Looking Beyond Trademarks

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SESSION 10

Indigenous Intellectual Property: Protection from Appropriation and Vehicle for Economic Change

Moderator: Marion Heathcote, Davies Collison Cave Pty Ltd (Australia)

Speakers:
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True Tracks: How brand owners can respect Indigenous Culture

Cultural Notice: Aboriginal and Torres Strait Islander people are advised that this presentation contains images of, and references to, deceased persons.
Indigenous arts and rights to culture

‘When we paint - whether it is on our bodies for ceremony or on bark or canvas for the market, we are not just painting for profit...we are painting as we have always done to demonstrate our continuing link with our country and the rights and responsibilities we have to it...furthermore, we paint to show the rest of the world that we own this country, and that the land owns us’. - Galarrwuy Yunupingu
Scope of Problem

• Misappropriation of Indigenous Cultural and Intellectual Property – Indigenous Knowledge and Indigenous Cultural Expression
  
• Occurs without consent and without benefit sharing.

• This misappropriation demeans cultural practices and distorts meanings. (HARM)

• Sacred and secret knowledge disrespected.

• Unfair copycats and unjust enrichment, no benefit sharing (ECONOMIC)
Scope of Problem – Application of Law

• The misappropriation of Indigenous Knowledge and Cultural Expression is not adequately protected by intellectual property (IP) laws.
• IP Laws protect western knowledge systems based on individual property and material form culture.
• There has lead to misappropriation and Indigenous disempowerment and inequity.
• A history of mistrust which stops collaborations of both western and Indigenous knowledge systems.
Our Culture: Our Future

Linked to people, land and identity
Constantly evolving
Handed on through the generation
Roles and responsibilities to look after the knowledge and pass it on
Consultation and consent processes according to customary laws – mens/women’s business, sacred
Cultural connections remain forever

terrijanke.com.au
**IP vs ICIP**

**IP**
- Expression protected
  - Material form
- Individual
- Economic rights – except for moral rights ©
- Assignable rights
- Limited duration

**ICIP**
- Styles or underlying theme important
  - Oral and performance
- Communal
- Cultural rights
- Handed down as cultural practice
- Rights continue

Old songs, stories, rock art – public domain

Old songs, stories, rock art – cultural practice
Declaration on the Rights of Indigenous Peoples

Article 31 of the Declaration on the Rights of Indigenous Peoples asserts that, ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions’
Copyright and Indigenous art

Copyright Law Protects Indigenous pre-existing clan design with skill, labour and effort
Milpurrurru v Infodurn

Copyright owner has obligations to clan to respect customary laws
Bulun Bulun v R & T Textiles

Banduk Marika, *Djanda at the Sacred Waterhole*, 1984

*Magpie Geese and Water Lilies at the Waterhole* © Johnny Bulun Bulun
Ganalbingu clan
Art: Bibi Barba and the Hotel Eclipse

Desert Flowers
© Bibi Barba

Carpet in Hotel Eclipse, Poland

Source: http://www.eclipsehotel.pl/
Stamping out Fake Arts

- Fake Arts Harms Culture, Indigenous Art Code, Arts Law Centre of Australia and Copyright Agency Campaign
- *Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth)* – Bob Katter Bill
- Government Inquiry in the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia
True Tracks Protocols

1. Respect
2. Self Determination
3. Consent & Consultation
4. Interpretation
5. Cultural Integrity
6. Secrecy & Privacy
7. Attribution
8. Benefit Sharing
9. Maintaining Indigenous Culture
10. Recognition & Protection
Successful ICIP frameworks incorporate the law and protocols

- Make protocols the accepted national standard
- Use contracts for licensing rights to ensure terms are understood
- Use IP law to vest ownership in Indigenous people
- Roles and responsibilities covered in protocols that can be specific
Protocols for Indigenous Art

Aboriginal and Torres Strait Islander Arts Board of the Australia Council

Artform Protocols

Condition of Funding
Luxury accessories and clothing featuring artwork from contemporary Indigenous Artists

