Indigenous Peoples and Intellectual Property Rights

Research Paper No. 20 1996-97
Major Issues Summary

Indigenous peoples claim that existing intellectual property rights (IPR) systems do not provide adequate recognition and protection of their cultural products and expressions. Some critics consider IPR systems to be a threat to Indigenous peoples' cultural maintenance.

Western intellectual property rights systems create individual property rights, which can be subject to transactions, and which are designed to foster commercial and industrial growth. These systems are conceptually limited in their ability to afford recognition and protection of Indigenous intellectual property rights.

Internationally, the incorporation of Trade Related Aspects of Intellectual Property Rights (TRIPS) into the General Agreement on Tariffs and Trade (GATT) in 1994 has, in some critics’ views, provided the impetus for further commercialisation by predominantly affluent industrialised countries of the knowledge and products of Indigenous and local communities.

Indigenous peoples' intellectual property rights extend to include a wide range of subject matter, beyond what is recognised within existing intellectual property rights and other protection systems. They are closely linked to land, cultural heritage and environment, and also to cultural property. In addition, Indigenous communities possess some unique features of their knowledge, creative expressions and innovations, which emphasise communal rights, in which many creative works are of an indefinable antiquity, and in which cultural products, expressions and manifestations are tightly integrated into all other aspects of society. These features are at odds with conventional western notions of intellectual property.

Indigenous peoples' intellectual property rights are being exploited in many and diverse ways. Works of art are misappropriated, and Indigenous peoples’ biological resources, knowledge and human genetic materials are collected and patented without due recognition being given or benefits distributed to the Indigenous peoples concerned.

A growing body of declarations, statements, and other developments both within the United Nations and its agencies, and by Indigenous peoples, calls attention to the unique features of Indigenous intellectual property systems and provides potential opportunities for countries to introduce measures to recognise and protect these.
Discussions within the World Intellectual Property Organisation (WIPO) and UNESCO may provide some scope for expanding international copyright systems to embrace intangible expressions of culture (termed 'folklore' in these discussions).

The International Labour Organisation (ILO) Convention 169 provides potential opportunities for those countries which ratify the Convention to develop frameworks, partnerships, or other 'special measures' to protect Indigenous cultures.

Some international developments in the environment and conservation area can also provide avenues for introducing measures to recognise and protect Indigenous cultural knowledge. The framework provided by the outcomes from the 1992 United Nations Conference on Environment and Development (UNCED) is significant in this regard, especially the program statement Agenda 21. The Convention on Biological Diversity required countries to conserve and protect Indigenous peoples' knowledge, innovations and practices relevant to the conservation of biological diversity.

The standard setting activities currently being pursued by the United Nations and its agencies on Indigenous rights—though some way from being fully realised—also provide important opportunities for recognition and protection of Indigenous peoples cultural rights, including their rights to cultural and intellectual property. Key areas of work in this regard are the Draft Declaration on the Rights of Indigenous Peoples and the study on Indigenous Cultural heritage by U.N. Special Rapporteur Erica Irene-Daes.

A series of developments, legislation, reports and recommendations have been made in Australia over the last two decades, not only in intellectual property laws but across a range of land, heritage and environment issues. To date there has, however, been little action to provide recognition and protection for Indigenous intellectual property rights.

The development of new *sui generis* legislative systems that provide recognition of the full range of Indigenous peoples' cultural products and expressions, and which enable community empowerment for the control of their cultures, is the only way to achieve a just solution to the problems faced by Indigenous peoples in the exploitation of their intellectual property rights.
Introduction

Indigenous peoples claim the western system of intellectual property rights does not provide adequate protection of their cultures. Some Indigenous critiques go further, and oppose intellectual property rights' systems as inherently antithetical to their interests.

In western legal systems intellectual property rights denotes a specific set of laws designed to foster commercial creativity and industrial innovation by protecting the rights of individual creators and innovators.

Indigenous peoples assert that intellectual property systems not only fail to provide adequate protection for their cultural forms, products and expressions; they serve the interests of the dominant, non-Indigenous cultures as against the distinct rights and interests of Indigenous systems of creativity and cultural products and expressions.

This paper outlines Indigenous perspectives on cultural protection, and discusses some of the ways in which their cultures are appropriated or exploited. The paper then explores where existing intellectual property laws fail to meet Indigenous peoples’ expectations and aspirations regarding protection of their cultures.

The paper surveys a range of reports and developments internationally and within Australia that have either direct or indirect implications for Indigenous peoples' intellectual property rights and cultural protection. Some possible avenues for reform are then explored which may provide better recognition and protection for Indigenous cultural forms, products and expressions.
Indigenous Peoples and Intellectual Property Rights

Indigenous Peoples and Cultural Appropriation

Recognition and protection of Indigenous intellectual property rights is not only relevant to arts or copyright issues. To Indigenous peoples artistic designs are an integral part of the cultural system that also includes language, dance, song, story, sacred sites and objects. The many elements that make up this system might also be thought of as cultural heritage, and are maintained and managed according to a complex set of rights and responsibilities, which are determined by customary rules and codes. In a general sense, these rights are considered to be ‘owned’, and managed communally, or collectively, rather than inhering in particular individuals. If an individual wishes to perform, transmit, or make manifest an aspect of culture—such as a design or motif—he or she will require the authority, consent or permission of others who may have rights and interests in the particular design or motif.

These rights and responsibilities, which might also be considered a system of law, are in turn informed by a knowledge system that is derived from, and integral to, the dreaming. This knowledge system links the diverse elements of culture with country, and also informs the ways in which culture is expressed and made manifest through material forms.

In conventional western legal terms, intellectual property rights refers to copyright, patents, trademarks, designs and trade secret laws, and breach of confidence. To Aboriginal and Torres Strait Islander peoples, however, the cultural products, forms and expressions for which protection is sought do not strictly conform to the limited provisions of intellectual property laws. This is because it is not only the material forms and created or invented products for which protection is sought. Indigenous peoples also consider that they have rights in the substance that underlies these cultural products. That is, the knowledge, innovations and practices that give rise to cultural products and expressions are significant elements of their culture. These intangible aspects are not considered within the scope of copyright and related laws. Indigenous knowledge is also essential to Indigenous peoples’ rights and interests in medicinal substances, biological diversity, land and ecosystem management, and sacred sites and objects, as well as arts and other cultural expressions. The performance aspects of Indigenous cultures, such as language use, story, song, dance and ceremony are vital to Indigenous identity and cultural expression—and these are inextricably linked to land and sacred sites and objects, and religious, cultural and political systems. Given these connections, reforms to provide protection for Indigenous cultures cannot be purely confined to copyright and related intellectual property law systems. The rights in cultural knowledge, expressions and manifestations for which Indigenous peoples seek recognition and protection will ultimately require a wide
Examples of Appropriation of Indigenous Cultures

The scope of Indigenous peoples' intellectual property rights has become increasingly apparent as these people have raised concerns about infringements or exploitation of their cultures. To Indigenous peoples, intellectual property is part of their cultural heritage in its widest sense. This includes:

- moveable cultural property
- all literary and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- scientific, agricultural, technical and ecological knowledge
- human remains
- sacred sites, burials and sites of historical significance
- documents of Indigenous peoples' heritage (including film, photographs, video and audio recordings, and archival collections).

In all these components appropriation and exploitation may occur, and three examples are outlined below. Not only are art works and designs misappropriated, but we see exploitation of Indigenous peoples' rights in biological resources through 'bioprospecting', and of their rights in their own genetic and bodily material, notably through the Human Genome Diversity Project.

Arts and Cultural Expressions: Aboriginal Art and Copyright

Since at least the 1970s there have been instances of exploitation and misappropriation of Aboriginal peoples' artistic expressions, and artists have brought actions under intellectual property laws. These cases have shown that existing intellectual property laws can be of some, although limited, use in accommodating Indigenous peoples' perspectives. The most recent of these cases, Milpurruru v Indofurn Pty Ltd (1995), known as the ' Aboriginal carpets case', has been considered a 'landmark' in Indigenous intellectual property protection. The case was significant for its recognition of the 'cultural harm' suffered by the plaintiffs in the awarding of damages, and its implied recognition of the communal ownership of Indigenous designs in the distribution of the damages.2
**Indigenous Knowledge and Biodiversity: Bioprospecting**

One of the most significant issues raised by Indigenous peoples is the collection, screening, and use for commercial and industrial purposes of their knowledge and of genetic and biological products which come from their lands or which are important to their societies. This ‘bioprospecting’, as its critics refer to it, raises some important questions about the nature of innovation, and of the relationships between natural resources, knowledge, and intellectual property rights.

The ecosystems within which Aboriginal and Torres Strait Islander peoples have lived, and which they have managed sustainably for millennia, are not only vital for their survival; they also figure significantly in their cultural, religious and social systems. These ecosystems also comprise some of the most biologically diverse areas in the world, and the products they yield are sought after by a large and growing biotechnology industry for use in a vast array of medicinal, cosmetic, industrial, and food and agricultural products. Biological products and Indigenous peoples’ knowledge about these products and their properties form a vital contribution to the commercial products and processes that sustain the rapidly growing biotechnology industry. The industry isolates and modifies biological and genetic products, and registers patents for them; and in doing so it is dependent on Indigenous peoples’ knowledge of these products and their properties.

The Indigenous communities from which these products and knowledge are obtained receive little or no recognition for their contribution, and generally do not share equitably in benefits resulting from uses of biological products and knowledge. The intellectual property laws which foster commercial and industrial uses of biological products and processes, and which protect the interests of the biotechnology industry, cannot effectively be used to protect Indigenous peoples’ claims. This is because of the strict requirements for inventions registered as patents. Products and knowledge from Indigenous communities are, in this way, increasingly being transformed into intellectual property in the western industrialised world.

