the developments in communications and reprographic technologies, which have exposed formerly isolated cultures to digital imitation and to global transmission, without compensation.^{li} As with the exploitation of developing countries through bioprospecting, the exploitation of traditional cultural resources without exploitation raises similar issues.^{lii} Indeed Chengsi has suggested that folklore protection has become a “trade-related issue”.^{liii}

3. Modalities for the Protection of Traditional Knowledge

Proposals of mechanisms for the protection of traditional knowledge have ranged across two axes. Along one axis are various suggestions to improve the private law rights of the creators or custodians of traditional knowledge. These suggestions range from proposals to modify existing copyright law through to the creation of sui generis traditional knowledge rights. Along another axis are suggestions to deal with the protection of traditional knowledge as a public law right. These suggestions range from the creation of a public protection authority, through *domaine public payant* proposals, to the empowerment of Indigenous peoples' protective agencies. These various suggestions are considered below.

At the minimalist end of discussions concerning the protection of traditional knowledge, are suggestions to deal with the perceived inadequacies of existing intellectual property laws by supplementary legislation. It should be noted at the outset that a number of commentators have questioned whether traditional knowledge is amenable to private law remedies. For example, Rosemary Coombe questions the applicability of private law concepts to cultural expressions.^{liv} Puri, questions whether property concepts are cognizable under customary Aboriginal law.^{lv} Daes, explains,

...indigenous peoples do not view their heritage as property at all- that is something which has an owner and is used for the purpose of extracting economic benefits- but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.^{lvi}

However, bearing these reservations in mind, the various private and public law suggestions for the protection of traditional knowledge are canvassed below.

(a) Copyright

As has been indicated, in the survey of Australian cases above, existing copyright law does not easily recognise communal authorship and to a lesser extent, communal ownership. Both of these matters can be dealt with by statutory amendment. For example, a form of representative or class action, could be brought by Indigenous and communal groups.

Another ownership issue, is the matter canvassed in the *Yumbulul* case, discussed above, whether notwithstanding an assignment of copyright, a communal group retains the underlying right to the folklore. It has been suggested that this could be dealt with by the recognition of an underlying equitable right in the communal group.^{lvii} This right would seem to have a similar quality to the moral rights which are recognized in civil law jurisdictions.

A major limitation of western copyright law, is its insistence upon material fixation as a precondition for protection. The Tunis Model Law on Copyright for Developing Countries, 1976, in s1(5*bis*) provides a useful precedent of the fixation requirement being waived for folklore.

The limited duration of copyright protection has been perceived as a problem for traditional works, some of which may have originated many thousands of years ago. Again this is a problem which could yield to appropriate legislative drafting.

It has been suggested that the unauthorised appropriation of the styles of Indigenous peoples, could be dealt with by the concept of copyright in derivative works.^{lviii}

In general, the view of many commentators and committees of review is that the legal structure of copyright, with its emphasis on private proprietary rights, is ill suited to protect traditional works.^{lix}

(b) Moral Rights

Another copyright possibility for the protection of traditional knowledge is within the rubric of moral rights. Each of the moral rights of publication, paternity and integrity, have an applicability to the protection of traditional knowledge. The right of publication allows a creator to decide whether a work should be made public. This would permit the creators of spiritually sensitive works to control their dissemination. The right to have paternity acknowledged, would be useful in securing the authentication of traditional works. Most important is the right of integrity, which protects works from distortion, alteration, or misrepresentation.

(c) *Domaine Public Payant*

To deal with the fact that copyright works fall into the public domain after a finite time, a number of states have introduced legislation to prevent or sanction the use of

such works, which would prejudice their authenticity or identity.^{lx} Additionally, a fee may be imposed for the use of such works. The moneys thereby received can be diverted to the promotion of cultural activities. This scheme is particularly suited for the nurturing of traditional works. The Tunis Model Law on Copyright encourages the use of domaine public payant to assist developing countries to “protect and disseminate national folklore”.^{lxi} However, the extent to which this sort of law can protect traditional works has been questioned.^{lxii}

(c) Authentication Marks

A suggestion emanating from IP Australia, the Australian intellectual property office, is the appending of an authentication mark to works of Indigenous creativity. This would be in the nature of a certification mark,^{lxiii} although, of course, it will be limited to certain manifestations of traditional knowledge.

