



Safeguarding Indigenous materials / Terri Janke

I am a Murri from Cairns. I am Torres Strait with Meriam, Wuthathi & Yadaighana connections. How I ended up here was going to UNSW. I would like to acknowledge my IP lecturer Professor Jill McKeough who taught me IP when I was at UNSW. I actually joined up to her class because I wanted to be an intellectual. But, we learn all about copyright, trademarks and patents and Jill delivered the course with such enthusiasm I found it was an area I wanted to work in.

Today I have been asked to talk about safeguarding Indigenous cultural materials and I would like to focus on Indigenous cultural and intellectual property (ICIP) rights and give you an update. This is about the 3rd ATSilIRN conference I have spoken at and I will talk about the work I have done in the past but also give an update about what is happening at the moment. I am going to talk about ways for safeguarding that are being used, without there being any specific laws that address ICIP. I am going to talk about how Indigenous people are using copyright protocols, trademarks and contracts to protect their cultural interests.

To start off with, what is ICIP? For those of you who have read *Our culture our future*, you would know that it plots the actual categories of cultural IP drawing from a study that was done in 1993 by Irene Daes, which looked at the protection of heritage internationally. The definition used is, "The heritage of Indigenous people is comprised of all objects sites and knowledge the nature or use of which has been transmitted from generation to generation and which is regarded as pertaining to particular people or territory".

This is the map that puts all those categories together - it is the interconnectedness of Indigenous knowledge, Indigenous cultural expression, Indigenous culture and IP. It includes literary, performing and artistic works - the songs, dances and stories; languages, traditional scientific and ecological knowledge, cultural property, ancestral remains, immovable cultural property and Indigenous people's heritage. All of this information is useful for Indigenous people for the carrying on of culture but also as outsiders come into Indigenous communities and want to use and reproduce and commercialise ICIP, it presents issues for Indigenous people and in terms of the national and international debate, Indigenous people want certain Indigenous cultural and IP rights.

Our culture our future has a list of rights. There are seventeen of them altogether. I've pulled out a few, which are: the right to require prior informed consent; to be recognised as primary guardians and interpreters; to authorise or refuse use and to benefit commercially from authorised use; to prevent derogatory use; to maintain secrecy and the reference if you want to get further list of those rights <http://www.austlii.edu.au/au/journals/AILR/1999/51.html#Heading95>.

I guess a lot of the information (in that table that I mentioned before) ends up being held in libraries and archives. Libraries hold a wealth of Indigenous material and the role of libraries and archives then becomes very important as the gatekeeper, about who can access and use and reproduce that material.

Our culture our future was finalised in 1999. It actually called for the recognition of generous legislation to protect ICIP. The current government has taken up none of that. But in terms of international debate, there has been a shift in the terminology being used. I note that the Draft Declaration of the World's Indigenous People that is currently being considered, the reference in the article now refers to traditional knowledge and traditional cultural expression,

which reflects also the terminology that is being used in the World Intellectual Property Organisation (WIPO).

Since 2000, WIPO has convened an Inter-governmental Committee on IP and genetic resources traditional knowledge and folklore. They are looking at access to genetic resources and benefit sharing which is a big one for a lot of the countries that have a rich bio-diversity.

The protection of traditional knowledge and creativity and the protection of folklore

Folklore is a term that is not very well favoured in Australia but is still used in Africa and Southern American countries to refer to traditional cultural expression. They have drafted two important documents, one is a guideline on traditional cultural expression and the other is a draft policy and objectives for traditional knowledge. It is good to have a look at that if you are interested in following that world debate.

How is Australia developing in protecting this area of law? The Attorney General drafted amendments proposed for the Copyright Act, in December 2003. It has been three years and nothing much has happened. In fact the draft has not been widely circulated and there hasn't been much discussion on it, but it proposes three rights which mirror the individual moral rights. They are: the right of attribution; for Indigenous communities to be identified as the cultural source; have cultural association with the work or a film. They have a right against the false attribution and the right of integrity not to have their work or film if there are Indigenous communal moral rights in that work or film, for it to be subjected to derogatory treatment. Indigenous communal moral rights though are not going to exist as soon as a work is created like individual moral rights. It is going to require that there be a voluntary agreement for it to exist. For that reason a lot of Indigenous organisations and the Arts Law Centre have criticised the bill saying that it should exist as soon as it is created. There shouldn't be this falsity of an agreement because quite frankly if people do not agree that there is Indigenous copyright, Indigenous communal moral rights in a work or a film then there won't be. These amendments haven't been put to the government yet, but still the Attorney General says that he intends to do so.