The patenting of inventions derived from biological and genetic resources raises some critical questions for Indigenous communities. There are ethical concerns regarding the collection and use of such products and their derivatives without the informed consent or equitable participation of Indigenous communities who claim rights in the products and knowledge. There is also the concern that companies and researchers that collect such knowledge and products usually provide for few (if any) financial benefits to be returned to the Indigenous communities.

Another critical concern is the fundamental inappropriateness of patent laws to Indigenous peoples’ ability to protect their own biological knowledge and resources. As a legal instrument, a patent confers exclusive rights on an inventor which for a fixed period prevent others from producing, using, or engaging in commercial transactions for the invention. A patent requires that an invention should be useful: that is, it must have an
Industrial application. It also requires an invention to be novel, or recent and original, and not previously known. An invention can also only be accepted for patenting if it is non-obvious; that is, it must have been produced by a reasonable level of technical know-how, rather than having merely been a discovery of what already exists in nature.

These requirements create an essential incompatibility between patents and Indigenous knowledge and innovations. Innovation and knowledge in Indigenous societies generally does not fit the patent laws’ requirement for novelty of invention, which hinges on the isolation and modification of biological and genetic products using highly technological processes. Moreover, patents confer rights in individuals or corporations, and are not applicable to communal rights which often pertain in Indigenous societies. Indigenous peoples’ notions of property differ generally from those which form the basis of patent laws. Biological knowledge in Indigenous communities is generally regarded as being a community resource, and is shared and transmitted ‘freely’ within communities according to customary rights, rules and obligations. The private ownership rights which patent laws confer for inventions are thus antithetical to Indigenous peoples’ world views.

Although, as with all intellectual property rights systems, patent laws are available for use by Indigenous peoples, the incompatibility outlined above means that Indigenous peoples are unlikely to use these laws to protect their knowledge and innovations. Moreover, use of such laws is usually costly and time consuming, and usually necessitates the services of skilled legal professionals. For these reasons, Indigenous peoples’ access to patent laws, like copyright laws, is likely to be limited.

Although article 8(j) of the Convention on Biological Diversity may provide scope for countries to develop systems for recognition and protection of Indigenous knowledge and innovation, this is still a long way from becoming a reality in Australia. One potential problem is that, in its current form, and where there is no effective implementation of its provisions to actively preserve Indigenous knowledge and innovations, the Convention provides implicit support for contractual agreements between countries, which may disadvantage Indigenous communities within those countries. Implementation of article 8(j) of this Convention may also be subject to some constraints, as discussed below.

**Human Genetic Material: the Human Genome Diversity Project**

Indigenous peoples have in recent years begun asserting that their rights in their bodily substances such as blood and genes are being violated. This problem has attracted attention since the early 1990s with the commencement of the Human Genome Diversity Project (HGDP). This project, dubbed the ‘Vampire Project’ by its critics, is being carried out by scientists throughout the world, with the aim of mapping the broad genetic diversity of humans. The HGDP involves the taking of genetic samples from a large number of communities, including a significant proportion of Indigenous communities. These
Intellectual Property Rights

Indigenous communities are 'targeted' for sampling on the grounds of being considered 'rare' or 'endangered'.

The HGDP has serious implications for Indigenous peoples, as the blood and genetic samples that are collected can be modified and patented, and as such may potentially provide products and processes which are commercially valuable. Not only do Indigenous peoples receive no share in the benefits that might result from these products and processes, but the sampling itself, without their informed consent, represents a grave violation of their rights, and raises serious ethical questions. As with biological sampling, patent laws do not protect genetic or other human products unless these have been modified or altered. There are currently no laws to protect the rights of Indigenous communities to their bodily products.  

Intellectual Property Rights

The western concept of intellectual property rights is based on the notion that ideas, innovations and inventions, expressed through various material forms, can be owned, and that individuals have distinct property rights to these forms of creative expressions and products. Intellectual property laws are aimed at protecting rights to literary and artistic property, as well as industrial property. The 1967 Convention Establishing the World Intellectual Property Organisation (WIPO), at article 2(viii) defines 'intellectual property' to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, phonograms and broadcasts;
- inventions in all fields of human endeavour;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and
- all other rights resulting from intellectual property activity in the industrial, scientific, literary or artistic fields. 

The western system of intellectual property law includes Patents Act 1990, the Trademarks Act 1955, the Designs Act 1906, the Plant Breeders Rights Act 1994, and common law areas of trade secrets and confidentiality. While all these intellectual property laws are available to Indigenous peoples, some, such as copyright and patent laws, are more potentially relevant or useful than others. The Copyright Act, for example, has received most prominence, as it has been used by Aboriginal artists to seek redress for exploitation of their designs. As a result of these actions this Act has been tested to the extent to which
it adequately protects the intellectual property rights of Indigenous peoples (see discussion above).9

The Copyright Act 1968 is designed to protect copyright, defined by McKeough as 'a form of property, a personal right, or a combination of both'.10 Golvan defines the copyright law as that which 'protects the form of expression of ideas, or the way in which ideas are expressed in a literary, artistic, dramatic or musical form, as well as in the form of cinematographic films and broadcast signals.' As such, Golvan states, the Copyright Act 1968 'thus founds the basis upon which creators of such forms of ideas can claim monopoly rights in them.'11 Although there is no requirement for registering copyright works, works must be in material form, and must be original. The term for copyright protection is limited to the life of the author plus fifty years.12

Golvan claims that advances in technology (such as the facsimile, and computer and data based technologies) are providing a challenge for copyright, which is 'increasingly having to be protected on a collective basis, with copyright ownership, as such, providing an entitlement to the distribution of centrally collected fees'.13 However, the need to rethink the fundamental bases of copyright and other intellectual property laws is created not only by advances in technology, but also by the increasing assertion by Indigenous peoples of their cultural rights.

The requirement that 'ideas expressed are in a tangible medium in order to attract protection under the Copyright Act', and the fact that operation of the Act is 'based on the concept of copyright as an individual property right that can be transferred or subdivided through commercial transactions', are, in McKeough's view, the primary impediments to proper protection for Indigenous peoples' cultural products and manifestations under existing copyright laws.14 The requirement that works are 'original' is an additional limiting factor, since it is often argued that artistic and other cultural expressions in Aboriginal or Torres Strait Islander societies are not necessarily produced by a single, identifiable individual; rather, there may be various levels of rights and interests in a work of cultural production. A person who produces a painting in Aboriginal society is not necessarily thought to be the 'owner' of the work, but may have been given authority to produce certain designs or images by others within the community, who may be members of a clan to whom the designs or images are said to 'belong'. The case of rock art is often cited to illustrate the difficulties in conforming to the requirements for 'originality', and for the term of protection under the Copyright Act.

The Patents Act may also be considered in terms of its applicability to the protection of Indigenous cultural products, forms and expressions. As discussed above, the requirements under patent laws concerning the novelty, usefulness, and non-obviousness of inventions, as well as the limited period for protection, and the individual nature of these rights, renders these laws incompatible with Indigenous peoples' interests.
The *Designs Act* is more limited than the *Copyright Act* in terms of Indigenous rights, as it requires registration, has similar requirements regarding originality, and offers a shorter term for protection.15

The use by Aboriginal people over the past decades of the *Copyright Act* (and to a lesser extent other laws such as breach of confidence) and the judgements resulting from those actions, have extended the boundaries of the interpretation of intellectual property laws. They have also emphasised the conceptual gaps between western notion of intellectual property and Aboriginal and Torres Strait Islander peoples’ perspectives, derived from their cultural systems.

Although other intellectual property laws such as plant variety rights legislation are also relevant to Indigenous peoples, there is not scope in this paper for a discussion of these.

### Indigenous Critiques of Intellectual Property Rights

Western intellectual property rights (IPR) systems have been criticised by Indigenous peoples (and Third world critics) as promoting the commercialisation and commodification of cultural products and expressions at the expense of Indigenous and local cultures. Although Indigenous people may have access to intellectual property laws, they are generally inadequately informed about these laws, and to bring actions under such laws is a costly and time consuming exercise, usually requiring the services of legal expertise.

Some Indigenous people argue that western intellectual property laws are fundamentally incompatible with Indigenous cultural systems and ignore the complexities of such Indigenous systems. The IPR system is based on western notions of property that emphasise individual ownership and alienability. The property rights established by these systems are essentially managed as commercial transactions, and are not designed to protect cultural products and expressions.16 In some critics’ views, IPRs pose a threat to Indigenous peoples’ systems of informal innovation, and communal rights and responsibilities in cultural products and expressions.17 There is a spectrum of views which range through arguments for the development by communities of their own *sui generis* systems, to include community empowerment rights; arguments advocating greater use by Indigenous peoples of a range of existing IPR systems together with land, heritage, and environment laws and statements and human rights regimes; support for the need for integration between Indigenous and western systems of innovation; and a position which claims the existing IPR system is adequate, requiring only minimal amendments.
Setting Standards: International Instruments and Intellectual Property Laws

Western intellectual property laws have been developed from a context of international developments. These have set the terms and definitions for the concept of intellectual property, and established standards for its protection. The Berne Convention for the Protection of Literary and Artistic Works was formulated in 1886, and has been subject to several revisions. The most recent revision to this Convention, to which Australia became a signatory in 1928, was at Paris in 1971. The scope of subject matter under this Convention is 'literary and artistic works', which is interpreted broadly to embrace 'any production whatsoever in the literary, scientific or artistic domain'.

