

Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006

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Aboriginal and Torres Strait Islander Arts Board
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Checklist

Problems encountered by Indigenous Artists		Potential Government Responses
1.	Artists and Indigenous people cannot stop the exploitation of their ICIP such as oral or performance works and rock art (and other works out of copyright)	<ul style="list-style-type: none"> • Draft sui generis laws • Prior informed consent mechanisms explored (Ref: section 3)
2.	Indigenous Communal Moral Rights are not recognised	<ul style="list-style-type: none"> • Productive consultation on proposed model • Consider adopting model based on prior informed consent of the owners. (Ref: section 4)
3.	Artists receive no share of high prices paid for the works when sold a second or subsequent time (at auctions, by dealers and galleries)	<ul style="list-style-type: none"> • Draft laws to implement a legislative resale royalty scheme (Ref: section 5)
4.	Unethical practices including paying unfairly in alcohol and drugs; operating sweatshops	<ul style="list-style-type: none"> • Trade practices • Code of practice • Support advocacy and representation • Education and stakeholder liaison (Ref: section 6)
5.	Artist relationship with galleries no clear terms	<ul style="list-style-type: none"> • Gallery and artist written standard term contract

		<ul style="list-style-type: none"> • Code of practice • Support advocacy and representation • Education and stakeholder liaison (Ref: section 6)
6.	Non-Indigenous artists imitating Indigenous art	<ul style="list-style-type: none"> • Trade practices • Support protocols (Ref: section 6)
7.	Indigenous artists are forced out of the market due to being out priced by cheap fakes and copyright infringements	<ul style="list-style-type: none"> • Trade practices • Stop importation of fakes - Customs Act to filter out fake Indigenous art and souvenirs • Authenticity label (certification marks) and quality assurance • Regular trade marks • Ethical branding • Geographic indications • Business and legal advice • Codes of practice/ethics • Special unfair trade practices legislation (Ref: section 6)
8.	Imported products are passed off as authentic craft	<ul style="list-style-type: none"> • Trade practices • Customs Act (Ref: section 6)
9.	Indigenous artists works are forged	<ul style="list-style-type: none"> • Introduce laws relating to fraud and forgery (Ref: section 6)

10.	Fakes and copyright infringements of Indigenous artists works are sold on the internet	<ul style="list-style-type: none"> • Copyright law • Legal support to artist to take action • Test case • Introduce laws requiring auction sites to require more details from sellers of Art on-line • Codes of practice (Ref: section 6)
11.	Indigenous custodians of culturally significant objects need to be more involved with the movement of cultural objects to and from Australia	<ul style="list-style-type: none"> • Introduce consultation with custodians of culturally significant objects into the permit and certification processes which apply to the import and export of culturally significant objects. (Ref: section 7)
12.	Indigenous artists are often treated unethically and unconscionably by dealers	<ul style="list-style-type: none"> • Support industry Codes of Practice eg: NAVA, City of Melbourne • Consider implementation and enforcement • Consider Inquiry into Indigenous arts industry (Ref: section 8)
13.	Indigenous cultural practices are often ignored and breached through ignorance	<ul style="list-style-type: none"> • Support for educational projects • Support for protocols (Ref: section 8)
14.	Sometimes protocols are not followed	<ul style="list-style-type: none"> • Encourage inclusion of protocols in contractual arrangements.

		<ul style="list-style-type: none"> • Government arts funding conditional on following protocols (enforced in contract) (Ref: section 8)
15.	The rights of Indigenous artists and cultural custodians are often ignored or breached	<ul style="list-style-type: none"> • Support for advocacy through programs and organisations (Ref: section 8)
16.	Indigenous artists often require better industry representation	<ul style="list-style-type: none"> • Support arts centres • Representation through collecting societies such as Viscopy • Legal and business support for artists and arts centres (Ref: section 8)
17.	Sometimes Indigenous artists are treated as one group, and diversity of urban, regional, rural and remote cultures and traditions are not understood	<ul style="list-style-type: none"> • Support protocols • Support consultation at local level (Ref: section 8)
18.	Indigenous artists get ripped off by sharp practice	<ul style="list-style-type: none"> • Support the provision of accessible legal advice for artists (Ref: section 8)
19.	Indigenous artists miss opportunities to maximise financial benefit from their work	<ul style="list-style-type: none"> • Support government funded business advice to artists • Support Market promotion such as Gallery Shop Front initiatives and the institution of 'warehousing' practice ie where a warehouse operation is set up drawing from art centers and other producers to supply shop fronts. (Ref: section 8)