(d) Public Protection Models

The approach to protection, which was adopted in the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*, envisaged a system of prior authorisation to be administered by a competent authority which representing the relevant traditional community’s interest in protecting its folklore. Authorisation was required for commercial uses of folklore other than in the traditional and customary context, subject to the supervision of the competent authority.

Where folklore was used in a traditional context, an authorisation was needed for the publication, recitation, performance or distribution. Use of folklore outside its traditional context would have to seek the prior consent of the community or an authorised person. Authorisation was not required for uses of expressions of folklore if the purposes relates to research, conservation and archiving. Furthermore, there is no need for authorisation, outside of the traditional or customary context, when an expression of folklore was used: for educational purposes; by way of illustration; for creating an original new work; for reporting of a current event; and where folklore is permanently situated in a public place.

The Model Law prohibited unauthorised commercial use of expressions of folklore. It provided that where the competent authority granted authorisation, it could set the level of remuneration and collect fees. The fees would be used for the purpose of promoting or safeguarding national culture or folklore. The commentary on the Model Law suggested that it would be advisable to share this fee with the community from which the folklore originated. The Model Law provided for offences relating to distortions of expressions of folklore. The offence provisions required the element of “wilful intent”, with fines and imprisonment imposed as punishment. There were also civil sanctions and seizure provisions.

The *Model Law*, was anticipated in Australia, by the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, which envisaged the appointment of

Commissioner of Aboriginal Folklore to exercise a protective jurisdiction. The Commissioner, rather than Indigenous peoples would initiate litigation against infringing activities. This Report was commended in the 1982 WIPO/UNESCO meeting of experts on folklore^{lxiv}, but it was not implemented. The notion of a protective jurisdiction would certainly not find favour today. Certainly in Australia, the notion of a government-administered, protective, jurisdiction has been thoroughly discredited, particularly because of the disastrous consequences of other paternalistic policies of protectivism.

However, in countries which have not endured this sort of colonial experience, the protective model is considered unobjectionable. For example, the folklore provisions of the Nigerian Copyright Act 1988 are based extensively on the WIPO/UNESCO Model Law and the supervision of the exploitation of cultural works is conferred upon the Nigerian Copyright Council.^{lxv}

4. For Whom and by Whom?

The discourse about the protection of traditional knowledge assumes the necessity for this protection and also assumes that the primary beneficiaries of this protection will be Indigenous peoples and community groups. However, the state as guardian of its people's cultural heritage, also has an interest in the preservation of the traditional knowledge which exists within it^{lxvi}. The various African laws which seek to protect folklore, stress its significance as part of the national heritage.^{lxvii} Multiculturalism has begun to replace nationalist uniformity as the new orthodoxy. An incidental beneficiary will be the nation state, first from the vigour of cultural health and secondly, from the commercial exploitation of traditional knowledge.

A corollary to the assumption of the necessity to protect traditional knowledge, is the assertion of the right of Indigenous peoples and traditional communities "to determine the appropriateness of the use being made of their culture"^{lxviii}. Thus Erica-Irene Daes, declared that "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used"^{lxix}.

The increasing involvement of Indigenous peoples in models for the protection of traditional knowledge can be seen in the Australian experience. In the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, proposed the establishment of a Commissioner for Aboriginal Folklore, who would exercise a protective jurisdiction on behalf of traditional peoples. Further reports in 1987,^{lxx} 1989^{lxxi} and 1994^{lxxii} made recommendations which envisaged an increasing role for Indigenous peoples in the protection of traditional knowledge. In 1998-99 Australian Indigenous Peoples conducted their own inquiry, based on a discussion paper *Our Culture, Our Future: Proposals for the recognition and protection of Indigenous cultural and intellectual property*.^{lxxiii}

Today in Australia, Indigenous peoples regard the protection of traditional knowledge as an issue of self-determination.^{lxxiv} For other countries, with a less unfortunate colonial history, the issue of who controls the protection and conservation of traditional knowledge might be less politicised.

