Indigenous communal moral rights

Perspective
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Intellectual property law has slowly realised that it hasn’t really given Indigenous people a fair go.¹ Like the debates that Mabo inspired, intellectual property law has also been forced to consider a world beyond its cultural borders.²

Initially in Australia it was the copyright and Aboriginal art cases of the 1980s and 1990s that highlighted how a variety of social and cultural relationships determine ownership in Aboriginal art.³ For example, in the 1998 Bulun Bulun case, the artist Johnny Bulun Bulun explained how he painted his artwork only through permission of the senior members of the Ganalbingu people.⁴ As the Ganalbingu people also held rights in Bulun Bulun’s work, it was argued that it was communally owned. This case directly challenged traditional intellectual property conceptions of individual ownership.

In the years that have followed there has been lively discussion about the possible legal directions that would accommodate differing Indigenous interests such as community ownership.⁵

In 2000 the Copyright Act 1968 (Cth) was amended to include moral rights. Moral rights aim to prevent unauthorised or derogatory treatment of works – things like not acknowledging the name of the creator of the work or displaying works in contexts that distress the creator.⁶ At the time of the parliamentary debate, Senator Ridgeway argued that the Bill should be amended to also give Indigenous communities’ moral rights.⁷ Whilst rejected by the Senate, it was acknowledged that further provisions would have to be introduced to accommodate the different needs of Indigenous communities. Thus it was no surprise when the Federal Government made public statements committing to the drafting of an amendment to the Copyright Act specifically concerned with Indigenous communal moral rights.

In the coming weeks, the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 will be presented to parliament. Yet the effects of this legislation have been ill-considered. The focus is on creating a ‘legal solution’ rather than developing realistic and practical outcomes for Indigenous people.

The intention of the draft Bill is to give “Indigenous communities legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom.”⁸ The legislation intends to “provide a simple, workable and practical schema for Indigenous communities, artists, galleries and the public.”⁹

However, the draft Bill is far from simple or practical. Instead it is phrased in highly complicated and legalistic language. This Bill is difficult to understand, even for a lawyer, and raises serious questions of access for the people the Bill is designed for. There are five requirements that must be met before Indigenous communal moral rights could be recognised.¹⁰ These are not explained well in the legislation. Given that Indigenous communal moral rights rest on successfully meeting these stated requirements, it
important that the people who will use the Bill understand what they must do for their rights to be recognised.

The draft Bill also presents serious practical obstacles for Indigenous people and communities seeking to protect their knowledge and its use. Another significant impediment is that the onus is upon the Indigenous people and communities to initiate contact and negotiation with those interested parties intending to utilise their art for commercial purposes, rather than vice versa as might be expected. This ignores the remoteness of rural communities. Making Indigenous people and communities responsible for contracts and agreements forgets the difficulties that these communities have accessing legal advice. If we remember that English is not the first or in some cases even the second language of many Indigenous communities, the terrain which this Bill intends cross appears increasingly difficult.

Such practical problems of language and access should alert us to the difficulties of legislating solutions to complex social issues. We should be more attentive to the tendency in law making communities to assume that the most important issues revolve around what the law says rather than the effects of the law. The playing field is not level and it should not be assumed that Indigenous people have the same opportunity to access law as big businesses and companies do. The point worth reflecting upon is, if people can’t understand the law that has been designed for them, how are they supposed to use it – and how will it deliver better protection for Indigenous peoples’ cultural knowledge. The Bill is a good face saving measure for the government but it will fail to deliver any real benefits for Indigenous communities. It again shows how wide the gulf is between governmental imagination and reality.

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5 These discussions have been held in both national and international contexts.
6 Part IX Copyright Act 1968.
8 Department of Communication Information and Technology, Department of the Attorney General and Department of Immigration and Indigenous Affairs, Indigenous communities to get new protection Joint Press Release 19 May 2003.
9 Ibid