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Intellectual Property and Indigenous Culture

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Abstract

The extent to which cultural activities can generate social and economic benefits for Indigenous communities, and the way in which those benefits are shared within communities depends largely on the way in which the system of intellectual property rights handles Indigenous cultural products. The aim of this paper is to address these issues, taking account of both legal and economic perspectives. Rather than taking concepts of intellectual property as given, we ask what kinds of intellectual property systems, if any, can best contribute to meeting the economic, social and cultural needs of Indigenous communities.

Keyword: Indigenous culture, intellectual property

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Intellectual Property and Indigenous Culture

Introduction

The preservation and continuation of Indigenous culture is a central concern for Indigenous people and for public policy in Australia. In addition to its intrinsic significance, Indigenous cultural activities are potentially of great economic importance, particularly in regional, rural and remote Australia.

The extent to which cultural activities can generate social and economic benefits for Indigenous communities, and the way in which those benefits are shared within communities depends largely on the way in which the system of intellectual property rights handles Indigenous cultural products. There are, at present, substantial limits on the capacity of the intellectual property system to contribute to income generation and distribution. The problem is complicated by the fact that the intellectual property system as a whole is undergoing rapid, and vigorously contested, change, largely as a result of the developments in computing and communications technologies.

The aim of this paper is to address these issues, taking account of both legal and economic perspectives. Rather than taking concepts of intellectual property as given, we ask what kinds of intellectual property systems, if any, can best contribute to meeting the economic, social and cultural needs of Indigenous communities.

The paper is organised as follows. Section 1 provides some background information on the economic problems of Indigenous communities and on the role of Indigenous culture as an economic and social activity. Section 2 summarises the current debate over intellectual property, including the views of critics and supporters of stronger systems of intellectual property. Section 3 argues that none of the competing views prominent in the general debate over IP take adequate account of the needs of Indigenous people. Section 4 deals with the problem of how to maximise the economic benefits flowing to Indigenous communities from cultural activities. Finally, some concluding comments are offered.

1. Background

The problems of low employment and low income facing Indigenous people are well-known. In rural and remote Australia, employment rates for Indigenous adults are below 50 per cent, and, particularly in remote communities, employment relies heavily on the Community Development Employment Projects (CDEP) program. CDEP accounts for around one quarter of all Indigenous employment and the proportion is higher in rural and remote communities (Hunter 2003).

These problems reflect both the legacy of dispossession faced by Indigenous people and the more general problems of declining economic activity in rural and remote Australia. Employment in outer regional Australia, including rural and remote areas has generally declined in recent decades, both absolutely and as a proportion of total employment (Australian Bureau of Statistics 2004).

Particularly since the decline of employment in the pastoral industry, one of the major sources of employment and income for Indigenous Australians is the arts and culture sector. There are a number of ways in which arts and culture provide employment.

Firstly, Indigenous visual artists in urban and remote areas contribute in a number of ways to both the high end and tourist ends of the art market. At the high end of the art market, prices for Aboriginal artists have reached $778,750 for Rover Thomas's *All That Big Rain Coming from the Top Side* 1991 in Sotheby's 2001 auction. The record sale price for 2006 was achieved by Lin Onus for the sale of his synthetic polymer on canvas, *Water Lillies and Evening Reflections, Dingo Springs* by Deutscher-Menzies for $396,000 in March this year (Strickland 2006). Indigenous performance company Bangarra Dance Theatre have achieved international acclaim, both for their work, and the model they adopt of community, government and corporate partnership.

The use of images on merchandise including clothing, jewellery,

homewares such as placemats and coasters, and ceramics such as cups and plates, t-shirts has been successfully harnessed as a business opportunity by the owners of Tobwabba Arts. Tobwabba Arts began in 1992 in rural New South Wales, and has now grown into an art and design studio/gallery producing fine art, sculpture and designs for over thirty licensees. It remains based in Worimi country in the Hunter region of New South Wales and provides both economic development and cultural practice. Tobwabba's website states (Tobwabba 2006):

> Community Development is the basis of Tobwabba, and its most fundamental precept. When Tobwabba began, there was a 90% unemployment rate in the Aboriginal community. Tobwabba was conceived as an innovative employment creation program which would also, it was hoped, encourage a new sense of Aboriginality amongst its participants. Tobwabba has been successful beyond anything that was hoped for, ultimately it is a business built around culture, not a culture built around business. The business provides one of the definitive models of a successful Aboriginal enterprise.