20.	Indigenous artists not represented at international and national standard setting forums	<ul style="list-style-type: none"> • Support prior consultation with artists by delegates • Send Indigenous contingents (Ref: section 8)
21.	Indigenous cultural legal and policy matters are often complex and require new and innovative and sensitive approaches	<ul style="list-style-type: none"> • Engage in international dialogue and support Indigenous participation so Australian responses to issues have the benefit of this discourse (Ref: section 8)
22.	Government is often required to respond to matters which are both culturally and commercially complex	<ul style="list-style-type: none"> • Seek advice of Aboriginal and Torres Strait Islander Arts Board members and staff • Consider establishing Indigenous Advisory Committee to provide advice on specific issues. (Ref: section 8)
23.	No leadership or advocacy agency that represents the specific issues of Indigenous artists in the sector	<ul style="list-style-type: none"> • Support a National Indigenous Cultural Authority (Ref: section 8)
24.	Indigenous artists often want to develop their arts practice and engagement in the arts economy, but lack information for planning	<ul style="list-style-type: none"> • Commission research on issues which would help planning and cultural development (Ref: section 8)
25.	Uncertainty as to the extent of unethical practices and unfair trading in the Indigenous arts	<ul style="list-style-type: none"> • Conduct national Indigenous arts inquiry (Ref: section 8)

	marketplace	
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1. Introduction

We are pleased to be invited to present an overview of the most pressing issues for the recognition and protection of Indigenous Cultural and Intellectual Property (ICIP) in 2006.

Australia has a burgeoning Indigenous arts sector which provides enormous value to the cultural and economic life of the nation. Indigenous visual arts and culture contribute to strong primary and secondary markets. Indigenous artists and craftspeople, writers, performers and musicians enhance Australian tourism and cultural life.

Fundamental to Indigenous peoples are land, sea, lore, law, family and ancestors. The work of Indigenous creators is informed by common experiences and connection to culture. Amongst this common experience are equally strong layers of diversity. Some of this diversity pre-dates colonisation. Indigenous clan groups with different stories, songs, languages, governance structures and laws have maintained that diversity. This is further shaped by different experiences of colonisation across the nation. Some aspects of culture remain unchanged, and some aspects have adapted to new forms. Indigenous culture is diverse and alive. It is not static.

One foundational principle underlies development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways.

In order to positively contribute the integrity of Indigenous cultural life, arts infrastructure must support Indigenous control of ICIP management. An essential part of this support is acknowledgement of local community authority, communal rights over cultural heritage material, and engagement of Indigenous people through consultation and prior informed consent mechanisms. This must be balanced with acknowledgement of the authority of individual artists and encouragement of creativity and innovation.

Positive input into the Indigenous arts sector also requires responses to unethical and unconscionable practices towards artists, and consideration of protective measures for artists, consumers and the integrity of the Indigenous arts market. Indigenous artists are entitled to work in a safe environment, to

be appropriately represented and to benefit fairly and equitably from the sales and copyright use of their work.

A targeted approach combining legislation, prosecution of test cases, protocols, codes of practice, promotion of best practice, education, advocacy, research and ongoing consultation can make an effective contribution to the recognition and protection of ICIP, and the rights of Indigenous Australians to continue their roles as custodians, practitioners and teachers of culture.

Outline of this paper

The purpose of this paper is to inform government consideration of the current issues for Indigenous cultural and intellectual property.

