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Resources


Jane Anderson

In 2004, the Museum of Victoria in Australia held an exhibition of previously unexhibited Aboriginal bark etchings from collections held at the British Museum and the Royal Botanical Gardens in Kew.1 The collection was assembled around 1854, and provenance of the bark etchings could be traced to the Dja Dja Wurrung Aboriginal community in Central Victoria. The bark etchings constitute the oldest surviving paintings from south-east Australia (Pratt 2006).

Through a combination of Indigenous activism and academic scholarship around questions of who owns the past, and who owns culture, a broader recognition of the need to develop new kinds of relationships among museums and Indigenous people and communities, and a new awareness of the extent of Indigenous people’s interests in controlling, accessing, and using their cultural heritage materials that are held within museums and other cultural institutions has emerged.2 Importantly such changing relationships in Australia were also produced through changing political environments that saw an increased recognition of Indigenous rights more generally. In responding to these changing political environments, the Museum of Victoria built frameworks explicitly addressing the need for productive working relationships with Indigenous communities.3 Thus, prior to the exhibition, the Museum of Victoria sought and engaged in a range of consultations with the Aboriginal Cultural Heritage Advisory Committee and with other relevant Aboriginal organizations. Through this process, the Museum of Victoria secured initial moral support from the relevant Indigenous communities for the exhibition (Willis 2008).

However, six weeks before the close of the exhibition, a senior representative for the Dja Dja Wurrung community called for the Australian Prime Minister to ask the British Museum to return the bark etchings permanently (Willis 2008:53). Generally, the claims focused on traditional ownership of the bark paintings as significant Aboriginal cultural heritage, and, as such argued that the material should remain in Australia. Concerns regarding ownership of the tangible and intangible dimensions of the work were also implied. In this sense, the claim also extended to the intellectual property dimensions of the artwork—the cultural knowledge that the artworks contained and transmitted. The claims received significant publicity in the national media and in other political networks, and tensions between community spokespeople and the Museum increased (Willis 2008:53). At the request of the community, an inspector from the Aboriginal and Torres Strait Islander Heritage Protection Act (1984) imposed a series of emergency declarations preventing the museum from returning the items.4 As a result, the Museum of Victoria was unable to fulfill its contractual obligations to the British Museum and the Royal Botanical Gardens (Pratt 2006:243). This meant that the Museum of Victoria was caught, on one hand, in
a breach of contract position with the other overseas institutions, and a complicated legal and political dispute under the Aboriginal and Torres Strait Islander Heritage Protection Act over ownership and provenance of the works themselves.

The Museum decided to try and negotiate the dispute. However, after several months of unsuccessful negotiations between the Museum and the Djia Djaj Warning community (during which period a representative from the British Museum was also flown to Australia), the Museum of Victoria took the case to court and successfully challenged the legality of the emergency declarations keeping the echings in Australia. In the Court proceedings, Ryan J. decided that the inspector "lacked the power to make the second and subsequent emergency declarations" (Proctor 2006:243). Consequently, the protective declarations over the objects were lifted. A further permanent declaration of preservation was unsuccessful and the bark-etchings were returned to the United Kingdom. The Djia Djaj Warning community were manifestly disappointed with this outcome. Cultural theft, ongoing dispossession and the perpetuation of colonialist collection rationales were themes taken up in popular media and scholarship. The community itself continues to make arguments regarding both the real property and the intellectual property ownership over the echings and justify such claims by pointing attention to the irreconcilibility of traditional ownership rights, the ongoing and unjustifiable dispossession of cultural property, and the extent that Indigenous claims to cultural material remain very difficult and therefore marginal concerns within museums globally.

The Problem

There was a long historical moment when the collection of any kind of cultural material relating to Indigenous or traditional peoples, lifestyles and cultural practices was actively encouraged and endorsed without regard to the Indigenous laws and cultural responsibilities that governed these materials. Across vast territories as well as in new and emerging nation states, peoples and their cultural objects, were stolen, taken, acquired or traded. As new academic disciplines emerged, these collections continued to grow as they offered material objects for the study, experiment, analysis, and measurement of different cultures and different peoples.