What that might mean if it does go through is that there will be three levels of clearance for Indigenous cultural material and it will exist alongside moral rights so it would involve copyright moral rights and Indigenous communal moral rights. I am taking an example of the carpets here – this is Banduk Marika a friend of mine whose work “Djanda and the Sacred Water Hole” was copied on the carpets in the 1994 in the Carpets Case, *Milpurruru v Indofurn*. In that particular case the only action taken was in copyright. Moral rights weren't yet law. If that happened today there would be actions potentially in copyright, the individual moral rights that belong to the individual artist and there would also be an Indigenous communal moral right infringement potentially which would rest in the Yolngu clan as the community responsible for that Indigenous communal knowledge embodied in her work.

That's about the extent to how the Australian Government is moving in this area but I still ask the question do we need new laws? I still believe that we do. This was a recommendation in *Our culture our future*. The Indigenous Reference Group that informed The Report were keen on having specific laws recognising ownership and providing special protection for secret and sacred material. They want protection that recognised those rights exist in perpetuity, not limited in terms of the duration of copyright like patents or copyright rights. They also wanted systems that allow payments to Indigenous owners for their commercial use of their cultural material. But because the laws haven't changed, Indigenous people have been using what is available to them and you can see that most importantly in copyright. A lot of the Federal Court judgments have involved, for instance, Indigenous artists taking cases against people who have put their work on carpets or fabric and those sorts of test cases are being brought and they are actually having an impact on how the copyright law actually applies to Indigenous cultural material. Not that it is seeking to give rights but it is looking at how Indigenous cultural rights are recognised or how the interface between the two laws are working. I think that the more that happens, the more you will see Indigenous people using copyright law.

Although copyright and intellectual property laws are largely about economic interests, they have been used for cultural interests. In the Carpet's case the damages awarded by the judge included a component for the cultural harm that the artists would suffer by the

infringement in breach of customary laws. Even though they were not directly responsible they were in some way accountable for the important ritual information that was in a form that it could be walked upon. But I do think that there are two levels of safeguarding that are coming to play when we are working in this area. There is that cultural maintenance protecting against assimilation of endangered cultures, the loss of further culture and the erosion of the meaning and derogatory treatment of culture. There is also the economic argument that needs to come out because Indigenous cultural and Indigenous people can use IP where appropriate for grass roots development for commercial development, they can enter into partnerships, tourism ventures. So that is about protecting their economic interests as well.

Copyright protects the interests of creators and authors. If Indigenous people know how copyright can work they can actually they can actually consider the issues when they are approached for projects. They can negotiate and talk about how the rights might be shared or owned outright by the Indigenous people. They can negotiate right under contract. More and more I can see that happening in the work that comes to me. A lot of Indigenous communities are asking for written contracts which say "we own the copyright" in the research book, the language book and in that way the vesting of copyright can protect Indigenous cultural and IP.

I want to mention a case study. This one is from the language area because I think language presents a lot of interesting subjects issues. I am going to talk about Wangka Maya Lake Pilbara Language Centre. It is a language centre located in the Pilbara region of Western Australia and it is run wholly by an Aboriginal management committee. It was established in the 1980s and it is for the purpose of traditional owners' research and recording and passing on Aboriginal languages in the region.

There are a lot of issues that arise with Aboriginal languages. Indigenous people don't have an inherent right to the language – there is no copyright in a language. The person who actually records it in a form that is in a material form – through a sound recording or someone like a linguist who works with a speaker and writes it down in a dictionary format - will then have a vested copyright in the written form.