This issues paper sets out, in the opinion of the authors, all current major Indigenous Intellectual and Cultural Property Issues in 2006, for the Indigenous arts industry. In accordance with the brief it:-

- uses an articulated comprehensive framework providing an 'industry' or 'value chain' perspective and a 'social' or 'community' perspective
- cited major studies publications and authorities
- canvasses some of the instruments and interventions which could be considered in respect of these issues.

2. Indigenous cultural and intellectual property rights

Overview

Indigenous cultural and intellectual property rights refer to Indigenous people's rights to their cultural heritage. These rights allow Indigenous Australians to continue their roles as custodians, practitioners and teachers of culture

Indigenous cultural and intellectual property (ICIP) rights refer to Indigenous people's rights to their cultural heritage. Indigenous people's heritage is a living heritage and includes objects, knowledge, stories, songs, dances and images that are created today or in the future, based on that heritage.¹

The nature or use of Indigenous heritage material is such that it is transmitted or continues to be transmitted from generation to generation. It is also regarded as belonging to or originating from a particular Indigenous group (or groups) or its territory.

Indigenous cultural and intellectual property rights include the right for Indigenous people to:-

- ◆ **own and control** Indigenous cultural and intellectual property
- ◆ be recognised as the primary guardians and interpreters of their cultures. This raises issues relating to **representation** and how stories and information is presented
- ◆ the **right to authorise or refuse the use** of Indigenous cultural and intellectual property according to Indigenous customary law
- ◆ maintain the **secrecy** of Indigenous knowledge and other cultural practices
- ◆ to be given **full and proper attribution** for sharing their heritage

¹ Terri Janke, *Our culture: our future: Report on Australian Indigenous cultural and intellectual property rights*, Michael Frankel & Company, written and published under commission by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney 1999, p. 7.

- ◆ control the **recording** of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.²

3. Copyright

Overview

The interface between copyright law and ICIP has been the focus of much debate and there have been three reported Federal court judgments on the issue. Indigenous artists as creators and the carriers of Indigenous culture balance copyright and cultural obligations.

Since the 1970s, Indigenous artists have noted the inadequacies of Copyright Act 1968 (Cwlth) to protect Indigenous works. In the 1990s, Indigenous artists starting commencing copyright action in courts. Cases such as *Yumbulul v Reserve Bank*³, *Milpurrurru v Indofurn*⁴ and *Bulun Bulun v R & T Textiles*⁵ have discussed issues where copyright applies, or does not apply to Indigenous art. The Copyright Act provides individual creators of works, sound recordings and films with exclusive rights that allow them to exploit their works without others being allowed to copy that creative input. There are moral rights for individual creators. Indigenous creators' works will be protected by copyright where it meets the requirements of this Act.

Copyright has had the effect of granting exclusive individual rights to ICIP material that was in the past orally transmitted or performance based, as part of the cultural process. The copyright owners can make this information publicly available, alter and adapt it, digitise and authorise others to reproduce this ICIP material without having to consult the original custodians of this ICIP material. This is a concern for Indigenous people because it moves ICIP out of the hands of Indigenous people.

Indigenous people's concerns about the shortfalls of copyright protection are outlined in the table below:-

² Terri Janke, *Our culture: our future*, n.1, pp 47 – 48.

³ *Terry Yumbulul v Reserve Bank of Australia and Aboriginal Artists Agency Limited and Anthony Wallis* (1993) 20 IPR 481A

