Indigenous Culture and Intellectual Property Rights

Rajat Rana†
National Law School of India University, Nagarbhavi, Bangalore-560 072

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This paper analyses the intersection between intellectual property rights regime and indigenous claims in the context of folklore, songs, practices, etc., as well as human rights law and intellectual property law with specific reference to Australia where the judiciary has played a significant role in protecting the cultural interest of the aboriginals.

Keywords: Indigenous knowledge, culture, intellectual property rights, human rights

The definition and scope of intellectual property (IP) and associated laws are under intense debate in the emerging discourse surrounding IP and human rights. These debates primarily arise within the context of indigenous peoples’ rights to protection and ownership of culturally specific properties. Indigenous people are rich in ideas and stories and this has always been their principal means for financial benefit. Most of the indigenous people are opposed to the phrase ‘sustainable development’, which they regard as a code phrase for the illusory goal of continuous growth of human consumption. Indigenous people are therefore opposed to global marketing of their ideas and to the assumption that the world community will benefit from the world culture of consumerism.

In the process of consumerism- of cultural production and appropriation, one can see the genesis of the institutions and the laws captivated by western consumer capitalism. As John Trudell puts it ‘When one lives in a society where people can no longer rely on the institutions to tell them the truth, the truth must come from culture and art ... Every culture has art and probably the first form of art is the spoken word, making pictures with words and communicating it.’ Thus, one must look back on the fabric of culture and art to understand the indigenous claims to cultural capital as a direct challenge to hegemonic cultural practice and its associated exploitation of the other (the indigenous community, the self being the consumer).

This paper deals with the intersection of intellectual property rights regime and indigenous claims in the context of folklore, songs, practices, etc., as well as human rights law and intellectual property law. This is done with specific reference to Australia where the judiciary has played a significant role in protecting the cultural interest of the aboriginals. Also, copyright law is analysed in context of the indigenous culture. The reason for the special treatment of copyright is due to the fact that of all the existing legal mechanisms, copyright law appears to be the best suited to protect indigenous folklore. Copyright law is also a logical choice because copyright law is designed to protect artistic works from unauthorized reproduction. Likewise, indigenous groups are seeking to control the reproduction of their paintings, songs, and dances.

Indigenous Cultural Practice: Significance

The identity of indigenous people is construed by reference to their traditional homelands-their countries. As per Fay Nelson, ‘country connotes the place (physically, spiritually and culturally) where indigenous people were ’given life to’. Culture, here, is generally handed down from generation to generation. Indigenous groups gain knowledge about their culture as it is transmitted from their ancestors. McKeough and Stewart argue that ‘the most enduring aboriginal heritage is intangible. Aboriginal cultural heritage takes many forms, including the images of dreaming- of the ancestral past that is preserved in tribal lore and periodically recreated in artworks of various kinds (cave paintings,

† Email: rajat@nls.ac.in
sand sculptures, facial and body paintings, etc.). Such aboriginal heritage and custom are crucial to the community’s social cohesion, function as a means of dispute resolution, and provide amusement and education.

Artistic practice in the context of aboriginal heritage acted as the community’s ‘social element’ and created invisible ‘bonds that enabled social and spiritual contact’. Aboriginal cultural heritage and practice has significant intangible functions within aboriginal communities. A further dimension, namely, economic, has now been added to some of the artistic cultural practices. Positive economic outcomes for aboriginal artists often bring much needed infrastructure to some remote communities and can provide a significant source of non-public sector income to such communities. Thus, the western tendency to privilege the interests of recognized commercial actors in IP law on the basis that IP is an ‘economic rights system’ has become highly questionable as a basis for denying indigenous claims.

Colonial ‘Heritage’: Authorship and IP Regime

The liberal imperialist narratives of discovery have been translated into IP regimes. As per Rosemary Coombe, binaries of ‘self’ and ‘other’ have been transferred intact to this legal regime. The ‘self’ has become the ‘romantic author’ and the ‘other’ continues to be located in the western imagination via orientalism.