A lot of problems have arisen from Indigenous language centres, for example, trying to use linguist material that may have been recorded in the 1970s. The living speakers then were few and far between and are now deceased. The ownership and the copyright in the dictionary might belong for instance to a UK based linguist who came in to do research in the 1970s. When the language centres want to republish and re-interpret their language materials, they are told they do not own copyright and they do not in terms of western law because it belongs to the linguist and often the negotiations between the community and the linguist are subject to good will. Basically it is up to the language centres to be able to negotiate rights. So coming from that Wangka Maya decided to develop a "Copyright and traditional knowledge in Indigenous language policy" that recognised rights of Indigenous language speakers at the outset. If a linguist works with a language speaker they would give the recorded language rights to Wangka Maya. It has become practice to use written agreements. They would get a non-exclusive licence from the language speaker and use information brochures and ways which they can tell people about how they are going to publish the material and where it goes. They also put a notice on the inside cover where normally the copyright is on books, which is going to say the language and information contained in this book is traditional knowledge and Indigenous cultural and IP and belongs to the Manyinyara and Warnman people. You must not reproduce or commercially use the language and information without the prior informed consent of Wangka Maya and the traditional custodians.

More and more Indigenous publishers are using this custodians notice. Here's an example of Bachelor Press who have published *Jurtbirrk Love Songs*. It is a CD of songs from Northwest Arnhem Land and it has one that says "The music in the booklet contains traditional knowledge of the Iwaidja people and it is created with their consent. Dealing with any part of the music for any purpose has not been authorised by custodians and is a serious breach of customary laws and may also breach the copyright act 1968".

Here is another example of a notice used by Wandjuk Marika, her art centre Buku Larngay Mulka, they use this particular notice which recognises the 'c' in the circle, the copyright

belonging to the individual artist, but it also says this work and the accompanying story is copyright of the artist and may not be reproduced without the consent of the artist and the clan concerned.

Other ways that people are using copyright as a way to enforce their cultural rights is for example, this was a t-shirt that was found in Paddy's Markets by one of the women from the Badmardi clan. Dr Vivian Johnson had a team of her students go around looking for the dubious Indigenous copyright infringements. Mandy Muir and Vivian Johnson found this t-shirt and it depicts Mimis from rock art and this particular one was from the Cadell River region. It was just put on the t-shirt and the question they were asking is "can copyright law stop third parties from putting our important rock art Mimi figures on t-shirts without our permission?"

There is no copyright in rock art because it is very old. This work taken from a rock face that was established to be 16,000 years old so there is no copyright; copyright only lasting for the life of the artist and 70 years now. When they came along, they bought a book published by AIATSIS – a very beautiful book. It was published work of a researcher called Eric Brandl who went up to that area in the 1970s. He was funded by AIATSIS to go there. He recorded the rock art and this book was the result of it. Part of his work involved taking free hand drawings of the rock art and he had informants with him. He would take photos as well and when he came back to his home he would project it onto a wall and then draw it to come up with these Indian ink black drawings that are in the book. If anyone has seen the book you can see it has a lot of detail of the rock art and the Mimi figures that you probably wouldn't get if you went to the rock face because it is all interlayered.

Brandl's contribution of his input, skills, labour and effort meant a copyright interest and also AIATSIS as the funder and publisher had a copyright interest. They joined together with the Badmardi Clan and the widow of Brandl (he had since passed away) and took an action saying that there had been an infringement. We took an action for copyright infringement using the three parties. We sent a letter of demand to the graphic designers or the company who made the t-shirt and they said "oh well, it's not a copyright infringement - we changed it by 10%", because they thought that if they were changing a work by 10% they were creating a new copyright work in their own interests.

We said, "No. You might have a new copyright work but it is an infringement because you are taking from something that is already a copyright work." They did get legal advice and it did settle. It is an interesting case. It was pre moral rights laws but one of the remedies that the group got was a written apology in *The Australian*, so they got quite a detailed apology. They also got damages and they got a handover of a lot of the t-shirts and they had umbrellas as well that they had used. I was really lucky because they had a tank top range and it's really great for summer. Just joking!

That's an example of how copyright (law works) and in fact Mrs Brandl said, "It's not really that we own it but we will use this copyright in a way that allows the Indigenous traditional custodians to have a right". I thought that was really quite good.

