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On Traditional Cultural Expressions: Inspiration From Australian Aboriginal Art Protection

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Abstract

This paper seeks to further the understanding of effective protection strategies for traditional cultural expressions. It mainly studies the Australian Aboriginal art protection experience, followed by two implications being revealed. Finally, the paper calls for more indigenous participation in international rule-making.

Key words: Traditional cultural expressions; Australian aboriginal art protection; Inadequate protection; Collective/individualistic cognition; Indigenous participation

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1. INTRODUCTION

As for holders or custodians of traditional cultural heritage, protection always stays the top priority. For the past few decades, indigenous people have come to realize the need to utter a stronger claim for their cultural and economic rights than ever before. For instance, the Australian Aboriginal art industry is estimated to have a turnover of approximately 130 million US dollars, of which the indigenous community gets only a small fraction of 23 per cent. Conflicts arise mainly from the increasing misuse and misappropriation of traditional cultural expressions by third parties.

Since the protection of traditional cultural expressions is usually discussed in copyright or copyright-plus terms when applying the conventional intellectual property regime, we will be examining some Aboriginal art protection cases first to see how effectively the Australian copyright law works, followed by some inspiration from that particular experience. Despite relentless efforts, protection of indigenous cultural assets is still undergoing multiple struggles in Australia. (Butterly & Lixinski, 2020)

The socio-legal approach will be first employed in this paper since any discussion of the issue must be set in the constantly changing social and economic circumstances. After all, the issue of intellectual property protection cannot be discussed in a vacuum. And the black-letter approach will also be used to do some research on intellectual property laws in relation to the protection of traditional cultural assets.

2. AUSTRALIAN ABORIGINAL ART PROTECTION

Australia embraces abundant Aboriginal tradition. With the efforts of both Aboriginal groups and Australian authorities, protection of traditional cultural expressions has achieved success to a certain degree. Study of the Australian cases will surely provide beneficial experience to other indigenous communities yearning for proper and adequate protection of their traditional cultural assets.

2.1 Case Studies

We include in this paper the following four cases: Bulun Bulun v. Nejlam Investments and Others (1989); Yumbulul v. Reserve Bank of Australia (1991); Milpurrurru v. Indofurn Pty., Ltd. (1995); and Bulun Bulun & Anor v. R & T Textiles Pty Ltd (1998).

2.1.1 Bulun Bulun v. Nejlam Investments and Others (1989)

The first case of the Australian Aboriginal community to attract national attention was the 1989 action brought

by Mr. John Bulun Bulun and 13 other artists to obtain compensation in relation to the unauthorized replication of their works on T-shirts. Injunctions and an out of court settlement of 150,000 Australian dollars were awarded to the applicants in this matter. The judgment of this case was said to have broken the drought in copyright law concerning Aboriginal art. (Janke, 2003)

The case caught the public's eye because it came shortly after Australia's bicentennial celebrations. A more important reason is that for the nation's indigenous artisans and communities, visual arts and crafts constitute a big part of their source of income.[1] To the Aboriginal people, as a result, the degree of intellectual property protection they enjoy is of great importance.

2.1.2 Yumbulul v. Reserve Bank of Australia (1991)

Galpu Clan's claim of communal proprietorship in sacred images was rejected by the Federal Court in *Yumbulul v. Reserve Bank of Australia.* The case was an attempt by representatives of the Galpu Aboriginal community to stop the replication by the Reserve Bank of Australia, of the image of a Morning Star Pole on a commemorative banknote. The designer, who was also a Galpu member, had gained his authority to create the pole by way of sacred ceremonies and an initiation. The Galpu Clan viewed it as a communal obligation to stopping an outside entity from misusing the Morning Star Pole, and they considered its reproduction by the Reserve Bank of Australia a misuse. (Torsen, 2006)

The trial Judge was sympathetic to the clan's claim. Still he considered that the artist who had created the pole had successfully disposed of his intellectual property rights in it through a legally binding agreement. It was the Judge's lament that the then Australian copyright law did not provide adequate recognition of indigenous community claims to govern the replication and use of works which are fundamentally communal in origin. The Judge went on to conclude by recommending that "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators". (Janke, 2003)

2.1.3 Milpurrurru v. Indofurn Pty., Ltd. (1995)

Another issue related to the failure of the Australian courts to recognize "communal proprietorship" of traditional works is their failure to award communal harm compensation. In this case, damages were awarded for breach of copyright to a couple of Aboriginal artists whose designs were wrongfully replicated on carpets. The court claimed that this was a fundamental breach of copyright, which includes a culturally derogatory use of the infringed works.