The ‘self’ in IP regimes is drawn directly from the liberal notions of methodological individualism. Theoretically, IP seeks to preserve the ‘absolute freedom of the author’s imagination’. The author is privileged—everything in the world must be available to the author so that (he) can produce great works (such as philosophical texts, and artistic and musical masterpiece) that shape and enrich western culture and civilization. Anything that takes away from the totality of ‘ideas’ open to the romantic author may be characterized as censorship or a diminution of the author’s potential rights.

The IP regimes support orientalist production of meaning attached to non-western ‘others’ by protecting liberal authorship rights and to a large degree ignoring the rights of non-western authors. Ownership or production of works is effectively limited to authors who can articulate their rights in a manner cognizable to western legal property regimes. Claims to authorship and ownership that do not fit into western jurisprudential paradigms are rejected or given limited protection. The privilege afforded to western concepts of authorship and ownership reflects sanctions norms of imperialism. This is particularly evident in the western author’s inappropriate appropriation of indigenous culture.

International Law and Indigenous Knowledge

There are two areas in which international law intersects indigenous peoples’ claims: (a) one is in broad framework of the ‘general public international law’ and (b) other under the framework of ‘international human rights law’.

Berne Convention

One of the significant developments in public international law has been the Berne Convention. Before the Berne Convention, there were no references to folklore in any international instrument on IP, perhaps, because the general public availability of such works made protection concerns unsettled. A revision of the Berne Convention in 1967, however, added a provision of potentially useful application to folklore. Under the amendment, contracting states could designate competent bodies to represent unknown authors of unpublished works and notify World Intellectual Property Organization (WIPO) about the authority of such bodies.

Article 15(4) of the 1967 Berne Convention now provides:

‘In the case of the unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the director general (of WIPO) by means of a written declaration giving full information concerning the authority so designated.’

Conceivably, a state could take advantage of this provision and use it to create an organization with the authority to protect expressions of folklore.

It is doubtful, however, whether the provision can actually be used in relation to folklore because folklore is not mentioned in the amendment to the Berne Convention.
Development of National Model Laws

The next major development in the international legal protection of folklore was the preparation by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO of the Tunis Model Copyright Law (Tunis Model Law) in 1976 (ref.17). The Tunis Model Law was intended to be used as a guideline in drafting national copyright legislation. The Tunis Model Law protects folklore and works derived there from as original works for an indefinite period whether or not the expression of folklore is fixed in material form. Since 1973, UNESCO has worked in earnest on issues related to the protection of folklore. In conjunction with WIPO, it organized a Committee of Experts to draw up model provisions for national laws on the protection of folklore according to principles similar to those of IP law.19

In 1982, the Committee of Experts released the final text of its Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).

- The Model Provisions employ the terms ‘expressions’ or ‘productions’ instead of ‘works’ to distinguish between its unique protection of folklore and ordinary copyright laws.20
- Items protected under the Model Provisions are defined as ‘productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community . . . or by individuals reflecting the expectations of such a community.’
- The Model provisions allow criminal penalties to be imposed for: Failing to obtain the required written consent prior to use of protected folklore, failing to acknowledge the source of folklore, misrepresenting the origin of expressions of folklore, and distorting works of folklore in any manner considered prejudicial to the honour, dignity, or cultural interests of the community from which it originates.
- In addition, objects made in violation of the Model Provisions and any profits made there from can be seized. These remedies may be imposed along with damages and other civil remedies.
- In general, expressions of foreign folklore would be protected based on reciprocity agreements among countries adopting the Model Provisions, or based on other international agreements.

Regrettably, while the Model Provisions contain useful features, to date, they have not been adopted by any country, and therefore, are without much legal significance.

Human Rights and IP Regime

Human rights and intellectual property, two bodies of law that were once strangers are now becoming increasingly intimate bedfellows.21 For decades, the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between IP laws on the one hand and human rights law on the other.