This book is actually used as the handbook of infringement and this was another thing I came across – someone noticed that there were some chocolates being made using one of the figures inside. You can see the chocolate is exactly the image inside. That's arguably a copyright infringement. One of the problems is that we can never run the case because people keep eating the evidence! But it is an example of the copyright issues that can be used to protect cultural material.

There are also Indigenous cultural protocols and a lot of those are being produced now. These provide ways of using and dealing with Indigenous communities. They are basically not 'legal' but they encourage ethical conduct and are based on good faith and mutual respect. In the introduction I mentioned I worked on the Australia Council protocols and there are 5 of them that follow the production of Indigenous arts and cultural expression. There are also codes of ethics that bolster Indigenous cultural material rights and I pulled this one from the AIATSIS code of ethics for the audio-visual collection. What I am noticing is that the codes say that the rights of the legal copyright owner will be respected but also they're going to recognise the rights of Indigenous communities and individuals who are owners of the knowledge as well before they make material available to people who request it.

The other area that I have noticed quite an increase of being used by Indigenous people is trademarks. You have to register trademarks with IP Australia but they are basically signs used or intended to be used to distinguish goods or services dealt with or provided in the course of trade by a person, from goods or services so dealt with or provided by another person. Although again it is a very commercial focus, you can use it to protect cultural interest. I can see there are a lot of Indigenous institutions that have registered their trademarks and their names recently. Publishing companies (for example) and it is very well used by art centres. I think even Linkup has a registered trademark. I have pulled some examples from the ATMOSS Database. The Central Australian Aboriginal Media Association (CAAMA) has one that protects their media organisation and TV and radio. CAAMA is a registered trade mark. It includes the words and the black eagle Music, people might recognise that Trademark because its put on CD's. And this trade mark is Gab Titui Cultural Centre's logo, which is located on Thursday Island in the Torres Strait. It is a keeping place for Torres Strait Islander material. Their mark was registered a few years ago when the centre opened. It is used on their letter heads, t-shirts, caps and also on books and publications.

That is a way that people use trademarks to protect the things they are putting out because people identify it as the source indicating an authentic product. Trademarks also become things that Indigenous people can deal with commercially like for instance allow people to use particular Indigenous words or Indigenous designs as a trademark and get an economic reward. I have heard of New Zealand for instance that is happening. I have heard of one language centre that does charge for people to get endorsement for language words to use in a commercial context. For instance if a property development wanted to name a building or their area after the local Indigenous word, they might approach a language centre and the language centre gives cultural clearance for them to use it. They are entitled for payment of that. That's a commercial right.

So I can see more and more of that will be happening too.

I just wanted to mention how in New Zealand the Maori Trademarks advisory group was established in 2003. They're trying to safeguard against improper uses of Maori trademark material going on the register. They have a specific section that relates to that. We don't. It sets up this advisory group that vets applications for trademarks that contain Maori words and symbols and the advisory group members must have knowledge of culture, understanding and experience as well as business and legal expertise. They are 3 year appointments. We don't have one in Australia at the moment but I think it would be a good idea for IP Australia Trademark Office to have one.

Contracts is the final area I want to mention today. I am going to draw this example of how contracts are being used, particularly in the film area. There are a lot of contracts to get the rights to make a film - rights relating to protecting culture. This is from the Australian Film Corporation (AFC) Indigenous film protocols (<http://www.afc.gov.au/funding/Indigenous/icip/default.aspx>). Some terms in the contract involve sharing copyright royalties and payment of fees options of viewing and editing final rushes and also rejecting sensitive footage. This is an example of an ICIP rights clause that came out of the AFC. It is their production investment agreement. You can see that they are actually acknowledging the existence of Indigenous Intellectual Property rights saying that it will be upheld and respected that there will be a non-exclusive licence and if there is a dispute the parties will use best endeavours to resolve the dispute.

To finish up I wanted to share those four ways that Indigenous communities are using what is available to them now to protect and safeguard Indigenous cultural material and to leave with you the following principles with which safeguarding in your particular area might go forward - that is respect for culture, prior informed consent, promoting integrity and authenticity, proper attribution, acknowledging source of songs, stories, knowledge and other Indigenous cultural material and where it is used in a way that is giving rise to benefits they are sharing the benefits with Indigenous people.