In a strongly-worded decision, Justice von Doussa admitted that the unauthorized use of the artwork was a kind of piracy of cultural heritage. He also acknowledged that the copyright infringement could have profound influence in relation to the cultural environment in which they lived. What was even worse in this case was that the designs had been used on a medium carpet which was to be trampled upon. Although strong in its wording, the court's decision still rested on conventional copyright law and compensated only the individual authors, not the larger community as a whole. (Janke, 2003)

2.1.4 Bulun Bulun & Anor v. R & T Textiles Pty Ltd (1998)

The more recent Australian case concerning the communal rights of an Aboriginal people in Australia, *Bulun Bulun & Anor v. R & T Textiles Pty Ltd,* arose as a result of the import and sale in Australia of printed clothing fabric which was an infringement of the copyright of the Aboriginal artist, Mr. John Bulun Bulun, in his work "Magpie Geese and Water Lillies at the Waterhole". Applicants Mr. Bulun Bulun and Mr. George Milipurrurru were both members of the Australian Aboriginal Ganalbingu people. On the one hand, Mr. Bulun Bulun sued as legal owner of the copyright in his artistic work and sought remedies for copyright infringement under the Australian Copyright Act 1968. On the other hand, Mr. Milpurrurru went through the proceedings in his own name and as a representative of the Ganalbingu people arguing that the Ganalbingu were the equitable owners of the copyright in the painting. (Janke, 2003)

However, the court dismissed the representative action of Mr. Milpurrurru against the respondents, and went on to rule that the rights of the Ganalbingu were only limited to a right in personam against Mr. Bulun Bulun to enforce his copyright in works against third party infringments. In that very case, as Mr. Bulun Bulun had already executed his copyright, it was not permitted for the intervention of equity to award extra remedies to the beneficiaries of the fiduciary relationship. The Court went on to speculate that had Mr. Bulun Bulun not succeeded in taking action to execute his copyright, the beneficiaries of the fiduciary relationship might have been able to sue the infringer in their own names. This did not mean that the Ganalbingu community had an equitable interest in the copyright in the work, but were the beneficiaries of the fiduciary obligations owed to them by Mr. Bulun Bulun. (Janke, 2003)

2.2 Discussion

The previous four cases turn out to illustrate the following two points: 1) the incompatibility of the conventional intellectual property protection system; 2) the collective *versus* individualistic cognition in terms of copyright or copyright-plus protection.

2.2.1 Inadequate Protection

Some scholars argue that the existing intellectual property protection systems and practices are efficient in one way or another.

[1] Intellectual property and traditional cultural expressions/Folklore. Retrieved from http: / /www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf (last accessed on 26/08/2021).

Kuruk (1999) discusses significant problems with protecting traditional cultural expressions under current intellectual property laws. The author discerns much enthusiasm in Africa while noting the reluctance of the industrial world to adopt a binding international instrument on the protection of traditional cultural expressions.

Sackville (2003) reviews the continuous but painful history of dealings between Australian indigenous communities and non-indigenous peoples when indigenous cultural protection is concerned. The Australian Copyright Act 1968 provides remedies to artists whose works have been copied without their permission. According to the expert, the Australian legal system offers a sample for such protection in the international arena.

Weeraworawit (2003) sees the current intellectual property framework as efficient enough to safeguard indigenous interests. In other words, indigenous communities are suggested to remain realistic when expecting the international community to agree on the substance of the protection of traditional cultural expressions. International consensus needs more consultations in the international community.

Fischer (2005) advocates a cautious approach in respect to the latest attempts to establish an international regime of protection for traditional cultural expressions. And it recommends continuous efforts to train indigenous peoples to use current intellectual property laws to protect their cultural heritage.

But many more academic people have had intensive study of the incompatibility of the conventional intellectual property regime to protect indigenous interests.

In the previous four cases, Aboriginal Australians seek to employ the existing intellectual property system to secure their cultural and economic rights, with legal and practical lessons learned therefrom. The research indicates that conventional protection systems are not seen by indigenous communities as meeting their interests, and that non-IP measures also have a role to play in securing comprehensive and effective protection. (Janke, 2003)

Paterson and Karjala (2003) explore the deficiencies and general inappropriateness of the pre-existing intellectual property system regarding the claims of indigenous peoples for greater protection in respect of their intangible cultural heritage. Then they go on to examine the possibility of non-IPR protection.

Lewinski (2003) focuses on the previous and present attempts to achieve international protection of folklore. The scholar points out the legal and practical deficiencies of current intellectual property protection of folklore and suggests any inclusive protection model should take into account the various needs of indigenous peoples in respect to traditional cultural expressions.