Regarding international human rights law, the 1948 Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the International Covenant on Civil and Political Rights (ICCPR) guarantee fundamental rights relating to, inter alia, labor, culture, privacy, and property. Article 27 of the UDHR provides for:

‘right to freely participate in the cultural life of community, to enjoy arts and share scientific advancement and its benefits’ and that ‘everyone has the right to protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

Further, Article 15(1)(b) & (c) of the International Covenant on Economic, Social and Cultural Rights provide for the right to ‘enjoy the benefits of scientific progress and its applications; benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

Article 4 of the ILO Convention on Indigenous Populations and its 1989 revision directs states to take ‘due account’ of the cultural and religious values of indigenous populations and to promote the full realization of the cultural rights of indigenous peoples. Finally, The Draft Declaration on the Rights of Indigenous Peoples in Article 7 provides the right of indigenous people to have their cultural and intellectual property protected.

Nevertheless, human rights provisions remain of limited utility in the protection of folklore because they are directed mainly towards state governments
and establish no clear basis for application to transnational corporations and individuals engaged in unauthorized use of folklore.21

**Draft Provisions by WIPO**

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (‘the Committee’) is currently considering draft provisions embodying policy objectives and core principles for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoF). The draft provisions seek to reflect the essence of the Committee’s work on protection of TCEs/EoF since 2001. During the Eighth Session in June 2005, they came out with these draft provisions incorporating the comments from various countries.22 The draft provisions set out substantive standards, which may provide the content of international standards for the protection of TCEs/EoF against misappropriation and misuse.23

While the initiative and work of the Committee is indeed commendable specifically for taking into account both individual and community rights, two significant issues, namely, (i) complementarity with international and regional instruments and (ii) requirement of registration under Article 7 of the draft provision with the concerned agency do not seem to be in the interest of indigenous and other traditional communities. The current legal discourse is therefore, individualistic in its approach. Thus, making the draft provisions as complementary and consistent with current international and regional instruments defeats the whole purpose of this exercise by the committee. Further, it should be noted that it would be not reasonable to expect indigenous/traditional communities to be familiar with the complex procedures of registration as most of them are not literate and choose to be secluded from majority population.

**Copyright Law and Cultural Heritage**

It is true that intellectual property laws are based on western developed markets, western concepts of creation and invention, and western concepts of ownership. But whatever their origins, those laws have been, and currently are, the primary vehicle for the protection of artistic, literary, and scientific works worldwide.1 To segregate indigenous interests from this international legal regime, particularly, in the light of increasing globalization of markets, is to deny indigenous peoples both a powerful legal shield and a powerful legal sword. It is therefore necessary to seek for possible answers within this framework first. A suitable framework could be the existing copyright regime.

Before dwelling further into copyright law, one must critically analyse the two quintessential concepts of ‘authorship’ and ‘appropriation’ as they vary significantly in the context of indigenous cultural heritage. Authorship gained importance only around the eighteenth century where mass commercialization and commodification of culture due to industrialization shifted the emphasis from protection of ‘publishers right’ to the ‘author’s right’.24 Literature began to be seen as the product of an individual's private thoughts rather than the transference of ideas that were already in the public domain.

To appreciate the intersection of indigenous claims to intangible property rights and interpretation of the same in terms of IP, it is necessary to define appropriation. Appropriation or borrowing in IP is seen as a diminution of an individual’s legal entitlement.25 This is undoubtedly effect of the dominance of possessive individualism. Cultural appropriation is ‘never singular, but specific to particular people with particular historical trajectories’.12

Christopher N Kendall defines ‘appropriation’ as something ‘which includes removing indigenous cultural signs from their original context and placing them within ‘western museums, exchange systems, disciplinary archives and discursive traditions’.26 Appropriation of indigenous art in Australia includes, but is not limited to, ‘unauthorized imitation of…art’, via ‘direct copying of works’, ‘borrowing’…. (of) aboriginal themes’, images or styles or incorporation of traditional motifs into artwork in an unsanctioned manner.
There are however, a myriad of barriers presented by the copyright doctrine in protection of indigenous culture specifically art and folklore. The different barriers in effective protection of the indigenous art and folklore are illustrated in Figure 1.