⁴ *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209

⁵ *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513

NON-INDIGENOUS LAWS	INDIGENOUS CUSTOMARY LAW
<ul style="list-style-type: none"> • Emphasis on material form. 	<ul style="list-style-type: none"> • Generally orally transmitted.
<ul style="list-style-type: none"> • Limited in time; eg copyright is generally 70 years after the death of the artist 	<ul style="list-style-type: none"> • Emphasis on preservation and maintenance of culture.
<ul style="list-style-type: none"> • Individually based – created by individuals. 	<ul style="list-style-type: none"> • Socially based – created through the generations via the transmission process.
<ul style="list-style-type: none"> • Intellectual property rights are owned by individual creators or their employers and research companies. 	<ul style="list-style-type: none"> • Communally owned but often custodians are authorised to use and disseminate.
<ul style="list-style-type: none"> • Intellectual property can be freely transmitted and assigned—usually for economic returns—for a set time, in any medium and in any territory. 	<ul style="list-style-type: none"> • Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.
<ul style="list-style-type: none"> • Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned. 	<ul style="list-style-type: none"> • There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.
<ul style="list-style-type: none"> • Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression. 	<ul style="list-style-type: none"> • A holistic approach, by which all aspects of cultural heritage are inter-related.
<ul style="list-style-type: none"> • Emphasis on economic rights. 	<ul style="list-style-type: none"> • Emphasis on preservation and maintenance of culture.
<ul style="list-style-type: none"> • No special protection of sacred secret material or gender restrictions. 	<ul style="list-style-type: none"> • Specific laws on gender and sacred secret material.

4. Indigenous communal moral rights

Overview

The Government is to be commended for its commitment to establish ICMR. Eleven major issues need to be considered to achieve a workable, reasonable regime. The model must give meaningful rights to Indigenous people to guard the integrity of their ICIP, and to be attributed as the originators of it. An appropriate balance must be struck between the rights of Indigenous people and third party users who must also have certainty about their obligations. Productive consultation on the model is recommended.

Background

In 2000, when the individual moral rights legislation was passed through the Australian Senate, the government made a commitment to Senator Ridgeway to consider Indigenous communal moral rights (ICMR).⁶ The Coalition government's 2001 election art policy, *Arts for all*, noted that the Coalition will 'take steps to protect the unique cultural interests of Indigenous communities and the cultural works that draw upon communal knowledge... Amendments to the moral rights regime will give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.'⁷ In December 2003, the government drafted the Draft Copyright Amendment (ICMR) Bill 2003 to recognise Indigenous communal moral rights of integrity, attribution and false attribution in original copyright works⁸ and films that meet the listed requirements before the first dealing of the work or film.

The draft was sent to a limited number of organisations and individuals for comment. The government has stated that only minimal changes have been made in light of these comments and we understand that it will be put to parliament for debate some time this year.

⁶Intellectual Property Branch, Department of Communications, Information Technology and the Arts and the Copyright Law Branch, Attorney-General's Department, *"Indigenous Communal Rights Paper"*, December 2003.

⁷<http://www.liberal.org.au/documents/arts.pdf>

⁸Works refers to artistic, musical, dramatic or literary work that meets the requirement of the Copyright Act 1968 (Cwlth).

Voluntary agreement

ICMR do not exist unless the Indigenous community enters into a voluntary agreement with the author/creator.⁹ This approach differs from individual moral rights which exist upon creation without such a limitation.

This voluntary agreement (in writing, oral or implied) requires the Indigenous community to have a relationship with the creator, and to establish an agreement with the creator.¹⁰

Let's examine the ways in which this might work in practice. One straightforward example is where the creator is an Indigenous person from a community from which the Indigenous cultural expression originates. A voluntary agreement might be the oral or implied under customary laws, where Indigenous artist for instance are living and interacting with the community. However, complexities will arise for artists who live outside of their communities but have an attachment or belonging with a particular Indigenous clan or group.

Let consider the same scenario for non-Indigenous creators. It may be possible for the Indigenous community to enter an agreement where they are approached and consulted on the use of their Indigenous cultural material, but when it is used by non-Indigenous outsiders who access already published material to create new copyright works, it will be difficult. There is no onus on these copyright creators to even contact or consult the Indigenous community. If the proposed law is benefit Indigenous people then this surely is not achieved if third parties have no incentive to ask for use of cultural material.

It could be argued that these Indigenous communal rights might exist as a feature of customary law, whether the Australian legal system recognises this or not, in the same way native title laws existed before recognition at common law.