The changes in technology that occurred at the turn of the 20th century greatly increased means through which such material could be collected. Photographs and sound-recordings of community life and practice were added to the collections—and so for the majority of the 20th century an enormous mass of visual documenting material was also collected and assembled on and about Indigenous peoples. As an example of the extent of material that a single individual could collect—in her ethnographic research conducted in Bali Indonesia between 1936 and 1938, Margaret Mead made over 35,000 photographs and over 33,000 feet of motion picture film. None of this material remained in Indonesia, and most of it remains at the American Museum of Natural History in New York.

While it is clear that some objects and material were traded or were a result of trading alliances between specific groups and between those groups and early colonists, the very size and content of these collections suggests that there were other ways of assembling these objects—and many of the methods employed for doing so were ethically irresponsible.

Most of these collections are now found in museums, archives libraries and universities around the world. Some museums have emerged from the extent of one person's collection—this is the case with the Gustav Heye's collection that now forms the core corpus of the Smithsonian's Museums of the American Indian (Pepper 2009). Some institutions are much more eclectic deriving their original collections from multiple researchers through multiple time periods. Often Indigenous cultural material is far removed from its original contexts—for example it is not unusual to find material from the Pali-kur peoples from Brazil in Sweden, material from the Bugis people from Indonesia in the Netherlands, material from the Haida peoples from Canada and US in Germany and material from the Yolngu people in Australia in Britain and France. This dislocation of material from its original site to other countries illustrates clearly who these collections were and were not for. Indigenous cultural material is spread across the world, and almost every cultural institution has something—while the institution may have acquired it legitimately, most often providence is hard to find and thus legal ownership will be complicated. This matters when questions of legitimate ownership arise, when repatriation of material is requested or when digital access to collections is being considered.

Contemporary negotiations over cultural heritage, traditional cultural expressions and expressions of culture, raise a number of challenges for cultural institutions. This is not only in relation to the historical materials, but also for the material currently being collected. For there are now many more researchers working in Indigenous communities than there were at the height of the colonial collecting endeavor, and the material being collected is largely in digital form. It is and will continue to find its way into cultural institutions—and many of the same problems of ownership that haunt earlier collections will remain because a complete rethinking of who owns the research materials produced in the course of field-work has not yet occurred.

The current challenges arise from the complex social, historical, cultural, legal and political conditions informing the collections themselves. As the opening example illustrates, these elements can manifest in a variety of ways: there can be disagreements in what is being claimed/owned, and by whom, as well as confusion about the best way to respond, both from a museum perspective and from an Indigenous perspective. Even in circumstances of consultation and negotiation, contest over the rights and responsibilities of museums and cultural institutions to Indigenous and local collections can still emerge. This can be attributed to differing value systems and interpretations of history that Western scholars and museums bring into an Indigenous world, unequal (historical and contemporary) power relationships in relation to accessing collections by various parties, and changing legislative regimes governing (cultural) ownership, control and use of collections within museums and cultural institutional settings.

Part of the difficulty is that there is no clear legislative framework to provide guidance over the management, access and use of these collections—especially when there are different Indigenous perspectives about how and when these collections should be accessed and used. There is no difference in how non-Indigenous material and Indigenous material is or should be treated within an institution. But not all material is the same—and for Indigenous collections, the circumstances regarding the acquisition of this material are an issue of substance that makes a significant difference and which
should require different management policies and practices. Indigenous cultural material also tends to occupy a complicated legal status (WIPO 2011a). This is because of the age of the collections, their possible status as chattel property of the museum, that most of this material was never recognized as being legally owned by Indigenous people to begin with, and that ownership of photographs, sound records, films and manuscripts vest with the author or maker of this material. Of course the law has limited space to recognize the complex historical conditions and relations of power that legitimize and uphold certain forms of entitlement over others. As intellectual property law is a culturally specific body of law, that is, it is constituted and informed by cultural values that are predominately European in origin, it does not recognize Indigenous or customary laws relating to the ownership and management of cultural knowledge and property.

In the opening example, legal determination was able to resolve part of the dispute to the satisfaction of the museums, but the Indigenous claims regarding traditional ownership were not, and arguably could not, be fully addressed through law. The main stumbling block for Indigenous people in claiming ownership of cultural materials within museums and other cultural institutions is that they are not legally recognized as the rights holders because through the legal definition, they are neither authors nor consequently owners of this material. This means that they have very limited capacity to argue and assert legal rights and therefore negotiate management frameworks that are culturally appropriate for the material.