Another example of engagement in arts businesses includes the work of urban, regional and remote arts centres. Art centres provide industry support for artists, facilitate sales of work both in real time and online, and are generally involved in advocacy for artists.

Finally, Indigenous artists are involved in promoting culture and the arts to tourists in urban, rural and remote areas. Examples include, the Tribal Expressions program presented by the Koori Business Network at the 2006 Commonwealth Games in Melbourne which showcased local Aboriginal businesses, arts and performance. Many Aboriginal artists also produce artefacts and other products for the tourist market.

All of these forms of expression provide one of the most promising means of practicing Indigenous culture and engaging in the broader economy. It is,

therefore, important to consider how legal and economic structures may enhance or reduce the benefits flowing to Indigenous artists and Indigenous communities.

2. The Intellectual Property debate

The range of economic possibilities associated with the arts and culture sector depends crucially on legal structures associated with copyright, moral rights of artists, trademark protection and so on. These are collectively referred to as 'intellectual property' (IP) though it is important to note that the implied analogy to property rights over goods and real estate is not exact and may be misleading.

Intellectual property is the subject of vigorous debate around the world, and particularly in the United States. The most prominent participants are supporters of 'strong IP', on the one hand, and advocates of an expanded public domain, often referred to as the 'intellectual commons' (Lessig 2001), on the other. Neither of these conceptions matches the knowledge systems or needs of Indigenous people and Indigenous culture particularly well.

The central idea of the strong IP agenda is that the material ideas protected by intellectual property rights such as copyright are, or should be, items of private property. A common analogy is that reproducing a copyright item without permission is just the same as stealing a car. In particular, the strong IP agenda implies that copyrights should be unlimited in duration, fully tradeable and fully divisible. That is, each particular cultural product is treated as a unique item with copyright traceable to a single act of skill, labour and effort and transmitted by subsequent sale. The central element of the case for strong IP is that unattenuated property rights, such as unlimited copyright durations, maximise the incentive to produce intellectual property.

By contrast, advocates of an expanded public domain focus on the argument that, once created, ideas and their expression have one of the characteristics of a pure public good, namely, nonrivalry. The fact that an idea is used by one person does not diminish its availability to others.

The commons

The metaphor of the 'intellectual commons' reflects a focus on the public good nature of ideas, since a commons (a piece of land shared by all the residents of an agricultural community) is often seen as an archetypical public good. Against this view, advocates of strong IP commonly posit the notion of the 'tragedy of the commons' (Hardin 1968). The key idea is that since the commons is open to all, no-one has an incentive to invest in its improvement by producing and sharing valuable innovations. The solution, it is claimed, is 'enclosure' dividing the commons into pieces of individual property.

In historical terms, both of these representations of the commons are incorrect or at least misleading. Agricultural commons were not open to all, but only to a specific group of users (the commoners) with well-defined rights. Within the group, the use of the commons was tightly specified by a combination of traditional custom, manorial law and collective management decisions.

There was no tragedy of the commons in the sense described by Hardin. Arguably, enclosure itself was the tragedy. Whatever its long-term benefits, the immediate effect of enclosure was to expropriate the common rights of the poor peasants, converting them into a class of landless labourers.

Historically, the common field system exhibited a mixture of public good and private good characteristics. The same piece of land would be private cropland in one year, then common land during the period of fallow rotation. Privately owned cattle grazed on common land, and their dung fertilised it for subsequent private use (Dahlman 1980).

Related issues arise in the application of the commons metaphor to Indigenous cultural knowledge and practice. Unlike abstract intellectual knowledge, which is at least arguably a pure public good (use by one does not diminish availability to others) cultural knowledge derives its meaning and an essential part of its value from its association with a specific group of members of the culture concerned.

Similarly, it seems unlikely that full-scale privatisation of collective

cultural and real property, currently being advocated by some, will yield benefits to most people. Rather it is likely that existing rights will be lost with no permanent benefit to Indigenous people.

3. Indigenous culture and intellectual property

Neither the public domain model nor the strong IP approach fits well with the cultural concerns of Indigenous people. On the one hand, Indigenous culture is not a nonrival public good: it is associated with specific individuals and groups and use by others may diminish or destroy its cultural value. Unauthorised use of Indigenous cultural material for which a group or individual has responsibility, causes detriment to the custodians and damages relationships between them and the unauthorised user.