**The Individual Nature of Rights**

Copyright law is based on the fundamental premise that only individuals can have a copyright. It grants group rights only in very limited ways. Indigenous art, in contrast, not owned by the particular artist who created it. Instead, it is seen as the property of the group or clan. That is, it is something passed down through the generations for the enrichment of all. Moreover, most artwork is actually executed by a group. The making of art in the indigenous community is not a lonely, secluded, individual process idealized in the west, but instead a group process in which many people participate at various levels. Because indigenous art is not seen as something created by an individual genius, but instead is seen as something that belongs to the entire clan, it is the clan as a whole who owns the art and designs, not the individual artist who executes the work. No individual owns the work because no one individual is thought to have created it.

But copyright is contrary to indigenous custom where the art is seen as something owned by the community. Western notions of property, based on the premise of individual, rather than group rights, are incompatible with indigenous customs and traditions.

Here one must mention the fact that even in India, the concept of property was never purely individualistic. The Indian concept of property was based on distinctive feature of svaţva existing in favour of several persons simultaneously. Those possessory rights were of the same character as the original right of ownership and western distinction between legal owner and other interested parties were of no assistance to Indian jurists.

In the Australian case of *Yumbulul v Reserve Bank of Australia*, it became clear how the individualistic tendency of copyright law causes problems for the indigenous people. In this case, an aboriginal artist, Terry Yumbulul, sued the Reserve Bank of Australia because it had used the image of his sculpture (Morning Star Pole) on a new Australian ten dollar note issued to commemorate the bicentennial of the European settlement of Australia. The Bank claimed that the artist, who, significantly, had a valid copyright, licensed the Bank to use the image. The artist claimed that he did not have the authority to grant such a license as approval was also required, under aboriginal customary law, from the elders of the Galpu people, to whom the underlying motif belonged. This case therefore demonstrates the fundamental conflict between aboriginal understanding of the rights in artworks and that advanced by the copyright act. Under customary law, the right to depict a design does not mean that the artist may permit its reproduction. Rather, under customary law, artworks are subject to layers of rights and many individuals may need to grant permission to use an image.

Protection of copyright can be applied most successfully when artists claim for themselves the rights to their creations. But such an approach will force indigenous people to translate their story into the language of individualism, and therefore isolate and amplify one voice among many legitimate participants.

**Duration of Rights**

The duration of rights poses a significant problem in the protection of traditional cultural knowledge such as folklore. In all Berne Convention member states, the term of the protection is the life of the author plus fifty years. In India, under Section 22 of the Copyright Act, 1957, the term of protection lasts...
for period of 60 years after the death of the author. Many indigenous rights advocates argue that perpetual protection should be granted to folklore because 'protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time.'

Even assuming that works would be protected, say, for one hundred years as an unpublished anonymous work, that period is still insignificant in the life of artistic traditions that date back thousands of years. One hundred years from now, indigenous people will not want to release their sacred texts to be exploited.

**Originality Requirement**

The requirement of originality is also a considerable barrier to the protection of indigenous folklore and art. To be original, a work must not be copied, but must be the product of original thought, skill, or labour of the artist. Copyright law does not require absolute novelty. As long as a work evidences individual skill and labour of the author, it will satisfy this requirement. Where a work is based on a preexisting work, it must demonstrate substantial, and not merely trivial, variation.

However, when one comes to folklore of the indigenous people, the requirement of originality does not fit in. Folklore is the product of a slow process of creative development. It is not stagnant, but evolves slowly. Innovation is simply not what is valued in indigenous art. Rather, faithful reproduction is prized. Since indigenous art functions as a historical and sacred text, innovation is restricted. As a result, artists are often not free to express their inspiration either from God or nature. Rather, the production of traditional art is very restricted. Because the works are so closely connected to sacred thoughts, it follows that these designs must be reproduced faithfully and accurately. Since these art forms are the main means of passing down their religion and their history from generation to generation, it is important that any 'artistic license' be kept to a minimum.

