Intellectual Property Law:

The Indigenous Experience

Intellectual property is referred to by IP Australia as the property of the mind and intellect[1]. This canvasses a range of areas such as trademarks, copyright, designs and patents. Intellectual property is usually considered in the business environment, in the form of proprietary knowledge. However, this branch of law has come into contact with Aboriginal and Torres Strait Islanders across Australia through the mediums of art and academic research. This intersection is now referred to as Indigenous Cultural and Intellectual Property rights (ICIP).

Why are Indigenous Cultural and Intellectual Property Rights important to Indigenous people?

ICIP rights are important because they are aim to prevent of exploitation the intellectual property of Indigenous people, thus protecting both the cultural and economic rights of Indigenous peoples with regards to their artwork and cultural knowledge. There is a close connection between indigenous knowledge, land and law, meaning that the role of custodians as guardians of that knowledge is of the utmost importance. Indigenous intellectual Property is described by solicitor Terri Janke to be Indigenous people's rights to their heritage, which consists of "the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity"[1].

It is easy to see, from the comprehensive nature of this definition, why an infringement on ICIP rights would have culturally dire effects for the Indigenous person or persons involved.

Accompanying the cultural significance of ICIP, is the economic aspect of intellectual property rights. Although this aspect is more significant with contemporary, rather than traditional indigenous art, it is important nonetheless. It was once claimed by deceased former Aboriginal Arts Board Chairman and artist, Lin Onus, that Aboriginal artists accounted for half of all Australian artists. In 2001, this claim prompted a Macquarie University economist by the name of David Langsam to do some research into the subject. Although accurate figures are difficult to obtain, it was found that while only accounting for 1.7% of the Australian population, Aboriginal people make up 25-50% of all working visual artists[1]. In addition to this, the Report of Contemporary Visual Arts and Craft Inquiry of 2002 estimated the contribution to the economy of the Indigenous art market to be $200 million per annum. It is very likely that this figure is now higher. The vast nature of these figures illuminates how important it is to protect Indigenous Cultural and Intellectual Property rights.

What is the history of Indigenous Intellectual Property Rights?

Throughout the history of Australia, Indigenous people have been exploited for financial gain. There have been numerous accounts of improper use of Aboriginal artwork such as:

One Dollar note: The Reserve Bank of Australia used a copy of a bark painting by artist David Malangi without authorisation or acknowledgement. The bank wrongly assumed that Mr Malangi was long dead.

Western Desert Underpants: the unique style of western desert artists was used in designing underpants with an "aboriginal look". The symbols employed within this unique design were used by the original artist to represent scared dreaming sites and ancestral journeys.

Bulun Bulun T-Shirt: John Bulun Bulun attained permission from a senior traditional owner to use a dreaming design in his painting. The design was printed onto a t shirt produced by R & T Textiles.

Ten Dollar Note: the bicentennial ten dollar note featured an artwork by Mr Yumbulul of "the Morning Star Pole". The Morning Star ceremeny is very important and the artist believed that the importance of the pole had been reduced by its inappropriate use.

In addition to obvious artistic exploitation, the traditional knowledge of many Indigenous has also been subject to exploitation at the hands of academic research. Author Anita Heiss highlights that "over the last two hundred years, Indigenous Australians have provided copious amounts of information for PhDs, research theses, governmental reviews etc, but few have ever benefited in terms of financial or academic gain"[1]. As noted above, the protection of Indigenous Intellectual property, particularly in relation to traditional artwork, is necessary in order to avoid the subversion of the oldest living

Has there been an increase in the recognition of Indigenous Intellectual property rights?

It appears, through increased awareness, that there has been an increase in the level of the recognition that Indigenous Intellectual property rights have received. This recognition has been received through both the common law and the legislature.

There were proposed reforms to the Copyright Act through the tabling of the Indigenous Communal Moral Rights Bill 2003. Janke and co. interpreted it to establish "the right of a community member to bring an action for infringement or moral rights in a copyright work or film that embodies communally owned material such as designs themes and dances". Despite this propositions attempt to recognise communal copyrights, it essentially relies on a voluntary agreement between author and community. It is this voluntary element that leaves the proposition somewhat impotent to protect communal copyright. There has been much discussion about this Bill, however, no decisive action has been taken by Parliament.

Due to the lack of action by the legislative branch of government, it has been left to the judiciary to form some sort of protection for Indigenous people. The landmark case in recognising the intellectual property rights is Milpurrurru & Others v Indofurn Pty Ltd and Others (1994) 130 ALR 659. It was found that carpets produced in Vietnam and sold by a Perth based company were identical in form and colour to traditional artwork created by Aboriginal artists. The Aboriginal artists succeeded in bringing an action under s37 of the Copyright Act[1]. However, what was significant about this case was that Von Doussa J acknowledged the land and culture by awarding damages for the 'cultural harm' the artists had suffered within their own communities.

Another development in the recognition of Indigenous Intellectual Property rights is found Bulun Bulun v R&T Textiles [1998] 157 193. In this case it was found that the Ganalbingu clan of North-Central Arnhem Land were owed a fiduciary duty by the artist Bulun Bulun as he was using designs that traditionally belonged to the clan. Although the court did not recognise communal copyrights in the artwork, it was noted that if Bulun Bulun did not take action against a copyright infringement, the community would be able to do so. This approach is grounded in equity which establishes a constructive trust on the legal owner of the copyright with the clan being beneficiaries. Although this approach does not establish any copyright rights for the clan, it at least provides a method to seek remedy should there be an infringement.

What incompatibilities still exist between Intellectual Property Law and Indigenous peoples?

Despite the developments in recent time, there are a number of reasons why Intellectual property law falls short of protecting the rights of Indigenous peoples. These include:

Oral tradition: the absence of a written language has meant that Indigenous intellectual property in the form of cultural knowledge is passed down the generations through an oral tradition. This presents a problem as the Copyright Act only deals with work that is reduced to a material form. In addition offering no protection for oral stories, it is often a person such as an anthropologist or academic who holds the copyright, simply for recording traditional knowledge.

Communal Ownership: enshrined in s35 of the Copyright Act is the notion of individual property that was inherited from English common law. This directly contrasts with the Indigenous concept of communal ownership experienced in communities throughout Australia. It is this contrast which makes it difficult for many Aboriginal artists to claim copyright as it would be claiming something that in fact belongs to the community.

Time: the copyrights Act also provides protection for 50 years after an author dies. This limitation renders protection somewhat useless considering that the traditional knowledge behind much Aboriginal art has been passed on for over forty thousand years.

Conclusion

Aside from constrained acknowledgement in the courts, Intellectual property law appears to fall short in its recognition of Indigenous intellectual property rights.

This shortcoming is derived from the communal ownership and oral tradition experienced within Indigenous communities. Much like native Title, indigenous communities are disadvantaged by exhibiting communal title to property, real or intellectual. It also seems that the only way to overcome this disadvantage is to stagnate oral stories behind artwork by reducing them to a written form. The absence of a written language in Aboriginal culture makes artwork and oral stories of the utmost importance in the survival of Aboriginal tradition. It is for this reason that protection of the intellectual property of the artists and storytellers is paramount for Indigenous communities.

[1] http://www.ipaustralia.gov.au/ip/introduction.shtml
[1] blackwords
[1] Langsam, D. 1996 'Aboriginal Art: Australia's Hidden Resource' *Art Monthly* no 87 pages 4-5
[1] blackwords
[1] State section