Extensions to copyright laws were introduced in 1989 to provide some protection of rights for live performers, and consideration is being given to amendments to protect moral rights. The inclusion of moral rights protection offers potential for better recognition of Indigenous peoples' rights, as it may shift the balance away from the focus on economic dimensions under present intellectual property rights systems and towards a system that recognises and protects the 'right of integrity' or 'right of attribution'—aspects that are fundamental to Indigenous peoples' claims regarding exploitation of their cultural rights. A moral rights provision within the terms of the Berne Convention would provide avenues for redress in cases of distortion, mutilation or modification of an author's work. The inclusion of moral rights within amendments to copyright laws, and its implications for Indigenous people is discussed below.

Protection of folklore

The protection of cultural expressions of Indigenous peoples has been a developing area internationally. Recognising that copyright laws are not adequate for many aspects of Indigenous cultural protection, developments have occurred under the rubric of 'folklore'. The 1971 revision of the Berne Convention provided for countries to nominate a 'competent authority' to 'control the licensing, use and protection of national folklore'. Although the concept of 'folklore' is a potentially useful one for Indigenous concerns, as it embraces a more holistic notion of culture, the term is relatively contentious in its relevance, applicability or appropriateness to describe and define Indigenous cultures. Moreover, the notion of state control over cultural products and expressions of the peoples within them is antithetical to Indigenous peoples' aspirations for self-determination. It is useful to examine some developments that have considered this concept as a possible means of broadening the scope of what may be protected within copyright type regimes. These discussions have occurred mostly within the World Intellectual Property
An early development that provides potential for recognition of ‘folklore’ is the 1976 Tunis Model Law on Copyright, developed through WIPO. This instrument defines folklore as:

all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries, or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.\(^{23}\)

The Tunis Model Law provides for protection of cultural expressions without the requirement for these to be ‘fixed’ (as required by copyright laws), and provides protection for an indefinite period of time. It also includes a provision for ‘moral rights’ to ‘prevent the desecration and destruction of folklore works’.\(^{24}\) While a number of African and other countries have adopted the Tunis Model Law, it has not as yet been considered in Australia.\(^{25}\)

Both WIPO and UNESCO have also considered parallel developments to protect ‘folklore’, resulting in 1985 to the formulation of draft *sui generis* Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions. The Model Provisions do not define ‘folklore’, but rather ‘expressions of folklore’ as

productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

(i) verbal expressions, such as folk tales, folk poetry and riddles;

(ii) musical expressions, such as folk songs and instrumental music;

(iii) expressions by action, such as folk dances, plays and artistic forms or rituals, whether or not reduced to a material form; and

(iv) tangible expressions, such as:

(a) productions of folk art, in particular, drawings, paintings, carvings, sculpture, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;

(b) musical instruments;

(c) architectural forms.\(^{26}\)
One of the central issues raised by these developments is whether such instruments should protect heritage as that belonging to the nation or state, and therefore the extent to which there is recognition of the heritage rights of distinct peoples within nation-states.

**GATT—TRIPS**

Intellectual property rights have recently become a component of international trade. The General Agreement on Tariffs and Trade (GATT), established in 1948 by mainly developed countries sets out a regulatory framework for trading between member countries. The GATT aims to promote free trading by allowing negotiation of, concessions on, or removal of tariff protection. 27

The 1994 Uruguay Round of negotiations on the GATT resulted in the incorporation of intellectual property rights and the establishment of the World Trade Organisation as the administering body of the GATT. The incorporation into the GATT of intellectual property rights, known as the Trade Related Aspects of Intellectual Property Rights (TRIPS), has brought about an additional set of concerns for Indigenous peoples.

The TRIPS provisions in GATT have the general objective of harmonising intellectual property rights protection at the global level, and require countries without IPR systems to develop them in accordance with the GATT provisions. As Darrell Posey argues, the requirement in Article 27(3b) for the protection of plant varieties either by patents or by the creation of effective *sui generis* systems is viewed by some Indigenous and Third World critics as a threat to their community rights, as it 'would create legal monopolies on common resources'. 28 The TRIPS provisions in the GATT are regarded both as a threat and as creating potential opportunities. The new regulations place some pressure on countries without effective intellectual property rights systems to develop these quickly, thus creating a risk that the IPR systems that are introduced will be incompatible with local and Indigenous customary rights and practices. At the same time, there may be potential opportunities for countries currently lacking in effective IPR systems to create innovative *sui generis* systems that are in accordance with, and offer protection for, community based rights.

Some Indigenous and Third World critiques of the GATT/TRIPS have argued that this is a further development towards appropriation and control of the biodiversity rich south by the industrialised, affluent, yet biodiversity deficient north—a move which imposes additional constraints on recognition of the contribution made by Indigenous peoples to innovation and development. To these critics, the global integration of intellectual property rights regimes favours industrial innovation and discriminates against informal and communal knowledge systems and innovations. 29
Statements and Standards Supporting Indigenous Cultural Protection

There have been a number of standard setting and other developments internationally which provide the basis for an understanding of Indigenous intellectual property rights within a wider concept of cultural heritage and Indigenous cultural systems, and which appear to reflect more closely Indigenous peoples’ perspectives on cultural protection. Some of these developments are occurring within mainstream agencies of the United Nations and its agencies, while a parallel series of developments is being pursued by Indigenous peoples and Third World peoples, thus signalling a strongly emerging ‘soft law’ for Indigenous cultural protection.30

United Nations Statements and Developments

Developments within the United Nations and its agencies have generally adopted an integrated approach to Indigenous peoples’ cultural protection. A 1992 Report of the United Nations Secretary-General on the Intellectual Property of Indigenous Peoples states that Indigenous peoples’ intellectual property can, for analytical purposes, be ‘usefully divided into three groups: (i) folklore and crafts; (ii) biodiversity; and (iii) Indigenous knowledge’.31 This report concludes that, given the complexity of finding improved ways to protect the intellectual property rights of Indigenous peoples, ‘a greater understanding of the concerns of Indigenous peoples ... may be needed before determining the specific legal remedies which might be appropriate’.32

The protection of Indigenous peoples’ intellectual property rights has also been on the agenda of the United Nations Working Group on Indigenous Populations, established in 1982 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Draft Declaration on the Rights of Indigenous Peoples developed by the working group includes important provisions concerning intellectual property rights. Article 24 states that:

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals...33

Article 29 states:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.34
The comprehensive study on Indigenous Cultural and Intellectual Property prepared by Erica Irene-Daes for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities provides further discussion of the nature of Indigenous intellectual property and the need to consider it as a component of Indigenous cultural heritage. That study recommended that, consistent with the views of Indigenous peoples, intellectual property and cultural property cannot be considered in isolation from each other, as they are both integral components of Indigenous cultural heritage. This holistic view is also supported by the principles in the Draft Declaration discussed above.

Indigenous cultural rights are also recognised in International Labour Organisation Convention 169, Concerning Indigenous and Tribal Peoples in Independent Countries. As this Convention is primarily concerned with labour and employment, it contains only general provisions that are relevant to intellectual property rights. Article 4 states, for example, that:

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Article 5 states that:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected.

Article 8 states that:

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 13 states:

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable.
Article 23 states:

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.

Although this Convention has been criticised by Indigenous peoples and others for providing insufficient recognition and protection of rights, and for its assimilationist orientation, unlike the Draft Declaration it provides binding obligations on countries that have ratified the Convention. It is also argued that the Convention can be used to encourage governments to establish structures and processes for greater Indigenous participation in the political, economic and social life of that country. It remains questionable, however, as to how rigorously countries fulfil such ‘binding obligations’ through legislative enactments or policy measures.

Developments in Environment and Conservation

Given that Indigenous peoples consider their intellectual property rights to include rights related to environment, biological diversity and knowledge, developments in international standard setting relating to environment and conservation have particular relevance in so far as these include provisions concerning the need to recognise and protect Indigenous peoples’ rights. These instruments and statements are especially useful in that they build up a body of statements recognising, and advocating protection for Indigenous peoples’ knowledge systems—aspects of Indigenous culture which are currently beyond the scope of conventional intellectual property laws. The most significant of these international developments have resulted from the 1992 United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil (the ‘Rio Earth Summit’). The principal statements are the Rio Declaration, Agenda 21, the Convention on Biological Diversity, and the Statement of Forest Principles—all of which contain provisions relevant to, or implications for, the recognition and protection of Indigenous peoples’ intellectual property rights.

Perhaps the most comprehensive and potentially useful outcome of the Rio Earth Summit was Agenda 21, which provides a charter and programme for action for sustainable conservation and development into the next century. While there is much of relevance for Indigenous peoples throughout Agenda 21, Chapter 26 on Recognising and Strengthening the Role of Indigenous Peoples and their Communities contains some important provisions directly relevant to Indigenous peoples’ intellectual property rights. Section 26.3 states that Governments should ‘in full partnership with indigenous people and their communities’ aim to fulfil objectives that include:
(a) Establishment of a process to empower Indigenous people and their communities that include:

(iii) recognition of Indigenous peoples’ values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development.

Section 26.6(a) contains a programme statement to implement this principle, stating that Governments, ‘in full partnership with indigenous people and their communities should, where appropriate’:

(a) Develop or strengthen national arrangements to consult with Indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them.

These statements in Agenda 21 are reinforced by similar principles in the Rio Declaration. Agenda 21 is currently being reviewed by the UN.