**Carpet Case**

In the *Milpurrurru* case, also known as the *Carpet* case, decided by the Federal Court of Australia, disjunction between the copyright law's insistence on originality and the indigenous peoples' emphasis on accuracy in reproduction was quite evident. In this case, carpets reproducing the works of several prominent indigenous artists were discovered by the National Indigenous Arts Advocacy Association (NIAAAA). An action was brought against Indofurn, a Perth-based import company. The company imported the carpets from Vietnam, a country that is not a signatory to the Berne Convention for the Protection of Literary and Artistic Works, 1971, though there was copyright protection in the form of a civil code.

In June 1992, after production and importation of the carpets had commenced, Indofurn sought advice on copyright permission from the Aboriginal Legal Service of Western Australia. A letter was written to the Aboriginal Arts Management Association (AAMA, later called NIAAA) informing them of the reproduction of their paintings and the importation of the carpets and a cheque never received by NIAAA. When the information was received and the artists contacted, they refused to let their work be used in that manner and sought assistance from NIAAA to take action against the illegal importations. NIAAA returned the cheque and commenced action.

The main issue before the court was whether there subsists any copyright in the indigenous artworks? At the beginning of the trial, Indofurn disputed that copyright subsisted in the works. The issue before the court was whether a work incorporating pre-existing traditional designs and images was original and therefore subject to copyright protection. By the end of the trial, the respondents admitted copyright ownership of the artists. The judge was of the opinion that ‘although the artworks follow traditional aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality.’

Further, Justice Von Doussa noted that the altered images on the carpets, although not identical to the artworks, reproduced parts of the original artworks that were centrally important to that particular artwork. This factor was significant in leading the Court to conclude that copyright had been infringed.

**Fixation Requirement**

Indigenous authors have also argued that the fixation requirement is a barrier to protection for indigenous art. Copyright law usually requires that an expression be fixed in a tangible medium. Often folklore will be unable to satisfy this requirement.
because art forms may never be fixed. Song and dance, for instance, may be passed down from generation to generation through memorization, but may never be recorded in any tangible form.

**Conclusion**

Is indigenous art protected by intellectual property laws? When one begins with this question instead of proceeding straight to the conclusion that it is not, the resulting analysis reveals that there are no easy solutions to the problem of the commercial exploitation of indigenous culture. The analysis reveals that the problem is far more complicated than a legal regime that discriminates against one culture’s art. The question leads to another question: protection for whom? It becomes evident almost immediately that there are different interests and diverse motives involved. Therefore, to answer the question for one group without regard for another may not be accurate.

The problem is a compelling one. Its solution, however, may be beyond the scope of intellectual property. However, conclusion is that the presumption that indigenous art is protected by intellectual property law is inaccurate as it fails to distinguish the diversity of interests within the indigenous community. Furthermore, the rushed judgment that copyright law should be reformulated in order to provide greater protection to indigenous art may be misguided. Short of protecting folklore *per se* and prohibiting adaptations, tinkering with the copyright law will not address the underlying problems and may, in fact, impede the goal of maintaining the integrity of indigenous cultures.