With the amount of material within cultural institutions, the increased conflicts and disputes in relation to control and access of these collections, and the increasing role of intellectual property law in governing ownership of these collections, it has become clear that some kind of international guiding framework, in conjunction with several other tools, might be useful in helping cultural institutions come to terms with their new responsibilities regarding these collections.

The Resource
Since 1999, the World Intellectual Property Organization has paid special attention to issues relating to Indigenous knowledge. The Traditional Knowledge Division, focusing on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore (TKGRTCEs) was established following extensive consultations in 1998 and 1999 with a wide range of interested parties including primarily Indigenous peoples and local communities, NGOs, governmental representatives, academics and the private sector (WIPO 2011b). The consultations and the following Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) sought to identify the IP needs and expectations of the holders of traditional knowledge and cultural expressions (WIPO 2001).

Within this Division, the work of the Creative Heritage Project aims to assist museums, archives, libraries and other cultural institutions and Indigenous and local communities with managing IP when recording and digitizing intangible cultural heritage so as to both preserve cultural heritage and protect it against misappropriation and misuse.

Importantly this Project seeks to develop capacity-building resources including practical IP guidelines and information technology tools for managing IP issues. The aim is to provide Indigenous people and communities with a range of practical tools for managing IP options when documenting, recording and digitizing intangible cultural heritage. One of these tools includes a resource book on IP issues for museums, archives, libraries and other cultural institutions, specifically dealing with the management of IP in relation to current and future Indigenous collections.

In providing guidance to cultural institutions in relation to the IP issues that arise for collections of Indigenous cultural material, Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives aims to help build and strengthen relationships between cultural institutions, Indigenous peoples and traditional communities. Through numerous examples and analysis, the publication explores areas of cultural heritage and IP law and policy in order to elucidate questions and issues relating to the management of collections, documents and recordings related to TCEs by museums, libraries, archives and other cultural institutions.

Through focusing on already existing and emerging practice, this resource is directed towards rethinking the role, responsibility, and behavior of cultural institutions both in their dealing with IP law and Indigenous peoples.

The focus of the publication is on the interface between the preservation, protection, and promotion of Indigenous cultural material. This is because cultural institutions usually hold tangible expressions, for example products of art and handicrafts as well as materializations—namely photographs, films, audio and audio-visual recordings, manuscripts and transcripts. The rights of Indigenous peoples and communities in relation to these materials often sit uneasily within the balance struck by IP law. These rights were not developed with Indigenous peoples' needs in mind. From a public policy perspective, IP law does not take into consideration different concerns or aspirations for the circulation of such material.

While this publication does not attempt to advocate for a particular approach or impose singular solutions, it does provide information on current practices and their relationship to IP laws and principles and to demonstrate the effects those practices have had on Indigenous peoples, communities, and institutions. It aims to not only to facilitate the resolution of some of the unique issues facing cultural institutions but to also illustrate how relationship building and collaboration is key to the future successful management of these collections.

Divided into three separate sections, the first part details what some of the problems are, how they have come about, and what the IP implications are. The second part is a comprehensive explanation of the IP issues that are specific to museums, libraries and archives. This includes explanations about the objects of copyright protection, and what copyright protects and what it does not. It considers the legal definitions of authorship and the issues of orphan works and what the implication of this category of works is for Indigenous cultural materials. The differences between economic and moral rights are detailed as well as which jurisdictions recognize moral rights and which do not. The question of exceptions and limitations that are particular to cultural institutions are also outlined as well as how and when these are applicable or need to be renegotiated in
relation to Indigenous collections. The multiple forms of ownership, including crown ownership, joint ownership, and legal rights. It outlines some of the different approaches to digital collections that are emerging and the development of codes for ethical and responsible research practice. This is because it is often in the research phase where the material that institutions are asked to later manage is created. The examples draw from current and new practices within Australia, New Zealand, Vanuatu, Fiji, and the United States among several others and have largely been developed by institutions in collaboration with local Indigenous communities. The point of including these examples of current practice is to help other institutions see the kinds of new approaches that are possible, and while there is not a one-size-fits-all framework, there are many examples that can be adopted and repurposed by other institutions that reflect their own needs.