Among the political issues which have been raised in Australia are: whether eurocentric intellectual property law can be trusted with the subject of traditional knowledge^{lxxv} Similarly, it has been suggested that “a suspicious eye should be cast over any assertion of legal or moral authority by non-Indigenous people to adjudicate disputes between traditional and non-traditional artists”^{lxxvi}.

5. Indigenous Peoples and the Protection of Traditional Knowledge

The debate in Australia about the forms and modalities for the protection of traditional knowledge, has to be seen in the context of the burgeoning global self-confidence of Indigenous peoples. One of the results of the United Nations International Year for the World’s Indigenous Peoples, was the promulgation of a *Draft Declaration on the Rights of Indigenous Peoples*. Article 12 of the *Draft Declaration* recognised the right of indigenous peoples to ‘practice and revitalize their cultural traditions and customs, including the right

...to maintain, protect and develop the past, present and future manifestations of their cultures, such as ...artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 29 recognised the entitlement of indigenous peoples ‘to the full ownership, control and protection of their cultural and intellectual property’. This article also asserted the right of indigenous peoples ‘to special measures to control, develop and protect their...cultural manifestations, including ...oral traditions, literatures, designs and visual and performing arts.’

The growing self-realisation of indigenous peoples that the international recognition of their intellectual property rights in their cultural expressions would depend upon their own efforts, has resulted in the development of international solidarity through international conferences of indigenous peoples. These conferences have promulgated intellectual property declarations, formulating norms for the protection of traditional knowledge.^{lxxvii}

A significant initiative during the UN International Year for the World’s Indigenous Peoples was the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples which was convened by the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa, New Zealand in June 1993. The resultant *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* insisted that the protection of the rights of indigenous peoples in their traditional knowledge was an aspect of the right of indigenous people to self determination. The *Mataatua Declaration* recommended in art.1 that in the development of policies and practices, indigenous peoples should:

- 1.1 Define for themselves their own intellectual and cultural property.
- 1.2 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights.

- 1.3 Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.
- 1.4 Prioritise the establishment of indigenous education, research and training centres to promote their knowledge of customary environmental and cultural practices.
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- 1.6 Develop and maintain their traditional practices and sanctions for the protection, preservation and revitalization of their traditional intellectual and cultural properties.
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- 1.8 Establish an appropriate body with appropriate mechanisms to:
 - (a) preserve and monitor the commercialism or otherwise of indigenous cultural properties in the public domain;
 - (b) generally advise and encourage indigenous peoples to take steps to protect their cultural heritage;
 - (c) allow a mandatory consultative process with respect to any new legislation affecting indigenous peoples cultural and intellectual property rights.
- 1.9 Establish international indigenous information centres and networks.

The *Mataatua Declaration* in art.2.1 recommended that in the development of policies and practices, States and national and international agencies should recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.’ In art. 2.2 it urged the recognition that ‘indigenous peoples also have the right to create new knowledge based on cultural traditions’. The insufficiency of existing protection mechanisms was asserted in art. 2.3. Article 2.5 provided for the development

- ...in full cooperation with indigenous peoples, an additional cultural and intellectual property rights regime incorporating the following:
- collective (as well as individual) ownership and origin-retroactive coverage of historical as well as contemporary works;
 - protection against debasement of culturally significant items;
 - co-operative rather than competitive framework;
 - first beneficiaries to be the direct descendants of the traditional guardians of that knowledge;
 - multi-generational coverage span.

The conference delegates recommended that the UN incorporated the *Mataatua Declaration* be incorporated in its Study on Cultural and Intellectual Property of Indigenous Peoples.

The Statement issued by the International Consultation on Intellectual Property Rights and Biodiversity organised by the Coordinating Body of the Indigenous Peoples of the Amazon Basin (COICA), held at Santa Cruz de la Sierra, Bolivia in September 1994 reiterated the assertion of the *Mataatua Declaration* that

All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use

of their resources and regulation of the terms of exploitation) are aspects of self determination.