One of the binding statements resulting from the Rio Earth Summit, the Convention on Biological Diversity, contains a number of provisions relevant to Indigenous peoples’ intellectual property rights. One of the most important is article 8(j) which requires countries (subject to their national legislation) to:

...respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

The provisions in the Convention on Biological Diversity relating to Indigenous knowledge are subject to some discussion in the literature, in terms of the extent to which these provisions relate to conventional intellectual property systems, and matters regarding national, versus local and Indigenous rights in biological resources.39

While this Convention provides a potentially useful opportunity for countries to introduce sui generis systems to recognise and protect Indigenous knowledge and innovations, it also imposes some constraints. The requirement that implementation of article 8(j) should be subject to national legislation may be problematic for Indigenous peoples, especially if existing national laws take precedence, and where these might contravene or place limitations on any measures that may be introduced under 8(j). The use of ‘traditional lifestyles’ in the wording of this article may also be interpreted to exclude many Indigenous communities who have not retained their direct connections with lands and resources, but who wish to protect and preserve their knowledge and innovations.40
Although a more comprehensive discussion of the recognition and protection of Indigenous knowledge and biodiversity is outside the scope of this paper, it is sufficient to point out that, given that Indigenous peoples regard their knowledge systems and rights in biological diversity to be components of their intellectual property, developments such as the Rio Declaration (and more particularly Agenda 21 and the Convention on Biological Diversity) present potentially significant means for recognition and protection measures to be formulated within the legal system.

Darrell Posey has written extensively on the ways in which relevant provisions in the Rio Declaration, the Convention on Biological Diversity, and a wide range of human rights and other instruments, in addition to emerging Indigenous and other standards and statements can be used by Indigenous peoples to achieve better recognition and protection for their ‘intellectual property’ rights (or what Posey terms ‘traditional resource rights’). Posey’s work on alternative solutions that go ‘beyond intellectual property rights’ is outlined below.41

Another outcome from the Rio Earth Summit was the establishment of a new body, the Commission on Sustainable Development (CSD), within the United Nations Environment Program. The CSD has established an ad hoc Intergovernmental Panel on Forests (IPF) to consider a range of matters concerning sustainable forest management. Part of the program of work of this body includes considering the role of ‘traditional forest related knowledge’, a significant area of work relevant to Indigenous peoples’ interests. The recommendations and future actions arising from the work of the IPF are included in the agenda for a current United Nations General Assembly review of international environmental issues.

Other developments relevant to Indigenous peoples’ intellectual property rights are being considered within the United Nations Food and Agriculture Organisation (FAO) and its agencies (such as the Commission on Plant Genetic Resources). In 1983 the FAO adopted an International Undertaking on Plant Genetic Resources as part of the establishment of a Global System to coordinate and regulate plant genetic resources relevant to food and agriculture.42 This Undertaking has gone through several revisions, one of which in 1989 resulted in the inclusion of the recognition of a concept of ‘Farmers’ Rights’. These ‘Farmers’ Rights’ are currently subject to debate, especially in terms of clarifying what is meant by the term, and its implications for the rights of local and Indigenous communities regarding food and agricultural knowledge and production, and access to, control and ownership of plant genetic resources. Current revision of the International Undertaking is also considering possible harmonisation with relevant provisions of the Convention on Biological Diversity.
Indigenous Statements

In addition to the standard setting developments surveyed above, there is a growing body of declarations and statements by Indigenous peoples concerning recognition and protection of intellectual property and related rights.

The Draft Declaration, which has now assumed the status of a well established process within the formal United Nations machinery, has been developed by Indigenous peoples and their representatives during the annual sessions of the United Nations Working Group on Indigenous Populations (WGIP). As such, this draft Declaration is a strong statement of Indigenous peoples’ aspirations, and reflects their thinking on a wide range of cultural and associated rights. The Draft Declaration is currently being further considered by a special Working Group established by the United Nations Commission on Human Rights—a higher level body of the UN. This Commission is, however, a body comprised of government representatives. Government representatives that may oppose or be less supportive of the language in the Draft Declaration are therefore likely to be able to wield greater influence than was the case during the development of the Draft Declaration in the WGIP sessions. In any case, it is still many years before the Draft Declaration is to be considered for adoption by the United Nations General Assembly. Even when that occurs, as a Declaration it does not place binding obligations upon countries to uphold it as law, or to implement its provisions. It is more a statement of international customary law.

Indigenous peoples are also developing a series of statements proclaiming their rights in intellectual property. Usually such statements, consistent with the views expressed in the Daes report, reflect a more inclusive understanding of intellectual property, and incorporate variously ‘cultural property’, ‘knowledge’, and ‘biodiversity’—components that are generally considered outside the scope of western thinking on intellectual property.43 These include the following.

- In February 1992 an Open Forum held as part of the Seventh Asian Symposium on Medicinal Plants, Spices and Other Natural Products in Manila, Philippines, produced the Manila Declaration Concerning the Utilisation of Asian Biological Resources.

- A World Conference of Indigenous Peoples on Territory, Environment and Development, held in Kari-Oca, Brazil, in May 1992, produced a statement known as the Kari-Oca Declaration and the Indigenous Peoples’ Earth Charter.

- In June 1993 a meeting of Indigenous peoples took place in Whakatane, New Zealand. This was the First International Conference on the Cultural and International Property Rights of Indigenous Peoples. The meeting produced a statement called the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. This Declaration was submitted to the 1993 Session of the UN Working Group on Indigenous Populations.
• In November 1993 an international conference on Indigenous intellectual and cultural property was held at Jingarba in north east Queensland issued a statement, known as the Julayinbul Statement on Indigenous Intellectual Property Rights.

• A series of regional consultations and meetings of Indigenous peoples to discuss intellectual property rights took place in Bolivia, Malaysia and Fiji during 1994 and 1995. These meetings, sponsored by regional non-Government organisations, including the Coordinating Body for the Indigenous Peoples’ Organisations of the Amazon Basin and the United Nations Development Programme, issued statements concerning the recognition and protection of intellectual property rights.

• The regional meeting in Fiji also produced a Treaty for a Lifeforms Patent-Free Pacific and Related Protocols, to prevent exploitation of local and Indigenous peoples in this region by biological prospecting and the collection of human genetic materials.

These Indigenous statements are generally more inclusive in their coverage than statements in western law, incorporating a wider range of subject matter which Indigenous peoples consider to be their cultural and intellectual property. They form an important emerging body of principles which ultimately must influence western legal systems to provide improved protection for Indigenous cultures.
Developments in Australia

There have been various developments in Australia that have proposed recommendations concerning protection for Aboriginal and Torres Strait Islander peoples’ intellectual property rights. Most of these have focussed on the protection of Indigenous intellectual property rights in artistic works; relatively little comprehensive consideration has been given to protecting other components of Indigenous intellectual property such as secret or sacred material, cultural heritage, knowledge, or biodiversity. This section surveys some of these developments.

Reports and Developments to 1996

Folklore, Culture, Customary Law, Arts and Crafts and Social Justice


During the 1970s, partly as a result of the copyright cases brought by Aboriginal artists and the increasing entry of the works of Aboriginal artists into the national and international art markets, there was a growing recognition of the need to address inadequacies in legal protection for Aboriginal and Torres Strait Islander peoples’ intellectual property rights. In May 1973 the first National Seminar on Aboriginal Arts, held in Canberra, resolved that the Aboriginal Arts Board of the Australia Council should initiate procedures which would ‘enable each tribal body to protect its own particular designs and works and to strictly control the use of them by non-Aboriginals’. The Copyright Committee of the Australia Council referred that resolution to the Government, with a recommendation that a committee be established to ‘examine the nature of legislation required to protect Aboriginal artists in regard to Australian and international copyright’. This led to the establishment by the then Commonwealth Department of Home Affairs and Environment of a Working Party on the Protection of Aboriginal Folklore. The working party comprised representatives from the Attorney-General’s Department, the Australia Council, the Australian Copyright Council, the Department of Prime Minister and Cabinet and the Department of Aboriginal Affairs. The working party’s report released in 1981 recommended a draft law called the *Aboriginal Folklore Bill*, designed to establish an Aboriginal Folklore Board and a Commissioner for Folklore empowered to make determinations about uses of Aboriginal cultural items.
In deciding that the object of its study should be directed towards the protection of Aboriginal ‘folklore’, the report concluded that ‘folklore’ was a useful term if applied in an expanded sense, and that its use is also justified on the basis of its recognition in some international legal contexts. The report states that ‘use of the term ‘folklore’ recognises that traditions, customs and beliefs underlie forms of artistic expression, since Aboriginal arts are tightly integrated within the totality of Aboriginal culture’. It argued that ‘folklore is the expression in a variety of art forms of a body of custom and tradition built up by a community or ethnic group and evolving continuously.’

The Report draws on the Tunis Model Law which defines folklore as:

all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries, or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.

The recommendations from the working party report have not been implemented, although the model it outlines is one of the options for reform being considered by an interdepartmental committee. One potential difficulty posed by the model suggested in the folklore report is the centralised nature of the structure to be established; this is likely to be at odds with the concept of localised community decision making about uses of folklore.

A further difficulty is in the definition and scope of the term ‘folklore’. Although this terminology is used in the WIPO/UNESCO discussions, it is not appropriate to uncritically impose it onto the Aboriginal and Torres Strait Islander context. As some writers have argued, although the term ‘folklore’ is used in some discussions about African societies, it is derived from an early European and British context, and when used to denote Indigenous cultures connotes an entity that is subordinate to culture or heritage.