**References**

2. Globalization is creating two potentially opposing forces: the global marketing of goods and the global marketing of ideas.
3. The term ‘western’ is used here in its traditional sense to indicate a legal system of European origin, and not to refer to the legal systems of indigenous populations that first inhabited the western hemisphere.
4. Folklore, although not often defined, usually comprises ‘all literary and artistic works mostly created by authors of unknown identity but presumed to be nationals of a given country, evolving from characteristic forms traditional in the ethnic groups of the country’. WIPO, Glossary of Terms of the Law of Copyright and Neighboring Rights 119 (1980) includes folklore tales, legends, songs, music, musical instruments, dances, designs, and patterns.
5. [www.orca.on.net/dare/nelson.html](http://www.orca.on.net/dare/nelson.html) (4th January 2006).
6. Aboriginal heritage also functions to transmit ‘each community’s oral history, the details of certain rituals and ceremonies, the music and dance sequences used at gatherings and knowledge of the natural environment inhabited by the community’.
8. This re-formulation of the significance of indigenous culture is almost certainly an effect of totalizing disposition of the discourses of economic liberalism in western society generally, but particularly as it is embodied, supported and reinforced by the institutions and practices of the law: The very society and system that indigenous peoples, through the processes of colonization, have been forced to reside ‘within’.
11. Locke’s transformative labour theory provides for the authors ownership of that which he/she produces. Moreover, and perhaps more relevantly, Lockeian ideas can be seen to ruminant in European justifications for colonization.
12. However, there are counter arguments for limiting the ‘ideas’ available to the potential genius/romantic author. ‘Censorship’ might legitimately be characterized as a means of silencing the non-hegemonic voices that operate to destabilize the dominant conceptions of morality, value and reality. Of course, and as Rosemary Coombe notes, ‘[in] denying the social conditions and cultural influences that shape the author’s expressive creativity, we invest him with a power that may border on censorship in the name of property. By representing cultures in the image of the undivided possessive individual we obscure people’s historical agency and transformations, their internal differences, the productivity of intercultural contact and the ability of peoples to culturally express their position in the wider world. The romantic author and authentic artifacts are both, perhaps fictions of a world best forgone’; Coombe Rosemary, Properties of culture and the politics of possessing identity: Native claims in the cultural appropriation controversy, *Canadian Journal of Law and Jurisprudence*, 266 (6) (1993).
14. Bulun Bulun & Another v R & T Textiles Ltd, 157 ALR 173, a successful action was taken by the prominent aboriginal artist, John Bulun for the unauthorized reproduction of two of his paintings used in commercially manufactured T-Shirts. In the famous Carpet Case (*Milpurrurrnu v Indofurn Pty Ltd*) the question as regards to who the law will recognize as an owner of works – individual or communal owners was
The genesis of modern copyright law is often considered to be the 1709 Statute of Anne, which had as its stated goal to encourage 'learned men to compose and write useful books.' This statute, in practice, served more as a benefit to publishers than writers, in so far as it codified trade regulation practices of the London guild of printers and booksellers that controlled the book trade in the United Kingdom. Underlying the enactment of this statute was the increasingly widespread mechanical reproduction of text and a perceived need for accountability for written works, see Carpenter Megan M, Intellectual property law & indigenous people: Adapting copyright law to the need of global community, Yale Human Rights & Development Law Journal, 51(7) (2004).

The institution of copyright became the means by which the emerging capitalist class would wrest control over artistic and intellectual creativity from pre-existing oral traditions. The ‘literary common’ became subject to ‘enclosure movements’ as the state decided what printing privileges to grant to whom. By the late 17th century licensing of the press came under attack as part of the general assault on mercantile capitalism involving heavy intervention by the state into the economy. In England, John Locke called for the end of licensing altogether. He argued that the practice merely served to protect a publishing monopoly that had (in classic monopolistic practice) produced a scarcity of titles, poorly produced and sold at artificially high prices. For Locke (1797) the call for an end to licensing was a call for freedom of enterprise, not necessarily a call for freedom of the press. As the practice of licensing waned throughout the 18th century, the state turned to sedition libel and knowledge taxes to control the press. Meanwhile, book printers and booksellers turned to copyright to maintain their monopolies.


Yumbulul v Reserve Bank of Australia, 21 IPR 481.


L Batlin & Son Inc v Snyder, 536 F 2d 486, 491 (2d Cir 1976).


Yumbulul v Reserve Bank of Australia, 21 IPR 481.


L Batlin & Son Inc v Snyder, 536 F 2d 486, 491 (2d Cir 1976).


4 M, Payunka, Marika & Others v Indofurn Pty Ltd, 30 IPR 209.

35 Canadian Admiral Corp v Rediffusion Inc (1954) Ex CR 382 (Can).