There are numerous examples of the appropriation of Indigenous cultural material by people or organisations with no authority to use the material. The wandjina image is a well known symbol, which has been subject to extensive use without the permission of the owners. But in a recent example of restitution, a public relations company surrendered title it had asserted to the domain name wandjina when it realised it had misappropriated the cultural material of the Ngarinyin people of the Kimberley region. The public relations company had registered ownership of the domain name wandjina, but became aware of the Ngarinyin's people's prior rights to the image and word. The domain name was handed back to the Ngarinyin in a ceremony in 2001. http://www.wandjina.com.au is now the address for a website where Kimberley artists describe and market their artwork.

A distinguishing feature of Indigenous cultures, is that their origins date back to the indefinite past, and a central objective of cultural policy is that they should persist indefinitely into the future. This does not fit well with any notion of copyright limited to a finite period, even if this extends beyond the lifetime of individual creators. Similar incongruities exist with the limitations of the duration and nature of patent law (Janke 1999).

In some cases, Indigenous peoples have provided knowledge about plants,

their uses and methods of preparation which has been used to trigger, inform and guide drug or other biological and chemical development. Successful inventions resulting from this process may be patented, providing the patent owners with a monopoly on exploitation for a finite period, after which the knowledge which formed the foundation for the invention must be disclosed. Where this knowledge is used without authorisation according to customary practice, the rights and obligations of the Indigenous custodians of that knowledge may be substantially disrupted. This process of enclosure and disclosure may damage the custodian's relationship with their community, their neighbouring communities, their broader environment and practices such as food and medicine production.

While on the one hand conceiving of Indigenous culture as a nonrival public good is an inaccurate understanding, the idea that Indigenous cultures can be partitioned into discrete pieces of intellectual property, which may then be freely traded in global markets is equally unappealing. A central concern is that both individual creators of cultural products and the communities or groups whose culture and stories form the basis of these products should be able to exert control over their subsequent use (Gaithaga 1998).

This is especially important in view of the customary law and practice restrictions on different forms of cultural material. Unauthorised or inappropriate use of cultural material can be very damaging for those responsible for its care and maintenance. This was recognised by Justice Von Doussa in the Carpets Case[1] when he awarded damages for culturally based harm:

> 144. … In the present case the infringements have caused personal distress and, potentially at least, have exposed the artists to embarrassment and contempt within their communities if not to the risk of diminished earning

[1] Payunka, Marika and Others v Indofurn Pty Ltd. 30 *IPR* 209

potential and physical harm. The losses arising from these risks are a reflection of the cultural environment in which the artists reside and conduct their daily affairs. Losses resulting from tortious wrongdoing experienced by Aborigines in their particular environments are properly to be brought to account: Napaluma v Baker (1982) 29 SASR 192; Weston v Woodroffe (1985) 36 NTR 34, and Dixon v Davies (1982) 17 NTR 31.

> 145. The applicants contend that the unauthorised use of the artwork was in effect the pirating of cultural heritage. That is so, but under copyright law damages can be awarded only insofar as the "pirating" causes a loss to the copyright owner resulting from infringement of copyright. Nevertheless, in the cultural environment of the artists the infringement of those rights has, or is likely to have, far reaching effects upon the copyright owner. Anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering: Williams v Settle (1960) 1 WLR 1072 at 1086-1087.

Thus, the judgement gave recognition to the violation of cultural heritage in assessing damages for infringement of copyright, while insisting that no separate cause of action arose. This is, at best, a partial recognition of communal and moral rights.

Recent developments in Indigenous IP

Consideration of the problems raised for competing notions of intellectual property in handling Indigenous culture suggests issues that may apply more broadly. The debate about IP has been dominated by the concerns of writers and, to a lesser extent, producers of music: both of these are domains where adaptation and reuse of existing work are central cultural practices, and where reproduction on a large scale (through printing, sound recording and repeated

performance of musical works) is normal.

By contrast, cultural practices in the visual arts are focused on the status of unique physical objects such as paintings or sculptures. Commercial and cultural uses of this artform is less focused on reproduction that writing or music. Visual artists are therefore more dependent on primary sales of their work for income. Concerns about resale rights and the moral rights of the artist naturally arise in this context. These issues go to the heart of artist's rights to benefit from the commercial and professional success of the ongoing trade in their works, to ensure that they are always attributed as the creator of their works, and to have a remedy if their work is treated in a derogatory manner.

