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by Neil Lofgren

`Ngarrany yurru lakaram nhumalang dhaawu dhiyakuy nhaa dhuwal ngayi yothu yindiy. Mak linygun nhuma marnggin ngurikiyiny yolnguw *rock band*-gu Yothu Yindiw. Ngunhiny yukurra lakaram yuwalktja gurrutu yolnguny, gurrutu waangany ga gurrutu nhaa malanynha dhuwal nganapurr yukurra nhaama, nhaa malanynha ngorra marrtji balanyar bitjan waayin, dharpa, wata, gapu ga bulu wiripu ga wiripu nhaa malanynha.'

`I want to explain to you what *yothu yindi* really means. You have probably heard about the rock band Yothu Yindi. *Yothu yindi* is really a relationship term. The relationship holds for people, land and all that we see about us, for things such as animals, plants, wind, water and many more.'[1]

Aboriginal knowledge is Australia's greatest export. Indeed, Miller suggests that Aboriginal people `... have been the most important exporters of social theory and cultural production over the past century'.[2] He argues that many of the classic European and American sociological texts of the 1820s to 1960s - including the works of George Hegel, Karl Marx, Sigmund Freud, Emile Durkheim, Frederick Engels, and Claude Levi-Strauss - all incorporate some form of Aboriginal knowledge.[3] Nevertheless, because of the culturally inappropriate application of copyright, Aboriginal interests in Aboriginal knowledge are generally not protected.

Much Aboriginal knowledge may not be in material form (that is written down, or recorded by audio or video tape), which prevents the application of copyright. This is not to say that copyright is inappropriate in all cases where Aboriginal intellectual property needs to be protected. For example, if an Aboriginal musician writes a rock song, she receives absolute copyright protection in the lyrics. This copyright extends to all countries which participate in the copyright conventions that Australia has ratified. However, this same Aboriginal musician may also possess an interest, in common with other members of her clan/tribe/language group, in Aboriginal knowledge which is the communal property of that group.

Aboriginal sacred/secret knowledge is the only expression of Aboriginal knowledge protected by courts.[4] While the courts have recognised the special nature of Aboriginal sacred/secret knowledge,[5] only breach of confidence actions have successfully protected this specific expression of Aboriginal intellectual property. This limited protection does not extend to Aboriginal knowledge which is not of a sacred/secret nature,[6] which highlights the need to articulate a discourse of Aboriginal knowledge defined in Aboriginal terms. Indeed Harris has observed that:

`... knowledge is only relevant in its own context. Western scientific knowledge is not necessarily more relevant or more accurate than Aboriginal scientific knowledge in, for example, the survival of a culture or even the survival of an individual. Certainly Aboriginal cultural knowledge - Aboriginal science - is vital to the survival of Aboriginal cultural identity.'[7]

A recent United Nations study has suggested that indigenous knowledge encompasses all manifestations of `... scientific, agricultural, technical, and ecological knowledge, including cultigens, medicines and the phenotypes and genotypes of flora and fauna'. The report further observed that indigenous heritage comprises:

`... a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity. The diverse elements of an indigenous people's heritage can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practice. Simply recording words or images fails to capture the whole context and meaning of songs, rituals, arts or scientific and medical wisdom. This also underscores the central role of indigenous peoples' own language, through which each people's heritage has traditionally been recorded and transmitted from generation to generation.'[8]

The Australian Bureau of Statistics recently reported that 74 percent of Aboriginal people in the Northern Territory can fluently converse in an Aboriginal language.[9] For example, the Yolngu, the traditional owners of north east Arnhemland, have more than 2,000 native speakers (*Yolngu matha*), making them one of the strongest Aboriginal language groups in the Northern Territory.[10] The intrinsic relationship between Yolngu culture (*rom*) and land (*waanga*) has been documented by numerous anthropologists[11] and legal scholars,[12] and the sophistication of Yolngu culture has been widely recognised with exhibitions at art galleries throughout the world, and the incorporation of Yolngu designs (*miny'tji*) on Australia's currency and stamps. Yolngu song and dance (*bunggul*) has also gained international renown through the success of the rock band Yothu Yindi. Nevertheless, the Australian legal system (*maan*) has proved largely incapable, and the Commonwealth parliament (*baalkay*) unwilling to protect the cultural integrity of the Yolngu and many other Aboriginal communities through specifically recognising their human rights to own and control their knowledge. This is despite judicial recognition throughout the past quarter of a century of the existence of Yolngu law and custom, and the presence of communal cultural property rights.[13]

The *sui generis* nature of Aboriginal rights

Aboriginal rights are connected to traditional territory, and form part of a *sui generis* Aboriginal knowledge system which transcends common law notions of property and possession. The Privy Council[14] and both the superior courts of Canada and Australia have recognised the *sui generis* nature of Aboriginal rights. Indeed the dissenting judge in the British Columbia Court of Appeal judgment in *Delgamuukw v British Columbia* (`*Delgamuukw [No. 2]*') observed that:

`... it is not only aboriginal title to land that is *sui generis*, all aboriginal rights are *sui generis*. And it is not only in relation to aboriginal title that trying to describe the title in the terminology of common law tenures is both unnecessary and misleading; trying to describe aboriginal rights in terms of rigorous jurisprudential analysis may well be equally unnecessary and misleading.'[15]