The COICA Statement in art.9 pointed to the danger of distortion to indigenous systems in adjusting them to the prevailing intellectual property regime. The Statement formulated short and medium term strategies to deal with these problems. In the short term it identified intellectual property principles and mechanisms which were either inimical to or useful for indigenous peoples. For example, art.12 recognised that ‘there are some formulas that could be used to enhance the value of our products (brand names, appellations of origin), but on the understanding that these are only marketing possibilities, not entailing monopolies of the product or of collective knowledge’.

The Statement in art.14 proposed the design of a protection and recognition system in the short and medium term of mechanisms which ‘will prevent appropriation of our resources and knowledge’. These would include ‘appropriate mechanisms for maintaining and ensuring rights of indigenous peoples to deny indiscriminate access to the resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially indigenous’.

Although the COICA Statement was largely concerned with indigenous peoples rights in biodiversity^{lxxviii}, it called for the training of indigenous leaders in aspects of intellectual property.

In Australia, the *Julayinbul Statement on Indigenous Intellectual Property Rights*, was adopted by a Conference on Cultural and Intellectual Property held at Jingarrba on 25-27 November 1993. The *Julayinbul Statement* affirmed the unique spiritual and cultural relationship of Indigenous Peoples with the Earth which determined their perceptions of intellectual property. The Statement asserted that “Aboriginal intellectual property, within Aboriginal Common Law, is an inherent inalienable right which cannot be terminated, extinguished or taken”. The Statement called on governments to review legislation and non-statutory policies which did not recognise indigenous intellectual property rights and to implement such international conventions which recognised these rights. The Conference also issued a *Declaration Reaffirming the Self Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area*. This *Declaration* was primarily concerned with bioprospecting and the intellectual property rights of indigenous peoples to traditional knowledge.

In April 1995 the South Pacific Regional Consultation on Indigenous Peoples’ Knowledge and Intellectual Property Rights, held in Suva, Fiji in April 1995. The Final Statement issued by the Regional Consultation declared ‘the right of indigenous peoples of the Pacific to self-governance and independence of our lands, territories and resources as the basis for the preservation of indigenous peoples’ knowledge’. Article 7 urged the strengthening of indigenous networks and encouraged the UN and regional donors to continue and support discussions on indigenous peoples’ knowledge and intellectual property rights’. Article 8 pointed out the importance of strengthening ‘the capacities of indigenous peoples to maintain their oral traditions, and encourage initiatives by indigenous peoples to record their knowledge in a permanent form according to their customary access procedures’.

6. Conclusion

A particular contemporary impetus for the formulation of Indigenous positions on the protection of traditional knowledge has been the current debate concerning the review of Art.27.3(b) of the plant variety provision of the TRIPs Agreement.^{lxxix} On 25 July 1999 a federation of Indigenous Peoples groups issued a statement for the purposes of the review. An examination of this statement provides a convenient encapsulation of much of the substance of the debate on traditional knowledge.

The Statement commences with the observation that “Humankind is part of Mother Nature, we have created nothing and so we can in no way claim to be owners of what does not belong to us. But time and again, western legal property regimes have been imposed on us, contradicting our own cosmologies and values.” It expresses concern that Article 27.3(b) “will further denigrate and undermine our rights to our cultural and intellectual heritage, our plant, animal, and even human genetic resources and discriminate against our indigenous ways of thinking and behaving.”

The Statement draws the distinction between private proprietary rights and “Indigenous knowledge and cultural heritage [which] are collectively and accretionally evolved through generations...The inherent conflict between these two knowledge systems and the manner in which they are protected and used will cause further disintegration of our communal values and practices

Obviously, the Statement is largely taken up with issues of access to genetic resources and its promulgators appreciate that notwithstanding their misgivings, the TRIPs system has become an established part of the intellectual property firmament. However, they plea for a legislative structure which “Builds upon the indigenous methods and customary laws protecting knowledge and heritage and biological resources” and which prevents the appropriation of traditional knowledge and integrates “the principle and practice of prior informed consent, of indigenous peoples’ as communities or as collectivities”.

The Statement concludes with an affirmation of the commitment of Indigenous Peoples “to sustain our struggle to have our rights to our intellectual and cultural heritage and our lands and resources promoted and protected.”

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