Two measures have been recently considered by the current government. The first, a resale royalty arrangement was recently rejected by the government. However, a Bill has been drafted by the Australian Labor Party, and the issue is so strongly supported among artists' advocates that lobbying and debate are bound to continue. The second, recognition of Indigenous communal moral rights has been cast in legislative form and is scheduled for introduction to Parliament during the winter sitting of 2006.

These developments provide potential benefits to Indigenous artists and holders of cultural material as an incidental effect of the provision of benefits to artists of the wider community. For example, advocates of the resale royalty cite the examples of Indigenous artists, particularly in remote communities who sell their artworks at a low price, and receive little benefit from any increase in the value of their work.

Enormous differences in first and second sale prices are offered as evidence of the need to introduce a resale royalty for all artists. It is a firmly held view, by most artists' advocates that a resale royalty would provide some recognition of the artists' ongoing connection to their work, and their right to benefit from the increase of their reputation as it is reflected in the market.

However, the case appears particularly strong in relation to resale of work by Indigenous artists. Arguments that it is only the estates of "dead, white males" that benefit from the resale royalty (Stanford 2003) are clearly not as

relevant in Indigenous arts when the resale price of works by female Indigenous artists such as Tracey Moffat and Julie Dowling are considered (Mellor and Janke 2001). For example, Tooth (2002) reported that:

> Auction house Christie's Australia recently held its first-ever stand-alone contemporary sale where a complete set of photographer Tracey Moffatt's Something More series went under the hammer for just under $230,000, an Australian record. When first sold through the Mori Gallery in Sydney in 1989, the Moffat series went for around $1000.

The framing of Indigenous communal moral rights was raised by Senator Ridgeway during the 2002 amendment of the *Copyright Act 1968* (Cth) which introduced moral rights for copyright owners. Moral rights include the right to be attributed, the right not to be falsely attributed and the right of integrity. These rights belong to all authors of works. Indigenous artists may well benefit from these amendments, along with other artists, as their work has been frequently used without attribution of the artists authorship. Further, the right of integrity may be sufficient to provide a remedy in Instances where the author's work is used in a manner which may be derogatory to their reputation. This may include uses which are damaging to the author's reputation as a custodian of the cultural material embodied in the artwork, but this has not been tested in Australia.

Over the last few years a number of proposals have been suggested to deal with some of the shortfalls for Indigenous people in legal regimes, particularly intellectual property law. In general the proposals adopt models which acknowledge the need for some limitation on use, in a context of a desire to free up access for the broader community.

These proposals have included national Indigenous Communal Moral Rights Bill, and international guidelines proposed by the World International Property Organization (2001).

The Indigenous Communal Moral Rights Bill has been strongly criticised. It was hoped that the Bill would provide some legislative framework for the recognition of customary law practices while striking sufficient balance with enforcement to ensure compliance with the provisions in an unregulated environment. Many arts and Indigenous advocates believe that there was insufficient consultation with artists and Indigenous communities which has resulted in a Bill which promises more to those who trade in Indigenous arts, than to Indigenous owners of the cultural material.

On the international front, the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has developed draft Policy Objectives and Core Principles. It is clear from the Committee's title that a number of different forms of property and cultural material are merged within the workings of the Committee. These different forms of property and cultural material are subject to widely different rules regarding access to them and use of them. Some forms are suitable for economic development and dissemination, and some are not. These distinctions are not clearly reflected in the Policy Objectives and Core Principles. The extent to which commercial use is prohibited, strictly confined or allowed according to customary practice and the will of individual Indigenous artists finds little expression in the drafts.

4. Economic objectives of Indigenous IP policy

The main economic concern about IP policy for most non-Indigenous producers relates to the stream of income generated by a given set of IP rights. These income flows must be balanced against the benefits to consumers from access to cultural products and the ability to use those products freely. Non-economic concerns, such as those associated with moral rights may also be important

Alternative systems of property rights may affect the magnitude of income flows, and also their timing, variability and riskiness. For example, resale rights will tend to increase the average magnitude of income flows to

artists, but may reduce initial purchase prices and increase the variability of flows.