Report on the Recognition of Aboriginal Customary Law, 1986

In February 1977 the Australian Law Reform Commission (ALRC) was asked by the then Federal Attorney-General, the Hon. R.J. Ellicott, to inquire into the extent to which the existing system of laws might recognise Aboriginal customary laws. The terms of reference for this inquiry were:

(a) whether existing courts should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

The ALRC report discussed the definition of customary law, finding that there was some agreement among the many writers on this subject that ‘there existed, in traditional
Aboriginal societies, a body of rules, values and traditions, more or less clearly defined, which were accepted as establishing standards or procedures to be followed and upheld ... [and] ... furthermore, these rules, values and traditions continue to exist, in various forms, today'. There remained some difficulties, however, in the ALRC report’s discussion, about the extent to which this body of ‘values, rules and traditions’ may be considered, in the legal and anthropological tradition, as ‘law’.50

The main focus in the ALRC report was on criminal law and justice issues, and it considered only very briefly other aspects of customary law.51 With regard to cultural heritage, and intellectual property rights in art and cultural expressions, the ALRC touched briefly on these, but mostly stated that these matters were adequately covered in the report of the Working Party on the Recognition of Aboriginal Folklore, and that the Commonwealth Government was ‘considering the implementation of the recommendations’ of that report. The ALRC report recognised the inadequacies in existing copyright law for protection of Indigenous intellectual property, stating that ‘the protection of traditional designs is difficult to reconcile with the law relating to intellectual property, which grants a short term monopoly to the artist on the condition that the design or idea will eventually be available in the public domain.’ In the light of these incompatibilities, the ALRC report supports special legislative protection for Indigenous cultural items not adequately protected by copyright laws, stating that ‘such special legislative measures, together with careful use of the general law, and greater use of existing by-law powers, offer greater assistance to Aboriginal people than the enactment of a broad range of customary offences as part of the general body of criminal law.’52

The relationships between Aboriginal and Torres Strait Islander customary law (defined as the body of rules, values and traditions in Aboriginal and Torres Strait Islander societies) and intellectual property rights as protected under existing copyright laws have been explored by various writers.53 The general conclusion is that there is a fundamental difference between copyright laws, which exist to encourage creativity and investment by creating a private property right that can be transferred within a commercial market economy, and the ‘production and regulation of imagery within Indigenous communities ... [which] ... is not based upon notions of talent or individual expression, but stems from systems of inherited rights and obligations’.54

The problem of recognising Aboriginal and Torres Strait Islander peoples’ intellectual property rights has mostly been discussed as these relate to works of art. As such, a number of reports and other processes regarding what has come to be known as the Aboriginal and Torres Strait Islander ‘arts and crafts industry’ often have some regard to intellectual property issues. Most of these reports emphasise the need to support commercial and economic aspects of Indigenous ‘arts and crafts’, and focus on discussions about industry viability, improvement of marketing strategies, and funding initiatives for arts and crafts enterprise development. While the achievement of commercial success is undoubtedly an important component of the path towards self-determination for
Aboriginal and Torres Strait Islander peoples, so too is the recognition of their distinct cultural rights as Indigenous peoples. The promotion of Indigenous art as a significant industry must equally have regard to the ‘cultural integrity’ of the art. 55


In recognition of the increasing income generating potential of the Aboriginal arts and crafts industry, a committee appointed in 1989 by the then Aboriginal and Torres Strait Islander Affairs Minister, the Hon. Gerry Hand, was asked to conduct an inquiry into this industry. Although this committee’s primary concern was with matters relating to the commercial viability of the Aboriginal arts and crafts industry, and the need for a more effective marketing strategy, in its report of 1989 it did recognise the importance of protecting Indigenous intellectual property rights, and the difficulties in achieving adequate protection within existing laws. The report’s recommendations were more cautious than those of the Working Party on Protection of Aboriginal Folklore, but nonetheless supported the consideration of the latter report. 56


The Royal Commission into Aboriginal Deaths in Custody included consideration of Aboriginal arts and crafts in its discussion on increasing economic opportunity. The Commission added its support to the recommendations of the Arts and Crafts Industry Review Report, which advocated the establishment of an Aboriginal and Torres Strait Islander arts and crafts industry strategy, improved coordination of activities relating to Indigenous arts and crafts development, increased support to Indigenous arts and crafts centres, and special programs to assist these activities. Copyright issues are included in the Royal Commission’s discussion, supporting the views propounded in the previous Report. 57

The central issue here is that a pattern is emerging wherein each report has merely reasserted what is already well known, and reinforced the need to implement recommendations advocated in previous reports. While there is some merit in reasserting the same recommendations, relatively little of substance has been added to the comprehensive analysis in the 1981 Working Party Report. The same recommendations are being recycled, with little regard to serious consideration of implementation.

The need to support arts and crafts industry development is certainly of great importance. Indeed, the increasing entry of Indigenous arts and crafts into commercial markets brings an increasing urgency to protect the cultural sensitivities and customary rights of the producers and their communities. It is clearly not viable to argue that Indigenous arts and
crafts are purely an industrial activity; the cultural dimensions are integral, and must be
given added consideration as the industry continues to grow.

Creative Nation, 1994

The Keating Government released a Commonwealth cultural policy in October 1994. This
document drew attention to the inadequate protection of Aboriginal and Torres Strait
Islander peoples’ intellectual property rights under existing laws, and added to the body of
reports and statements advocating reforms to protect Indigenous peoples’ intellectual
property rights. Creative Nation stated that any measures should include consultations with
Indigenous communities.

Discussion Paper, Proposed Moral Rights Legislation for Copyright Creators, June 1994

In June 1994 the Commonwealth Government released a discussion paper on moral rights.
This paper examined the possibility of introducing the recognition of moral rights into the
Australian legal system, to provide protection for creators. Moral rights, as distinct from
the economic rights that are currently the focus of copyright law, comprise two
components: 'the right to be identified as the author of a work (the right of “attribution”),
and the right to object to distortion, mutilation or other modification of, or derogatory
action in relation to, the work which is prejudicial to the author’s honour or reputation (the
right of “integrity”).' 58

The introduction of moral rights would fulfill obligations under the Berne Convention, and
would also enhance the ability of the Copyright Act to protect Indigenous peoples’ rights.
Moral rights would provide legal recognition of the ‘use of works’, and provide
mechanisms for redress where works have been misused. As such, the discussion paper
says, these rights might ‘provide an additional and significant means of redress for some
Aboriginal artists’. Since moral rights are ‘personal’ in nature, and therefore cannot be
transferred, in the view of the authors of the discussion paper, they allow potentially
greater control by Indigenous creators over their works. 59

Issues Paper, Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait
Islander Peoples, October 1994

One of the more comprehensive developments since the 1981 Report of the Working Party
on the Recognition of Aboriginal Folklore was the release in October 1994 of the issues
paper Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres
Strait Islander Peoples. This was prepared by the Commonwealth Attorney-General’s
Intellectual Property Rights

Department and issued under the auspices of three Ministers in the Keating Labor Government: Duncan Kerr, Minister for Justice; Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs; and Michael Lee, Minister for Communications and the Arts.

This issues paper expanded on recommendations in *Creative Nation* and outlined the problems in achieving adequate protection for Indigenous peoples intellectual property rights under existing intellectual property laws. It surveyed some of the existing international and domestic laws relating to intellectual property, and suggested a range of possible options for improving protection for Aboriginal and Torres Strait Islander peoples’ intellectual property rights.

The paper adopts the terms ‘intellectual property’, and ‘arts and cultural expressions’ to denote aspects of Indigenous cultures, and defines ‘arts and cultural expressions’ to ‘encompass all forms of artistic expression which are based on custom and tradition derived from communities which are continually evolving’. Since this paper is bound within a conceptual framework of ‘copyright’, its discussion is limited to ‘those aspects of the protection of arts and cultural expression that have a close connection with copyright law’. It therefore precludes consideration of ‘other areas such as biodiversity and indigenous knowledge ... [which] ... are sometimes considered to be protected by intellectual property laws’, since ‘these areas often touch on aspects of intellectual property protection without involving property rights themselves’. The paper is thus problematic in that it denies the potential for Indigenous rights and interests in biodiversity and knowledge to be considered as ‘property rights’. As such, this paper does not adequately address Indigenous intellectual property rights: it deals only with one aspect.

An interdepartmental committee convened by the Department of Communications and the Arts is currently developing a response to the *Stopping the Rip-Offs* paper.