⁹ Ian McDonald, Article for Australian Intellectual Property Law Bulletin, 'Indigenous Communal Moral rights', Australian Copyright Council 2003

¹⁰Jane Anderson, 'Indigenous Communal Moral Rights, 'The Utility of an Ineffective Law', *Indigenous Law Bulletin* (ILB), February 2004, Vol 5, Issue 30, pp 8 – 10, at 8. See also Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' *UNSW Law Journal* 27(3) 2004, pp 585-605.

'Where cultural material is communally owned, pursuant to customary laws and traditions, it simply is. The task of legislation which aims to provide effective protection for Indigenous communal moral rights is to understand the content of the pre-existing right and build protections around it, to prevent unlawful uses. The draft exposure bill does not do that. It prescribes preconditions based, not on the nature or content of communal ownership, or Indigenous cultural property, but based on the kinds of assurances third parties might need to provide certainty in their dealings with Indigenous art.'¹¹

The common law is often able to take account of the diversity of different Indigenous customary practices. Given that statute subsumes the common law, legislators should avoid the situation where legislating on Indigenous communal moral rights in the Copyright Act 1968 would limit recognition of these rights under the common law. For example, there could be an argument that this amendment ICIP rights beyond those covered in the Copyright Act 1968 are restricted to interpretation under this Act only.¹²

Balancing ICMR and certainty to users

The model aims to provide certainty to users as to their obligations when making use of Indigenous cultural material. This is the foundation of the requirement of having an agreement in place in order to create the communal right.

However, the current draft does not encourage any interaction between users of Indigenous culture and Indigenous communities. This must be the foundation of any voluntary agreement, particularly in circumstances of language and cultural differences. The absence of this foundation creates an imbalance which leans predominantly in favour of protecting third parties who deal with Indigenous cultural expression rather than recognising the nature of communal ownership and protecting its content.

Another fundamental problem is the requirement that unless an Indigenous community's ICMRs are established in a work or film prior to the first

¹¹ Robynne Quiggin, 'The Contribution of Protocols and Moral Rights', paper delivered at Snapshot 2 (AMAG), Melbourne 5 August 2004, p.8.

¹² *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513 at 524 – 525.

dealing, then a person who deals with the work or film, such as an artist, publisher or film maker is not legally obliged to recognise any Indigenous cultural sensitivities in dealing with the work or film. Again, the foundation of interaction between Indigenous community and user of the ICMR is missing in the model. This interaction is essential to any reasonable agreement.

The draft proposals has been criticised as being ineffective. According to Jane Anderson, 'the draft Bill is highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their knowledge and its use'.¹³

Drawn from a traditional base

To qualify for ICMR, a work must be drawn from a traditional base. This means drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'. A community is defined loosely as an individual, family, clan or community group. This requirement of defining a community may cause unnecessary complexities, as seen in native title law. Communities, like art, are not static, and Indigenous people live in areas that are not their traditional lands and also live in a diversity of situations – including rural, urban and remote. The lifestyles will vary from living under close observance of customary laws, to those who live in cities and follow established protocols within that region or industry. It is difficult to be prescriptive on this point but we note the difficulties experienced in native title law in cases such as *Yorta Yorta Aboriginal Community v Victoria*¹⁴ and the recent Darwin Larrakia native title case (April 2006, unreported) where the Federal Court found when entitlement to rights rests on proof of traditions and customs of the group being maintained.

The law should recognise that Indigenous artists come from remote, rural and urban areas and that there are many different types of traditions, practices and protocols in this diversity.

Must be a copyright work

Another issue with the current legislative model is that ICMR exist only in a

¹³Jane Anderson, 'Indigenous Communal Moral Rights, The Utility of an Ineffective Law'. *Indigenous Law Bulletin* (ILB), February 2004, Vol 5, Issue 30, pp 8 – 10, at 8.

¹⁴ *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

copyright work or film.¹⁵ This will side step application of the laws to one of the most problematic areas of unauthorised appropriation. That is appropriation which occurs in cases where the cultural material is not protected by copyright in the first instance such as when the cultural material is in oral form, or so old that it is no longer protected by copyright. This is the case for a lot of Indigenous cultural material.