All of these concerns arise in relation to Indigenous IP policy. Market income levels for Indigenous people are well below the average for the community as a whole, so any measure that can increase incomes has the potential to yield significant benefits.

In addition to concerns about the value of payments, issues of income distribution are also significant

However, other economic effects of IP policy are at least as significant as the valuation of income flows. The most important of these are effects on employment. Particularly in remote areas, Indigenous people have very low rates of employment in the market sector. Unemployment rates are high, and employment is predominantly either CDEP or associated with the public sector (including publicly-funded community organisations).

Reliance on passive welfare ('sit-down money') has been criticised by many commentators as having damaging social effects (Pearson 2000). To a lesser extent, the same criticism has been made with respect to CDEP and public sector employment. It has been suggested that the only sustainable long-term response is to close down outstations and other isolated communities, and to encourage Indigenous people to move to areas with more favorable opportunities for employment.

Cultural production, particularly in the form of the production of cultural artifacts is one of the few areas of economic activity available to Indigenous people where the disadvantages of remote location are relatively modest and where remote location actually has significant advantages. Much Indigenous cultural production is related to land and its associated cultural traditions, along with contemporary interpretations. For these activities there is an obvious advantage in living in or near the areas of land with which particular traditions are associated.

To promote employment, Indigenous IP policy should encourage high levels of participation in cultural production, and facilitate the marketing of

cultural output. This will not always be consistent with maximising the long-term flow of income derived from IP.

Alternatives to IP

More fundamentally, it is not clear that exclusive reliance on IP and market production will be the best method of promoting desirable economic outcomes for Indigenous people and Indigenous communities. Much intellectual and cultural production relies on direct public funding in place of, or in addition to, market sales.

The most common model of direct public funding is based on grants to individuals or groups, usually awarded on a competitive basis. Bodies including the Australian Council for the Arts and the Australian Film Commission provide specific funding for Indigenous artists and projects. The policy orientation of these bodies is primarily cultural. Employment outcomes of grants, although undoubtedly welcome, are not a policy objective.

An alternative that has not been considered in detail is that of output or input subsidies. For example, artists could be paid a cash subsidy for their output, perhaps in the form of payments to cover commissions and other costs of sale. This would have the benefit of encouraging increased cultural activity.

Subsidies of this kind have fallen out of political favour in Australia in recent decades, but they were commonly used to promote a wide range of economic activity for much of the 20th century. For example, until 1988, farmers received a bounty to reduce the cost of superphosphate fertiliser. Manufacturers received equivalent benefits from tariff protection, and some continue to do so.

Although these policies were criticised by economists for generating an inefficient allocation of resources, they were highly effective in expanding the sectors of the economy, most notably manufacturing, that received assistance. The use of fertiliser declined substantially after the withdrawal of the bounty and the manufacturing sector contracted as tariffs were reduced.

Moreover, although the activities in question were not self-supporting in market economic terms, the beneficial social effects of increased employment did

not depend on economic calculations of this kind. Farmers and manufacturing workers did not, for example, exhibit any noticeable loss of self-respect as a result of their reliance on government assistance.

A combination of grants and subsidies may therefore enhance the economic benefits associated with Indigenous cultural production. Nevertheless, IP in the traditional sense clearly plays an important role. In particular, if cultural production is to generate significant benefits for Indigenous communities it is necessary to control the appropriation of the associated cultural traditions and symbols by non-members of the community. The wandjina case, discussed above, is an example of this process.

Concluding comments

In this paper, we have attempted to describe and analyse some aspects of the legal and economic framework within which Indigenous arts and cultural activity takes place. A number of questions arise from this discussion.

First, what can and should be protected? A satisfactory system must go beyond the standard IP model in which individual works of art are protected to take account of the culture from which those works are derived, considered as a dynamic process rather than a static set of traditional practices.

This point in turn raises the question of the relationship between individual and community rights over cultural concepts and modes of expression. To some extent, the two are in conflict and this potential conflict must be resolved. A further aspect of this question is that of the compatibility between cultural obligations and commercial use of traditional cultural motifs and practices.

Finally, there is the question of how intellectual property and other legal institutions for cultural and artistic activities relate to structures surrounding the use of other forms of traditional knowledge, such as the use of ecological knowledge in the protection of biodiversity and the use of traditional medicine as a basis for developments in biotechnology and pharmacology.

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