Kirrkin collaborates with Babici. The focus is on the Aboriginal artist – promote the artist and pay royalties.
Possum skin cloaks
Muramali Program

Muramali Program
Aboriginal Stolen Generation survivor, Aunty Lorraine Peeters developed a workshop to support Indigenous survivors of removal policies.
marumali.com.au
Certification Trade marks

**National Label of Authenticity**

**Supply Nation**
This mark certifies Indigenous businesses that are 51% or more owned by Indigenous people and are Indigenous managed and controlled.
Protecting the sacred Wandjina

Wandjina®
Registered trade mark owned by Kimberley Law and Culture Centre ‘within the custody of the Worrora, Wunumbal and Ngarinyin Aboriginal people’
Telstra and Muru-D

Muru is a word from the Eora Nation meaning ‘Path’

Shane Phillips, Aboriginal Community Leader with Lauren Ganley, former Indigenous Engagement Officer, Telstra.
Artwork: Aboriginal Artist, James Simon
Borobi TM Opposition by Jabree

• Borobi was the Mascot for the Commonwealth Games 2018.
• Borobi is the Yugambeh word for koala.
• An Indigenous cultural heritage body, Jabree opposed the Trademark, as it was using Yugambeh without seeking approval of the Yugambeh people.
• The Australian Trade Marks Office rejected the opposition and allowed the ‘Borobi’ Trade Mark to be registered.
National Indigenous Cultural Authority

Application discloses use
NICA identifies rights holders
Examination of Application
Written Agreement
Protocols
Trade mark
A rights tracking database
Monitor compliance
Disputes and enforcement

Source: Terri Janke, Beyond Guarding Ground
2018 - Indigenous Knowledge: Issues for protection and management

Issues of protecting and managing Indigenous knowledge:

1. Misappropriation of Indigenous arts and crafts
2. Misuse of Indigenous languages, words and clan names
3. Recording and digitisation of Indigenous Knowledge
4. Misappropriation and misuse of Traditional Knowledge
5. Use of Indigenous genetic resources and associated Traditional Knowledge
6. Misuse and derogatory treatment of secret or scared knowledge
Kerry Sillcock, IP Australia (Australia)
Indigenous Intellectual Property

IP Australia’s Perspective
Reconciliation Action Plan


IP Australia’s vision for reconciliation:

In partnership with Aboriginal and Torres Strait Islander Australians, promote respect and foster creativity, innovation and prosperity.

IP Australia has committed to:

Work with Australian government agencies and other stakeholders on IP issues relevant to Aboriginal and Torres Strait Islander Peoples.
The Protection and Management of Indigenous Knowledge

- Discussion paper by Terri Janke and Company

- Indigenous Knowledge
  - **Traditional Knowledge** includes know-how, practices, techniques, skills
  - **Traditional Cultural Expressions** includes visual imagery, performance, design, words, names
IP Australia’s Consultation Process

Commenced on 19 September, closes 1 February 2019.

Participate through:

– Online survey
– Written submissions
– Attend roundtable session

Brisbane 6 November  
Sydney 12 November  
Darwin 26 November  
Perth 29 November

Cairns 7 November  
Alice Springs 14 November  
Broome 28 November
Two key objectives:

- Promoting economic opportunities through the use of IP rights
- Protecting the cultural integrity of Indigenous Knowledge
Part A of the Consultation Paper

• Broad, high-level approach
• The six areas identified in the Discussion Paper:
  – Misappropriation of Indigenous arts and crafts
  – Misuse of Indigenous languages, words and clan names
  – Recording and digitisation of Indigenous Knowledge
  – Misappropriation and misuse of Traditional Knowledge
  – Use of Indigenous genetic resources and associated Traditional Knowledge
  – Misuse and derogatory treatment of secret or sacred knowledge
Traditional Knowledge and Genetic Resources

- Primarily involves research and patents that involve Traditional Knowledge, including knowledge about uses for genetic resources
- Proposals relate to ensuring traditional owners are consulted, acknowledged and respected
- Encourage use of IP rights to differentiate authentic Indigenous products and services
Commercial use of Indigenous Words and Images