Social Justice Reports, 1995

Following the passage of the *Native Title Act* in 1993, and establishment of a body to administer the Indigenous Land Fund, the former Government proposed a series of additional measures to address Aboriginal and Torres Strait Islander peoples’ disadvantage. The proposed social justice strategy recognised that not all Aboriginal and Torres Strait Islander peoples would be able to claim native title or other forms of land rights, and that there were many areas of Indigenous disadvantage that would not be addressed by these initiatives. In formulating its social justice strategy, that Government released a discussion paper and called for submissions. Among the most prominent submissions received were those by the Aboriginal and Torres Strait Islander Commission (ATSIC), the Council for Aboriginal Reconciliation (CAR) and the Aboriginal and Torres

The submission from ATSIC, presented in 1995, consistent with United Nations statements and Indigenous perspectives, recognised that to Indigenous peoples ‘intellectual property’ and ‘cultural property’ comprise integral components of what this report termed ‘cultural integrity and heritage protection’.61 This report provided the following three specific recommendations for the protection of Indigenous intellectual property rights:

The Commonwealth Government should amend statutes relevant to intellectual property rights to safeguard the integrity and ownership of indigenous cultural [and intellectual] property in a manner which recognises the particular features of Aboriginal and Torres Strait Islander ownership, including perpetual and communal rights. (Recommendation 81)

The Commonwealth Government should introduce measures to regulate and ensure appropriate compensation for agreed use of indigenous intellectual and cultural property. (Recommendation 82)

The Commonwealth Government must ensure that ATSIC and appropriate indigenous organisations are fully involved in negotiating the legislative reform and other aspects of the recommendations relating to cultural protection. (Recommendation 83)62

Similar recommendations were made in the submissions by the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner.63

The social justice package is not part of the Coalition Government’s agenda, although the Aboriginal and Torres Strait Islander Commission is carrying out some work on intellectual property.64

Coalition Government Policy, 1996

The policies of the Coalition Government support the need for improved protection for Aboriginal and Torres Strait Islander peoples’ intellectual property rights. In its Aboriginal and Torres Strait Islander Affairs policy the Coalition says that it will ‘ensure that relevant copyright laws fully recognise the cultural and economic rights of Indigenous artists.’ It is not certain at this stage whether the Coalition’s policies will be limited to reforms to the Copyright Act to provide better protection for Indigenous artists, or extend to recognising the full range of Indigenous peoples’ intellectual property and include consideration of new sui generis legislation.
Intellectual Property Rights


In March 1997 the Australian Copyright Council released a discussion paper on Indigenous intellectual property rights. This paper is a valuable contribution to the literature, and provides a very comprehensive coverage of the issue. As it openly states, this paper is working within a copyright framework, and its conclusions therefore remain cautious regarding reforms, suggesting that there may be sufficient remedies within existing copyright law to provide 'a measure of protection to the communities of individual indigenous creators'.

**Heritage, Biodiversity and Native Title**

The protection of intellectual property is integral, in Indigenous peoples’ views, to heritage and land. A number of legislative and other developments on heritage, biodiversity and land are relevant to Aboriginal and Torres Strait Islander intellectual property rights.

**Protection of Indigenous Heritage**

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* provides for the Commonwealth Minister to make declarations for protection over significant areas, sites or objects that are under threat of desecration. This Act is a 'last resort' to be used when State or Territory processes have failed. The Commonwealth Act does not include provisions for protection of non material aspects of heritage, but there is scope in Part IIA of this Act, enacted for Victoria. Part IIA includes 'folklore' in its definition of 'Aboriginal cultural property', which refers to:

...traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

The *Heritage Protection Act* was the subject of a review carried out in 1996 by the Hon. Elizabeth Evatt, AC. The Evatt Report has added to the growing number of reports and recommendations advocating the need to consider 'intellectual property' and other intangible aspects of Indigenous heritage in legislative and policy reforms.

This report made many recommendations aimed at improving the operation and effectiveness of the Act for protecting Indigenous heritage, and for achieving better coordination of heritage protection across all levels of government. Included in these recommendations are the need to include consideration of intangible components of heritage (including intellectual property) in protection measures, and matters concerning
the need to respect confidentiality, and customary restrictions on information in dealing with heritage protection. The report also recommended that, if State and Territory governments do not establish appropriate bodies, the Commonwealth Government should establish an Indigenous cultural heritage committee to ensure that Indigenous peoples have primary responsibility in deciding the significance of sites. This may allow the potential for the inclusion of intangible aspects of cultural heritage, including knowledge in frameworks for protection.

A discussion paper was released by the Aboriginal and Torres Strait Islander Commission in March 1997, on Proposed Minimum Standards Framework for the Accreditation of State and Territory Aboriginal and Torres Strait Islander Heritage Protection Regimes. This paper proposes that protection should be accorded to ‘areas and objects which are culturally significant to Aboriginal and Torres Strait Islander people, including human remains, cultural property and historic and archaeological areas (including buildings)’. The paper considers that the ‘significance of, and the nature of the threat or desecration to, an area or object is a matter for indigenous people to decide in accordance with their contemporary traditions’.

The Minimum Standards paper retains the emphasis on notions of physical places or objects as the primary (or only) manifestations of Indigenous cultural heritage, omitting any discussion of non-physical aspects. Although there may be some scope within the approach in this paper for Indigenous peoples to promote the non-physical dimensions of their heritage in ascribing significance, since the interpretation and management of heritage ultimately rests with government (the Commonwealth in this case), the focus appears likely at this stage to remain squarely on physical heritage.

The importance of incorporating Indigenous perspectives on heritage in Government approaches is recognised in some reports. This has been usefully discussed in a report by the Australian Heritage Commission released in February 1997, Australia’s National Heritage: Options for Identifying Heritage Places of National Significance, which drew attention to the importance of knowledge:

Indigenous people have a strong sense of heritage as including intangible aspects such as language, song, stories and art, and can be critical of a notion of heritage based too narrowly on ‘place’. Protecting knowledge associated with a place may be equally or more important than physical protection of a place. Indigenous understandings of heritage will need to be acknowledged…  

Other developments which have raised the problems in protecting Aboriginal and Torres Strait Islander peoples’ intellectual property rights have included an Inquiry into Aboriginal and Torres Strait Islander culture and heritage that was commenced by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, and which was discontinued with the change of government in March 1996. The full reference for that inquiry was:
...to inquire into and report on the maintenance and promotion of Australia’s Indigenous arts, cultures and cultural identity. This encompasses the full range of artistic and cultural activities, both traditional and contemporary, including visual art, craft, language, design, dance, music, drama, storytelling, folklore, writing, sound, films, heritage, traditional cultural practices and spiritual beliefs.

Of those components that the inquiry was to pay ‘particular attention to’, was the inclusion of ‘intellectual property rights, including the ownership and integrity of artistic work’. The inquiry received many comprehensive submissions, and conducted public hearings throughout several States before it was discontinued.

Indigenous Cultural Property

As advocated in international and Indigenous statements, to Indigenous peoples cultural property is inseparable from intellectual property, and these together comprise integral components of their cultural heritage.

Cultural property is generally considered to include a range of objects such as human remains, artefacts, items of a secret or sacred nature, and historical materials (including archival and other records). Much of this material is held in museums and other collecting institutions (both overseas and within Australia), for research and display purposes. Indigenous peoples claim their rights in this material, as it forms an essential component of their collective heritage, and is crucial to cultural identity.

Although many museums are actively working with Indigenous people to repatriate cultural property, there is little or no nationally consistent approach or policy, and no legislative obligation to repatriate. While the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and some State laws may be used to a limited extent for this purpose, the Commonwealth Act provides only for protection orders of a limited duration to be placed over collections, while attempts are made to negotiate regarding repatriation.

Some progress towards the development of a national policy was made in the early 1990s following lengthy and difficult negotiations between Indigenous peoples, museums, and governments, but this ultimately fell short of achieving an agreed national policy. Limited success was achieved by the museums association and by the Aboriginal and Torres Strait Islander Commission, each of which independently finalised policy positions and guiding principles.

The challenges to successful achievement of a national policy include matters such as ownership rights and interests in cultural property, questions of access and provision of information about such material, and relative roles and responsibilities (including financial) of key stake-holders, including governments, museums and their organisations, and Indigenous peoples.
Protection of Indigenous Secret or Sacred Information

Indigenous peoples consider information to be part of their intellectual property, and such information is regulated and managed according to strict cultural codes and rules. Matters of confidentiality and secrecy in Aboriginal and Torres Strait Islander societies are integral to the functioning of these societies, and are closely interconnected with religious, cultural, political and social systems.69

As with all their forms of intellectual property, knowledge is frequently obtained as information from Aboriginal or Torres Strait Islander people by researchers, scientists, government officials and a host of others, often without the consent of the people who ‘own’ the knowledge. As such, rules of confidentiality, often little understood or appreciated by the recipients of the information, are breached. Few actions have been brought by Indigenous people under western laws for breach of confidentiality, despite the fact that such information is very frequently sought. One case (Foster v Mountford (1976)) that has been documented is the action brought by members of the Pitjantjatjara Council who in 1976 sought to prevent information obtained by an anthropologist (Mountford) from being published in the Northern Territory. This action was taken using breach of confidence rules, and the court granted the plaintiffs an injunction to prevent sale of the book.70

The problems of confidentiality, especially with regard to Indigenous peoples’ secret or sacred information, are particularly pertinent to the taking of evidence in courts, and to hearings and provision of evidence in land and heritage matters. These issues have been discussed in the 1986 Law Reform Commission’s Report on the Recognition of Aboriginal Customary Laws, and were prominent in relation to claims that were made under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 by Aboriginal people for heritage protection around the Hindmarsh Island Bridge area. The Hon. Elizabeth Evatt, AC, devoted some considerable discussion of secret and sacred information in her 1996 report of the review of the Heritage Protection Act, and produced a number of recommendations aimed at ensuring that heritage protection laws and procedures have respect for customary restrictions on information.71

Protection of Indigenous Knowledge in Biodiversity

Indigenous peoples assert that their intellectual property rights extend to protection for biological diversity. Although international developments are proceeding in the complex area of Indigenous cultural rights, there has been relatively little consideration of possible measures that may provide recognition and protection for Indigenous peoples’ rights in biological diversity in Australia.
The most significant international development that provides potential for protection of Indigenous knowledge is the Convention on Biological Diversity, discussed above.

The Conference of Parties to the Convention on Biological Diversity and its technical advisory body, the Subsidiary Body on Scientific, Technical and Technological Advice, include in their programs of work consideration of the implementation of Article 8(j). Issues raised by this work include the clarification of the relationship between Indigenous knowledge and intellectual property rights, and whether Indigenous knowledge can be construed as a property right.