For example, the copying of important Indigenous cultural being depicted in rock art on t-shirts is not a copyright infringement because the rock art is old (out of copyright) and the author is unknown, so these works are not protected by copyright. When these works are incorporated into a new form such as a new artistic work, the question would then arise whether ICMR exists in the new artistic work. However, under the current model, if the creator does not have a voluntary agreement that it does, there are no ICMR.

In the *Rock Art on t-shirt matter*, t-shirts were made by a Sydney based t shirt company, copying from a book of rock art published by the Australian Institute of Aboriginal and Torres Strait Islander Studies. The book was written by E J Brandl who researched and depicted figures carved in the rock in Arnhem land in his book. The process of capturing the rock art involved drawing the rock art in Indian ink. This resulted in a new work, the ink drawings, which were protected by copyright and at law, vested in Brandl, although the rock art is not a copyright work because it is too old. This new works have already been dealt with given that it is published. This book is used by many appropriators of Indigenous art to create their own works. Would the relevant traditional owners have ICMR to this work? Not under the current model. In this matter, the AIATSIS and the Brandl estate took action against infringers on behalf of the traditional owners. For information on this example see *Minding cultures*.¹⁶

Acknowledgement of association

There must be acknowledgement of the Indigenous community's association with the work.¹⁷ This requires notice of association to be given by the community and the author to third parties such as funding bodies, publishers and others involved in a copyright transaction. The community can do this for

¹⁵ We also note that sound recordings is not included and consider that they should be given that many oral or performance based ICIP has been recorded by this means. Access and ownership over tapes remains an important for language and cultural maintenance. In many cases, copyright in these recordings is asserted by researchers and institutions.

¹⁶Terri Janke, *Minding culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, prepared for the World Intellectual Property Organisation, Geneva 2003.

¹⁷Clauses 195AZZL and 195AZZM of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* 2003

works and films it has been consulted on, but it will not be able to give 'notice' on works and films it has not. These are likely to be the works and films that are infringing Indigenous communal moral rights.¹⁸

Interest holders

It is also required that interest holders in the work need to have consented to Indigenous communal rights in the work or film. In this respect an Indigenous community has no rights if an interest holder refuses or fails to consent to the Indigenous communal moral rights. Just what constitutes an interest holder is not defined. It could perhaps include a funding body or a commissioner of work. This lack of clarity and problems with practical implementation are further concerns.

Agreement before first dealing

Under the current legislative model, ICMR will not arise unless the voluntary agreement is made before the first dealing. A dealing with reference to the communal moral right of attribution arises includes selling, letting for hire, by way of trade offering or exposing for sale or hire, exhibiting in public, or distributing where the proposed distribution is for the purposes of sale.¹⁹

Let's look at the application of this principle in another practical example: What happens where an author is pre-commissioned to write a book. Would it mean that there would be no Indigenous communal moral rights where an author is pre-commissioned to write a book about Indigenous stories for a publisher, because the literary work is created after the commissioned contract has been signed, this commission being the first dealing of the literary work?

Productive consultation

The confidentiality surrounding the released paper has restricted the free-flow of discussion in this regard. As a result, the draft bill had limited consultation with Indigenous peoples – communities and artists. These are the groups which are supposed to benefit from the new law. To engage Indigenous stakeholders in a meaningful debate on the contents of the Bill, we recommend that there needs to be meetings, and discussions held at a local and practitioner level.

¹⁸ Terri Janke, 'The moral of the story: Indigenous communal moral rights', *Bulletin*, #3/05, ISSN #1440-477pp 1,2, 7 & 8.

¹⁹Section 195AZZZB of the *Draft Copyright Amendment (Indigenous Communal Moral Rights)* Bill 2003.

The Use of Protocols and ICMRS

The use of Indigenous protocols is essential to any model of ICMRs. Indigenous protocols are developing within the arts and cultural industry that recognise many ICIP rights of Indigenous communities including the issue of integrity and attribution. The model should aim at allowing these protocols to be a reference in response to the reasonableness test.