- Prevent registration of offensive trade marks and designs
- Require the free, prior and informed consent of traditional owners to use culturally significant words and images in registered trade marks or designs
- An online database of culturally significant words and images which cannot be used in a registered trade mark or design without permission
Supporting Initiatives

• Indigenous Advisory Panel
• Education and awareness activities
Karaitiana Taiuru, Trade Marks Māori Advisory Committee, Intellectual Property Office of New Zealand (New Zealand)

Disclaimer: Personal views only created with cooperation of the Māori Trade Marks Committee.
MIHI

I acknowledge the traditional custodians, the Indigenous Peoples of this area – the Gadigal of the Eora Nation. Bujarri Gamurruwa.

Tēnā koe e ngā rangatira o te wā nei.
BACKGROUND TO THE FORMATION OF THE TRADE MARK ADVISORY GROUP

• In 1993 the Ministry of Commerce consulted on the TM, Patents and Copyright law reviews.

• Lack of Māori recognition was a common theme with feedback.

• In 1996 a consultation document sought Māori feedback from 9 hui around the country. This was received well by the community and lead to the formation of the Māori Trademarks Advisory Committee (MTAC).

• This was later in 2002 the MTAC was ratified in legislation and the committee was convened in 2003.
1. The **Māori TradeMark Advisory Group** is appointed under Sections 177, 178, 179 and 180 of the Trade Marks Act 2002. It operates under a MOU and Terms of Reference with IPONZ.

2. The **Patents Māori advisory committee** are appointed by the Commissioner of Patents under section 225 of the Patents Act 2013.
PROCESS OF DETERMINING WHAT IS OFFENSIVE OR NOT

• IPONZ selects all Trade Marks with a Māori word or image and adds to a CMS

• The Māori Advisory Committee rank the application:
  - *Offensive (why)
  - Likely to be offensive
  - Not offensive
  - Conflict of Interest

• Majority rules with discussions on marks we can not initially agree on
<table>
<thead>
<tr>
<th>Year</th>
<th>Total trade mark applications filed (classes)*</th>
<th>Applications with Māori element</th>
<th>Applications sent to MAC number and (%)</th>
<th>Trade marks deemed potentially offensive to Māori by MAC</th>
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<tbody>
<tr>
<td>2015</td>
<td>22,122 (45,800)</td>
<td>381</td>
<td>301 (79%)</td>
<td>15</td>
</tr>
<tr>
<td>2014</td>
<td>20,390 (39,472)</td>
<td>417</td>
<td>244 (58%)</td>
<td>4</td>
</tr>
<tr>
<td>2013</td>
<td>18,559 (35,370)</td>
<td>363</td>
<td>210 (58%)</td>
<td>9</td>
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</table>
# Offensive Trademark Statistics

<table>
<thead>
<tr>
<th>Year</th>
<th>Accepted</th>
<th>%</th>
<th>Refused</th>
<th>%</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td>548</td>
<td>90%</td>
<td>64</td>
<td>10%</td>
<td>612</td>
</tr>
<tr>
<td>2017</td>
<td>358</td>
<td>92%</td>
<td>32</td>
<td>8%</td>
<td>390</td>
</tr>
<tr>
<td>2016</td>
<td>286</td>
<td>96%</td>
<td>13</td>
<td>4%</td>
<td>299</td>
</tr>
<tr>
<td>2015</td>
<td>286</td>
<td>95%</td>
<td>15</td>
<td>5%</td>
<td>301</td>
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<tr>
<td>2014</td>
<td>240</td>
<td>98%</td>
<td>4</td>
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</tr>
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WHAT COULD BE BETTER?

• Most importantly WAI 262 the Māori claim for traditional knowledge to be acknowledged has yet to be advanced, resulting in a loss of Patent claims with endemic native species, Traditional Knowledge and Genomics.

• There are no written guidelines resulting in some confusion.

• People can still have an offensive to Māori brand, just without a TradeMark.
WHAT WORKS

The reduction in offensive Trade Mark registrations is proof that this committee is a success and could be mirrored for any Indigenous communities.
Thank You and Questions