Developments in Australia gained some momentum following the 1992 United Nations Conference on Environment and Development. In 1992 the then Commonwealth Government, with State and Territory governments, endorsed the Intergovernmental Agreement on the Environment, which includes an agreement to conserve biological diversity. Following that, in the same year a Task Force on Biological Diversity was established by the Australian and New Zealand Environment and Conservation Council (ANZECC) to oversee and report on the implementation of the Convention on Biological Diversity. Following recommendations from the Task Force, the Council of Australian Governments agreed in 1992 to implement a National Strategy for Ecologically Sustainable Development, which includes the conservation of biological diversity as one of its central objectives.

The Australian Government ratified the Convention on Biological Diversity in June 1993, and in 1996 the Commonwealth, State and Territory governments endorsed the National Strategy for the Conservation of Australia’s Biological Diversity. Action 1.8.2 of this Strategy is to:

Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:

(a) encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biological diversity, taking into account existing intellectual property rights; and

(b) establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.

The Commonwealth Government is also considering implementation of the Convention in various committees. The ANZECC Task Force on Biological Diversity recommended that a Commonwealth/State Working Group (CSWG) should be established to ‘investigate and report on the strengthening of existing controls governing access to genetic resources’. This CSWG was established in May 1994, and an interdepartmental committee convened by the Department of Industry, Science and Tourism was subsequently formed to monitor
the work of the CSWG and to develop a Commonwealth position on issues raised by the CSWG.73

The CSWG has prepared a draft discussion paper which includes a brief outline of Indigenous peoples' rights in biological and genetic resources, and the inability of existing intellectual property rights systems to adequately protect these. The paper concludes however that questions of Indigenous rights and ownership are too complex, are outside the scope of the Working Group's concerns and being dealt with in other forums. The paper therefore limits its discussion to the management of access to biological and genetic resources.

There are important implications particularly for Indigenous peoples post Mabo for ownership and control of biological and genetic resources. Given these implications and the multiple, intersecting and competing rights and interests in these resources, the CSWG's consideration of these aspects appears to be relatively inadequate.

Another intergovernmental committee convened by the Department of Environment, Sport and Territories is considering strategies for implementing the Convention; and a committee convened by the Department of Primary Industries and Energy is dealing with the FAO International Undertaking and related matters.

It remains to be seen how effectively these developments can incorporate consideration of Indigenous perspectives, including Indigenous intellectual property rights, particularly in the light of Australia’s obligations under the TRIPS Agreement.

The links between protection and conservation of biological diversity, and the role of Indigenous peoples' knowledge, practices and innovations, are of more than academic interest. Indigenous peoples are increasingly concerned about exploitation of plants and animals, and other biological products and derivatives, and of the knowledge about them. Indigenous biological knowledge is being collected and utilised by pharmaceutical, cosmetic and other research companies, without regard to the custodians and holders of this knowledge, and with little or no financial returns to the Indigenous communities.74 The protection of Indigenous biological and other types of knowledge is not within the scope of existing patent or other intellectual property laws.

Native title

The High Court's 1992 Mabo decision, the Native Title Act 1993, and the 1996 Wik decision carry potentially large implications for recognition of Indigenous intellectual property rights. Some writers have suggested that the recognition in common law of native title rights, could extend to recognising customary laws, including those related to ancestral designs.75
Given the close connections between intellectual property and land in Indigenous peoples' perspectives, it is feasible that claims could be made under the *Native Title Act*, using the Mabo Decision principles, to assert Indigenous peoples' rights in intellectual property. Whatever interpretations are made of these connections, there is no doubt that the Mabo Decision, the *Native Title Act*, and the more recent Wik Decision provide firm principles for the recognition of Indigenous customary laws within the western legal system.\(^76\)
Possible Avenues for Reform

There are many possible ways in which reforms can be introduced to provide better protection for Indigenous intellectual property rights. These range from amendments to a range of existing laws, through more creative uses of these laws, a variety of common law and non-legislative approaches, to new *sui generis* systems which would be designed specifically for Indigenous peoples’ intellectual property rights and which would provide greater community control over cultural products and expressions.

While a relatively comprehensive discussion of reforms is contained in the Australian Copyright Council’s recent discussion paper, given the focus of that paper on a copyright approach it is ultimately cautious in its recommended solutions.

Reforms to Existing Intellectual Property Laws

One possible avenue for providing improved protection for Aboriginal and Torres Strait Islander peoples’ intellectual property rights is through amendments to existing laws. The problem with this ‘minimalist’ approach is that it will not go far enough to sufficiently address intellectual property rights from Indigenous peoples’ perspectives.

Amendments to the *Copyright Act* might be usefully considered that extend, or waive the fifty year period for copyright protection, and expand the scope of the Act to include provisions for copyright protection of non-corporeal forms of work, such as performances. The provisions in the *Copyright Act* for performers’ rights may offer some scope for protecting Indigenous ceremonial performances, but do not recognise the communal rights in these performances, and protection would still be subject to the limitations within the Act discussed above. The inclusion of moral rights protection would go some way towards better protecting Indigenous creators, and enabling them to seek redress for misuse of their works.

Ultimately, however, copyright and allied intellectual property laws are reactive. They operate retrospectively: persons who consider that their copyright has been infringed bring actions under the *Copyright Act* for redress. Effective use of the *Copyright Act* also requires sufficient knowledge of the workings of that Act, access to legal assistance, and adequate resources to cover costly litigation. These latter requirements may provide constraints on Aboriginal and Torres Strait Islander people seeking to use this legislative option.

The Australian Copyright Council has discussed the concept of *domain public payant* as a possible avenue for reform. This system would establish a system for the payment of
Intellectual Property Rights

royalties to be made, for the commercial uses of works that are in the public domain. As that paper argues, however, this type of system would be likely to be antithetical to Indigenous peoples’ interests, as it would depend for its operation on cultural products and expressions being in the public domain, and therefore freely accessible. This would increase the risk of exploitation of Indigenous cultural works. Since a domain public royalty system also requires state control, this would deny Indigenous peoples’ wish to control their own cultural products and expressions, and to receive benefits from the wider uses of these. 78

Other Legislative Reforms Options: Heritage Protection and Native Title

Greater protection for Aboriginal and Torres Strait Islander intellectual property rights may be achieved by considering amendments to heritage laws. This avenue is particularly interesting, as it would be a recognition (consistent with international developments surveyed above) that Indigenous peoples’ intellectual property is a component of their cultural heritage.

The principal Commonwealth law for protection of Indigenous heritage is the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. This Act is designed as a ‘last resort’ to enable the Minister to issue protection declarations over sites, areas or objects which are deemed to be of ‘significance’ and which are in threat or danger of desecration.

This Act currently does not include in its provisions scope for protection over non-tangible aspects of heritage. There is, however, increasing recognition of the fact that Indigenous heritage is a more inclusive entity, which incorporates the intangible and the expressive (i.e. song, dance, ceremony, etc) aspects of heritage as well as physical sites or places. A recent discussion paper produced by the Australian Heritage Commission in relation to the national heritage register drew attention to the importance of the intangible dimensions of heritage, and the knowledge associated with sites. Similar assertions have been made in the recommendations of the report by Elizabeth Evatt on the review of the Aboriginal and Torres Strait Islander Heritage Protection Act. Some writers have argued that amendments to the Aboriginal and Torres Strait Islander Heritage Protection Act may be a more fruitful way to better protection for Aboriginal and Torres Strait Islander peoples’ intellectual property rights. 79 It is also significant to note in this regard the provisions of Part II of the Heritage Protection Act which were introduced for Victoria. These provisions go further than those in the Commonwealth Act, in that they allow for the inclusion of items of heritage other than purely physical places or objects in determining protection. This part of the Act also provides for a system of community control over heritage—an important aspect also absent from the Commonwealth law.

The Native Title Act 1993, as discussed above, establishes principles for recognition of Indigenous customary rights. This Act may also be interpreted to include recognition of
Intellectual Property Rights

Indigenous knowledge as intellectual property rights, within the meanings and definition of native title. One writer argues that since native title is defined according to the customs and traditions of the claimant group, this by definition must imply the inclusion of intellectual property rights, because to Indigenous peoples the ‘knowledge of the properties of fauna and flora’—a component of their intellectual property—is determined according to customary laws.\textsuperscript{80}

Non-Legislative Reform Options

There are options for considering common law reforms, using such mechanisms as ‘blasphemy’, and ‘prerogative rights’. These are also canvassed in the Australian Copyright Council’s discussion paper.\textsuperscript{81} While they may establish some useful precedents, these approaches are of limited effectiveness in providing adequate recognition and protection for the full subject matter of Indigenous peoples’ intellectual property rights, and incorporating their cultural perspectives in areas such as communal rights.

The development of guidelines, agreements, protocols, codes of conduct and similar arrangements are important areas for considering effective reforms. There are some significant emerging standards internationally, such as the Principles and Guidelines for the Protection of the Heritage of Indigenous People recommended in the 1995 study of Indigenous heritage prepared by the United Nations Special Rapporteur, Erica Irene-Daes.\textsuperscript{82}

The development of regional agreements, either within the provisions of the Native Title Act or independently, provides scope for including for Indigenous control of, and full participation in, management—which could include management of natural and cultural resources, products and expressions. These regional agreement type developments are currently being negotiated in the Cape York Peninsula region of Far North Queensland and in the Kimberley region of West Australia.