As many cultural institutions are now aware, a central problem for the future management of Indigenous collections is that Indigenous peoples and communities have historically been disenfranchised from these collections, while at the same time being their legitimate custodians, owners, and managers. The challenge is to find ways of dealing with the past practices of exclusion and marginalization, as well as building new relationships that recognize the value of these collections to Indigenous peoples. This requires recognizing that Indigenous peoples have legitimate perspectives about how specific material should be accessed and controlled, and by whom. The western logic that promotes the idea that all knowledge is and should be freely available is not universal. Finding space where real negotiation and dialog can occur about how these collections should be made available to the public in the future is a long and engaged project that requires recognizing the inequitable legal and ethical practices that produced many of the collections in the first place. This is not always a comfortable discussion. Yet it benefits Indigenous and traditional communities and institutions to step beyond this uneasiness in order to understand what the best ways for protecting, promoting, and providing stewardship for the rich cultural heritage that communities have been shaping for millennia, and which continue to be shaped and reshaped. As many institutions have discovered, working with communities often provides invaluable information about the collections, including more in-depth and nuanced social and cultural meanings. Such relationships also offer new benefits to Indigenous peoples and communities.

It is within this complex and sensitive context that this publication offers itself as resource—to help open discussion on what problems arise, what the legal frameworks are that govern cultural material, and how these can be renegotiated and new relationships developed that can contribute to the successful and collaborative management of these valuable cultural resources into the future.


It is available for download as a PDF at: http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf To request a hard copy of the publication, contact the Traditional Knowledge Division at the World Intellectual Property Organization on +41 22 733 5428.

Notes

1. The exhibition, running from March –June 2004, was entitled, Etched on Bark 1854: Kulik Barkis from Northern Victoria.

2. This recognition led to the key policy document: Museum Australia, Continuous Cultures, Ongoing Responsibilities – Principles and Guidelines for Australian Museums working with Aboriginal and Torres Straight Islander cultural heritage, February 2005.

3. For instance, a subcommittee of the Museums Board of Victoria, the Aboriginal Cultural Heritage Advisory Committee was established in 1984. The Committee is comprised of 22 representatives from Victorian Aboriginal Communities.

4. These emergency declarations were made under subsection 21C of the Aboriginal and Torres Strait Islander Protection Act (Cth) 1984.

5. A complementary set of practical guidelines for Indigenous and local communities on developing IP protocols is also being drafted for consultation purposes. These guidelines will focus on empowering Indigenous and local communities to establish their own IP-related protocols, contracts and strategies for the use of their traditional cultural expressions within the community and by third parties. This could assist communities to foster more equitable and balanced relationships with third parties such as researchers and the private sector.
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The International Conference “Cultural Heritage Values in China: Identifying, Evaluating, and Treating Impacts to Cultural Relics,” Shandong University, Jinan, and Qufu Town, Shandong Province, China, October 26-28, 2010
Pei-Lin Yu, George S. Smith, Chen Shen, Hui Fang

“Cultural Heritage Values in China: Identifying, Evaluating, and Treating Impacts to Cultural Relics” was the first international conference on heritage values and site damage assessment in China. The conference focused on information exchange and strategies for addressing at-risk cultural sites, with emphasis on local stakeholder involvement. As part of the conference, a draft site evaluation protocol was developed, field-tested cultural sites in Qufu, Shandong Province, and assessed. Chinese and Korean university students attended the conference and provided evaluation of format and content to organizers.

The first day of the conference at Shandong University, bringing an international panel of heritage experts to compare experience and practice on a wide variety of cultural issues from China and the world. The conference was opened by special lecturers Yan Chen, the Vice-President of Shandong University; Zhixiu Xie, Director of Cultural Relics Bureau of Shandong Province; and George S. Smith, Adjunct Faculity at the University of Idaho. Papers were organized into three sessions summarized below.

Session 1 - Managing and Protecting Cultural Heritage Values: Broad Perspectives
Phyllis Messenger’s presentation, “Heritage Protection and Archaeological Sites,” examined the ways that archaeological work adapts to urban settings, and even work settings, to maintain in understanding and preservation of cultural heritage in the twenty-first century. Hilary A. Soderland’s presentation, “Incompatible Interlocutor in: Heritage Governance: Applied Jurisprudential Universality as a Management Tool,” examined violations of law as a governing ap