Oguamanam (2004) proposes the idea of integrating indigenous knowledge-protection protocols into the intellectual property regime. After Oguamanam (2014) begins to recognize the inadequacy of western IP laws in relation to indigenous knowledge, he goes on to suggest that *sui generis* proposals should be drawn within the framework of conventional intellectual property system.

Torsen (2006) explores some problems in the existing international intellectual property regime and its failure to protect traditional cultural expressions, and attempts to suggest how the international protection of traditional cultural expressions could be accomplished by spurring the development of a new, specific body of law.

What is more, a couple of scholars have moved on to propose constructive solutions to the aforementioned issue.

Bluemel (2004) examines the values enhanced or undermined by indigenous group participation in international rule-making and concludes that participation should be highly context-dependent. Helfer (2004) examines the role of IGC as a forum for integrating new intellectual property protection standards into WIPO. Carpenter (2004) advocates the adaptation and/or expansion of the current intellectual property regime to accommodate various cultures and interests. Anaya (2004) explores indigenous issues from the international human rights perspective. Cottier and Panizzon (2004) discuss the possibility of devising a new form of intellectual property protection that would recognize the social value of indigenous knowledge and promote its incorporation into trade regimes while respecting local autonomy and cultural values. Riley (2005) suggests a bottom-up legal system, with tribal law as the foundation and together with national and international laws, to protect indigenous peoples' cultural property.

To sum up, a great many of scholars do regard the conventional intellectual property system as not adequate and proper enough for the protection of indigenous claims and interests.

2.2.2 Collective/Individualistic Cognition

Any discussion of the protection of traditional cultural expressions seems to begin with conventional intellectual property law, such as copyright law, as the major means of protection. However, the forms of protection necessary for traditional cultural assets far exceed the scope of protection that can be afforded by copyright law.

As can be seen from the analysis of Australian cases, the existing copyright law does not easily recognize communal authorship and, to a lesser extent, communal ownership. It has been suggested that both of these matters could be dealt with by statutory amendment. A second limitation of copyright law is its insistency upon material fixation as a precondition for protection.[2] The limited duration of copyright protection has been regarded

[2] WIPO Intellectual Property Handbook: Policy, Law and Use - Retrieved from https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf (last accessed on 26/08/2021)

as another problem for traditional artistic works, some of which may have come into being thousands of years ago. Again this problem might resort to proper legislative drafting. (Carpenter, 2004)

Thus the legal structure of copyright seems to be ill suited to protect traditional works with its emphasis on private proprietary rights. To be more specific, the main obstacle to copyright protection of folklore lies in the fact that copyright protection is based on an individualistic concept as opposed to a collective one. (Lewinski, 2003)

This view is shared by other scholars. Oguamanam (2004) argues that the incompetence of western intellectual property regime to appropriately cater to indigenous knowledge forms exists primarily because the former is not designed for the protection of the latter. Thereby there is a crisis of legitimacy in the intellectual property system. The conventional intellectual property regime is not the perfect answer for enhanced international protection of traditional cultural heritage.

3. CONCLUSION

Since the protection of traditional cultural expressions is ever developing, this paper feels the need to examine various policy options based on actual regional, national and international experiences. The paper first sets out to probe into the Australian Aboriginal art protection experience, followed by scholastic discussion of the efficiency of the pre-existing intellectual property mechanism.

Simply put, the international community differs on how to enhance protection of traditional cultural expressions. The industrial world generally holds that it is possible to offer greater protection of traditional cultural expressions under conventional intellectual property systems. But there are inadequacies in the current intellectual property regime in relation to the protection of traditional cultural heritage. And the most desirable remedy for some developed countries is through adaptation or expansion of existing intellectual property laws.

However, most indigenous communities argue that the convention intellectual property protection may only be effective under limited circumstances and to a certain extent. As holders or custodians of various forms of cultural heritage, indigenous people also report that the lack of funds and knowledge may also be a roadblock to employing legal instruments to protect their cultural heritage. What indigenous peoples worry most is the intellectual property regimes' individualistic characteristic, which does not recognize the collective feature of indigenous culture. This inherent deficiency leaves the current intellectual property system unsuitable to provide international legal protection for traditional cultural expressions.

To sum up, the Australian experience in search of copyright protection for traditional cultural assets stays beneficial for other indigenous communities. However, there is still the call for developing a comprehensive protection model which takes into account the various needs of indigenous peoples in respect of traditional cultural expressions. The inclusive model should not hold back indigenous groups from properly protecting their traditional cultural rights. And this mechanism should be open and flexible enough to accommodate the different needs of various indigenous groups.

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