One non-legislative measure with some potential to protect Indigenous intellectual property is the development by the National Indigenous Arts Advocacy Association of an authentication mark or trademark for Aboriginal and Torres Strait Islander art and cultural products. This is a label that will attach to cultural products, and which will be used to protect the origin and ‘authenticity’ of the products.\textsuperscript{83} Although the authenticity label is essentially a ‘marketing tool’, designed to protect the consumer more than the Indigenous producer or community, by ensuring that products are ‘authentic’ it may in time act as an inducement for galleries, traders, and others in the commercial art and cultural products market to recognise and respect Indigenous art, and thereby mitigate the potential for exploitation and misappropriation. It is also proposed that the development of the label be accompanied by an information and education strategy about Indigenous art and
authenticity—an initiative that would also assist in protecting Indigenous peoples’ intellectual property rights.

The development and introduction of effective reforms requires an active and committed approach throughout the entire machinery of government. A proliferation of committees, working parties and other bodies within the government bureaucracy may be an impediment to effective reforms. Conversely, with commitment and resources, these bodies can provide the impetus and the momentum necessary for meaningful and long term change.

**Sui Generis Legislative Options and Community Rights**

The inadequacies of existing intellectual property rights systems, and the challenges imposed by the GATT TRIPS are increasingly moving some communities to consider developing their own innovative solutions. One of the most potentially powerful is the development of sui generis systems for cultural protection, and community rights schemes. Some model legislation has been developed, notably by Third World countries, which seeks to establish a system for community control over cultural and resource rights. One such model, outlined by Nijar, suggests a conceptual framework and essential elements of a rights regime.

Legislation has been introduced in India providing for community control over cultural items and resources. This Act, the *Provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996* provides a model which, as well as that suggested by Nijar, could well be considered by other communities with a view to formulating approaches to recognition of their community rights. There are also debates among some Third World development scholars and advocates about sui generis systems for protection of biodiversity related community intellectual rights biological resources. Some writers have advocated such an approach, called the Model Biodiversity Related Community Intellectual Rights Act.

**Other Models: Traditional Resource Rights and Intellectual Integrity Rights**

Some emerging developments suggest a potential for introducing a more integrated approach to provide recognition and protection of Indigenous peoples’ intellectual property rights, and which incorporate the ‘holistic’ approach advocated by Indigenous peoples. For example, British ethnobotanist Darrell Posey is developing a model based on what he terms ‘traditional resource rights’. Posey bases his model on a notion of rights rather than on a model of commercialisation and commodification. ‘Traditional resource rights’ defines a ‘bundle of rights’, and Posey advocates an integrated process through which
Indigenous peoples can employ a range of international human rights instruments and principles of equity and justice to assert their claims to property. The advantage this approach offers is its foundational assertions about social justice, equity and self-determination: it embraces a more far-reaching set of Indigenous rights issues than more limited arguments for intellectual property reforms and other legislative measures.

Another model has been suggested in a 1994 Report by the Canadian based advocacy group Rural Advancement Foundation International (RAFI). In RAFI’s report *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* the authors argue that Indigenous peoples have a number of options available to them for protecting their knowledge. These include utilising existing intellectual property systems, developing a new *sui generis* legal regime, entering bilateral contractual arrangements, and establishing a system that combines each of these strategies. The RAFI report advocates an integrated system that combines all these approaches in what the authors term an ‘intellectual integrity framework’.

The RAFI model and Posey’s work are two emerging developments that move beyond simply restating the problem, towards attempting to develop some useful approaches based on a terminology largely free of value laden assumptions.
Conclusions

This paper has reviewed a range of international and national developments, legislation, policies, reports and recommendations concerning protection for Indigenous peoples' intellectual property rights. It is evident that existing copyright and other intellectual property protection laws do not provide a sufficient basis for protecting Indigenous peoples' intellectual property rights. Although the Copyright Act, and to a certain extent other intellectual property laws, have been used relatively successfully by Aboriginal people to obtain redress and compensation for misappropriation of their cultural products and expressions, there is a conceptual gap between Indigenous perspectives and western intellectual property laws.

The cases that have been brought by Aboriginal artists under the Copyright Act have demonstrated that this Act can be extended and interpreted in a way that is more accommodating of Indigenous interests, but there remain some fundamental problems with the conventional intellectual property approach.

There can be no doubt that amendments to the Copyright Act and other intellectual property laws are required to provide more effective protection for Indigenous peoples' intellectual property. The Copyright Act could, for example, be amended to extend the range of items for which copyright can attach. The term for protection under the Copyright Act could be extended beyond the current fifty year term to allow for Indigenous cultural products and expressions of some antiquity to be protected. A greater degree of information and education is required, so that Indigenous people especially are in a far better position to understand the laws that are available, and to have improved access to, and assistance in, using the existing legal framework.

There is a conceptual gap between existing intellectual property systems and the protection and recognition of Indigenous peoples' rights to their cultural knowledge, products and expressions. Indigenous peoples consider their intellectual property rights are an integral component of a 'holistic' cultural heritage, which includes a wider range of subject matter than can be accommodated within existing intellectual property laws. Given this, it becomes apparent that a different system is necessary to protect Indigenous peoples' rights, and it is for this reason that reforms to existing laws are best accompanied by the formulation of a new sui generis legislative arrangement that provides for community controlled decision-making, and financial benefits to Indigenous communities for the use by the wider community of their cultural products, expressions and knowledge. Although the terminology will need to be revised so that it is more appropriate to Indigenous concepts and perspectives, the model proposed in the 1981 folklore report offers a good basis for consideration of a suitable approach. The proposed model law could be harmonised with the provisions in the Convention on Biological Diversity, so as to provide a more integrated scheme for recognition and protection of Indigenous intellectual property. If a system for community decision-making and financial returns is devised, it could also pave the way for greater economic, as well as cultural self reliance.
Endnotes

1. A recent paper by the Australian Copyright Council provides an excellent comprehensive discussion: see Ian McDonald, Protecting Indigenous Intellectual Property: A Copyright Perspective, Australian Copyright Council, Sydney, March 1997.

2. There is a voluminous literature on Aboriginal art and copyright. For useful summaries of cases, see for example Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples, Issues Paper, Canberra, October 1994: 4–6; McDonald, op. cit: 23–30; Aboriginal and Torres Strait Islander Commission (ATSIC), ‘The application of copyright and other intellectual property laws to indigenous art and cultural expression: Cases, matters settled out of court and disputes that never went to court’, paper prepared by Terri Janke, Michael Frankel and Company, Sydney, April 1996; Duncan Miller, ‘Collective ownership of the copyright in spiritually-sensitive works: Milpurruru v Indofurn Pty Ltd’, Australian Intellectual Property Journal, 6(4), Nov. 1995: 185–207.


6. Rural Advancement Foundation International (RAFT), ‘Bioprospecting and indigenous peoples: An overview’, paper prepared for the Asian Regional Consultation on the


9. Useful summaries of these actions are to be found in Stopping the Rip-Offs op. cit: 4–6; ATSIC, 'The application of copyright and other intellectual property laws to indigenous art and cultural expression', op. cit: 23–30.

10. ibid: 13.


12. ibid: 4–12.

13. ibid: 1–2.


19. Ricketson, op. cit: 350

20. ibid.: 360–362.


24. ibid: 36.

25. ibid: 35–36; Blakeney, op. cit.


27. Peteru, op. cit: 23.


30. Posey defines ‘soft law’ as ‘a variety of instruments, declarations of principles, codes of practice, recommendations, guidelines, standards, charters, resolutions, etc’. See Posey and Dutfield, op. cit: 120.


32. ibid: 7.


34. ibid: 9.


39. See for example, Donna Craig, 'Implementing the Convention on Biological Diversity: indigenous peoples' issues', contribution to IUCN Commission on Environmental Law Technical Paper on Legal and Institutional Issues Arising from the Implementation of the Convention on Biological Diversity, presented to Regional Conference on the Biodiversity Convention, Manila, 6-8 June 1994; and see Posey and Dutfield, op. cit., for discussions about the Convention on Biological Diversity and indigenous knowledge.


42. Glowka et al., op. cit: 76-84.

43. See Posey and Dutfield, op. cit. for a good summary of these developments.

44. There is a good overview and discussion of many of these developments (as they relate predominantly to protection of art) in the Copyright Council's Discussion Paper: McDonald, op. cit.


46. ibid., para. 502.

47. ibid: 3, 17 (citing the 1976 WIPO/UNESCO Tunis Model Copyright Law for Developing Countries).

48. See for example Davis, op. cit; MacDonald, op. cit: 10-11.


50. ibid: 76.

51. ibid: 153-155.

52. ibid: 337-338.

53. e.g. Davis, op. cit; McDonald, op. cit: 38-46.

54. ibid: 38.

55. ibid: 34.


59. ibid: 23–25.

60. *Stopping the Rip-Offs*, op. cit: 2.


64. For a summary of current developments see Michael Davis, ‘Indigenous intellectual property protection consultations with Aboriginal and Torres Strait Islander peoples’, *Aboriginal Law Bulletin* 3(90), March 1997: 22–23.

65. McDonald, op. cit: 68.


70. See ATSIC, ‘The application of copyright and other intellectual property laws’, op. cit: 5; McDonald, op. cit: 23–24; Miller, op. cit.

71. Evatt, oop. cit., especially recommendations 4.1 to 4.4, 6.7, 7.1 to 7.6, and 9.4.

73. There is a useful summary of developments in Blakeney, ‘Bioprospecting and the protection of traditional medical knowledge’, op. cit: 11.


77. ibid: 50–67.

78. ibid: 61–62.


84. Gurdial Singh Nijar, op. cit.

85. Vandana Shiva et al, op. cit.

86. Posey, op. cit. and Posey and Dutfield, op.cit.