Implementation of ICMR

A law as complex as this model will require a substantial education campaign to explain its operation to Indigenous artists and the broader industry. For communities to fully realise these rights, they would need to also have additional measures of protection including protocols, education and awareness raising.

Another important concern is the possibility for enforcement. Given the narrow scope of the current model, it is difficult to see where a remedy might arise for infringement.

ICMR and prior informed consent

ICMR do not provide ownership rights, and to the extent that the intellectual property and heritage laws can recognize has been the subject of much debate nationally and internationally.

International developments are progressing the discourse about effective mechanisms for the interface between ICIP and IP laws. Mechanisms that are being advanced include consultation and permission to use ICIP, and the application of the principle of prior informed consent.

These international developments provide useful principles and models for ICIP management, including Indigenous communal moral rights but also other ICIP rights.

We note that the issue of protection Indigenous cultural expression and traditional knowledge has been debated in other regions including the Pacific and the World Intellectual Property Organisation (WIPO). WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore's Draft guidelines suggest member states adopt legal and practical measures must protect against

misappropriation of traditional cultural expressions of particular cultural, spiritual value or significance to a community, without its free, prior and informed consent. This level of protection requires prior notification or registration on a public register.²⁰ This right of prior informed consent gives a community the right to prevent or authorize the use of the traditional cultural expression on agreed terms such as benefit sharing.

The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002)²¹ for Pacific countries recommends the introduction of traditional cultural rights which provide the prior and informed consent of traditional owners before reproducing, publishing, performing, making available on line, traditional knowledge or expressions of culture.²² This right is in addition to recommended Indigenous moral rights for traditional owners – that is the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture. Material form is not required. The moral rights exist independently of their traditional cultural rights. The model also proposes that communal moral rights continue in force in perpetuity and that they are inalienable, meaning they cannot be waived or transferred.

5. Resale royalty

Overview

The Government's pursuit of a resale royalty arrangement model has initiated much useful discussion. To provide a strong workable system, a legislative model is preferred, which makes requires payments directly to artists so they can benefit from their successes in the market place.

Introduction

An important feature of the Indigenous arts market in recent years is an increase in the sale price of visual arts, in both the primary and secondary art markets. In 2004, the Department of Communication, Information Technology

²⁰ See Article 7. World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth Session papers, Geneva 6 – 8 June 2005, 'The protection of traditional cultural expressions/expressions of folklore – revised objectives and principles', (WIPO/GRTKF/IC/8/4), WIPO, Geneva, 2005.

²¹ An original draft by Dr Kamal Puri and Clark Peteru for the South Pacific Community in New Caledonia was debated and revised by Legal Experts attending Workshops held from 2000 - 2002.

²² Section 6, Model Law for the Protection of Traditional Knowledge and Expressions of Culture, *Ibid*.

and the Arts released a discussion paper, designed to stimulate broad discussion about whether it would be desirable to introduce a resale royalty arrangement in Australia.

What is the Resale Royalty?

While visual artists benefit from the sale of their work at its first sale, they do not receive any share of the sale price of subsequent sales. Returns from these sales are made only by the seller and the dealer. This produces an inequity for artists because as they develop their expertise and in market worth, they are excluded from directly benefiting from this section of the market for their works.

The resale royalty or *droit de suite* ensures that artists receive a percentage of the resale price of their works.

Arguments in favour of legislative implementation

There are a number of arguments in favour of implementation of a legislated resale royalty in Australia.

1. Artists would benefit from the resale of their works.
2. Visual artists would receive a royalty for their works, as do literary authors for their books and musicians for their songs and recordings.
3. Indigenous artists would benefit more because of their low incomes and high dependence on the arts industry.
4. A legislative scheme would avoid problems of avoidance of payments which would occur with an informal involuntary scheme.
5. A legislative scheme would provide for individual payments to artists and their estates. This strikes the right balance between state support and personal responsibility.²³ It makes redundant current well-meaning but patronising trust fund arrangements which are often administered by volunteers.
6. Indigenous artists would have recognition of their ongoing connection with the cultural material embodied in their artwork through the payment.
7. A resale royalty scheme would implement Recommendation 5 of the Myer Report.²⁴

²³ Prime Minister Howard, National Press Club Address, 25 January 2006
<http://www.pm.gov.au/News/Speeches/speech1754.html>

²⁴ Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, Commonwealth Department of Communications, Information Technology and the Arts, 2002. The Report recommended: To further

8. Australia would harmonise its laws with the European Union.²⁵
9. Australia would implement an optional provision of the Berne Convention.
10. Administration of a resale royalty scheme would record the origin (provenance) of artistic works which is valuable to the Australian arts market, as well as collectors and artists.

Arguments in favour of non-legislative implementation or no implementation

1. The resale royalty does not provide benefits uniformly. This argument is based on some experiences in which late career artists and the estates of deceased are the main beneficiaries.
2. It will not end Indigenous disadvantage.
3. It will introduce an additional level of administration of sales.
4. It would introduce additional costs to buyers.

Balancing the Arguments

Many of these arguments against the resale royalty are based on premises which either do not apply to the Indigenous art market or which misunderstand the purpose of the resale royalty.

The resale royalty would not only benefit “dead white males” as it is sometimes put. The work of young Indigenous female artists such as Tracey Moffatt, Judy Watson, Rosella Namok and Julie Dowling reach high sales figures.

Opponents also argue that the limited number of artists who will benefit is a reason to shun the resale royalty. But this misunderstands its purpose. The resale royalty is not intended to provide returns in any uniform manner of distribution, like welfare payments or CDEP payments. It is intended to provide a share in the market success of sold works.

protect the rights of visual artists and craft practitioners, the Inquiry recommends the Commonwealth Government:

- 5.1 Introduce a resale royalty arrangement.
- 5.2 Establish a working group, comprising representatives from government and the visual arts and craft sector, to analyse the options for introducing a resale royalty option.
- 5.3 Conduct a tender to determine an appropriate body to administer the resale royalty arrangement.

Allocate \$250,000 for the implementation of an implementation strategy.²⁴

²⁵ A directive requiring implementation of the resale royalty was issued by the European Union. Directive 2000/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art requires EU member states to harmonise their laws in relation to the resale royalty for artists. The United Kingdom is the most recent nation to implement the resale royalty.

Much is made by those opposing the resale royalty of the difficulties with precisely forecasting outcomes of its introduction. Dire predictions are made about fleeing collectors and a collapsing market, as a result of an additional cost to buyers. But there are two costs have recently been added to the purchase price of works in the secondary market without evidence of detriment. One cost is the buyer's premium. It is a cost of between 10% and 20% imposed by auction houses on purchasers. The other is the GST. The Indigenous art market remains strong despite these costs by auction houses and government. And while it is true, no prediction can be made with complete certainty, in the light of the buyer's premium these fears appear to be overstated in the extreme.

The payment of royalties to authors of musical and literary works is accepted practice. The creative income of visual artists on the other hand, is mainly restricted to the first sale price of their work. The resale royalty would provide a return to artists, founded on the same fundamental principles of intellectual property laws – the encouragement of innovation, creativity and excellence. Australia's cultural heritage, Indigenous art markets and arts sector would benefit from a proper recognition of visual artists rights to a return from their successes in the market place.

While initiatives which strengthen business skills and market structures are important, and should be pursued, so, too, should the championing of market success by artists. Sharing in and being rewarded by success in the market are fundamental to the resale royalty.

Features of the Indigenous Art Market

Some opponents of the resale royalty complain that the main recipients are artists and their families, who's work sells at the high end of the art market, and who are already financially well off. This is an unpersuasive argument for a number of reasons.

Firstly, on the whole Indigenous artists, even those selling at the high end of the market are not well off and often have financial commitments to extended families.

Many Indigenous artists continue to live in poverty while their works, originally bought for minuscule prices, fetch staggering amounts at resale. The resale royalty has been therefore been suggested as a viable means of increasing economic returns to