Similar sentiments were expressed by a number of High Court justices in *Mabo v Queensland [No. 2]*,[16] and the justices of the Supreme Court of Canada in numerous cases,[17] as well as the other justices in *Delgamuukw [No. 2]*, where one of the majority observed that the *sui generis* nature of Aboriginal rights has made them difficult, if not impossible, to describe in traditional property law terminology.[18] Nevertheless, Puri has argued that common law native title could

`... be broadened beyond the realm of real property rights and extended to intellectual property rights, provided that there has been continued observance of Aboriginal customary laws despite the existence of the common law'.[19]

Gray further argues that it would be logical to extend protection beyond the realm of Aboriginal art to other manifestations of Aboriginal culture, including songs and ceremonies.[20] While both Puri and Gray have articulated compelling arguments in support of common law native title intellectual property, such rights, under the *Mabo [No. 2]* doctrine, may be far too restrictive in application to many Aboriginal communities. Nevertheless, the maintenance of Aboriginal law and custom does not require continued presence on traditional territory.[21] The strength of Aboriginal identity is demonstrated by recent reports from the Australian Bureau of Statistics which show that nearly 75 percent of all Aboriginal people recognise their traditional lands, 60 percent identify with a clan, tribal or language group and 30 percent live on their traditional lands.

The Canadian courts provide an important source of Aboriginal rights jurisprudence for Australia. For example, in *Delgamuukw [No. 2]* the majority accepted that non-exclusive Aboriginal rights, other than a right of ownership or a property right, survive in land where native title has otherwise been extinguished.[22] While this jurisprudence extends Aboriginal rights to territory where native title to land has been extinguished, it does not, however, recognise an ownership right that affords protection of specific rights associated with that territory. Nevertheless, this judgment, along with the previously cited judicial observations on the *sui generis* nature of Aboriginal rights, provides scope for the application of common law Aboriginal intellectual property rights to those expressions of Aboriginal knowledge which are integral to the maintenance of Aboriginal cultural integrity.

Common law Aboriginal property rights

Tully argues that the common law has always recognised `... two different but juridically equal systems of property'[23] - one British, the other Aboriginal - and this common law tradition is being rediscovered by a number of Native American and other legal scholars to justify Aboriginal property rights. The common law accommodates antecedent Aboriginal rights, providing that these rights have not been extinguished. For example, a number of justices in *Mabo [No. 2]* observed that Aboriginal people became British subjects on 7 February 1788; nevertheless this left::

`... room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law. The adjusted common law was binding as the domestic law of the new Colony and, except to the extent authorised by statute, was not susceptible of being overridden or negatived by the Crown by the exercise of subsequent prerogative powers.'[24]

The British Columbia Court of Appeal came to a similar conclusion in *Casimel v Insurance Corporation of British Columbia*, which made the following observations on *Delgamuukw [No. 2]*:

`All five judges who heard that appeal concluded that aboriginal rights arose from such of the customs, traditions and practices of the aboriginal people in question as formed an integral part of their distinctive culture at the time of the assertion of sovereignty by the incoming power (which in that case was taken to have occurred in 1846), and which were protected and nurtured by the organised society of that aboriginal people. These aboriginal rights were then recognised and affirmed by the common law when the common law became applicable following the assertion of sovereignty with the result that those rights became protected as aboriginal rights under the common law.'[25]

Their Honours cited observations in *Mabo [No. 2]*, and other Canadian cases to render a judgment recognising common law Aboriginal customary adoptions. This judgment is consistent with the view that the scope and content of specific common law Aboriginal rights vary from one group of Aboriginal people to another.

Bartlett cites extensive Australian, Canadian, New Zealand, and Privy Council authority that the onus is upon the Crown to prove that Aboriginal title no longer exists, either through statutory extinguishment, or the abandonment by Aboriginal people of their rights.[26] The absence of statutory instruments extinguishing Aboriginal intellectual property rights, and numerous Federal Court judgments recognising the presence of communal Aboriginal interests in Yolngu designs,[27] supports the continued operation of common law Aboriginal intellectual property rights to knowledge.

International law

International law provides another source for respecting Aboriginal intellectual property rights to knowledge. For example, Anaya has suggested that cultural integrity has joined the contemporary norms of freedom, equality and peace, as specific human rights guaranteed by contemporary international law.[28] Australia has ratified a number of United Nations human rights and other instruments which expressly guarantee the cultural integrity rights of indigenous people,[29] and the High Court has recognised that these instruments `... may be used by the courts as a legitimate guide in developing the common law'.[30] Consequently, the High Court has consistently interpreted Aboriginal native title in terms of the universal human rights of inheritance, property ownership and equality before the law.[31]

Conclusion

This article has attempted to integrate a discourse of Aboriginal knowledge into the realm of Anglo-Australian common law. Aboriginal knowledge is not an esoteric argument restricted to the rarefied domain of a few intellectual property lawyers or academics, but a matter of cultural survival imperative to the cultural integrity of many Aboriginal communities. Indeed, Mandawuy Yunupingu, the internationally famous Yolngu rock musician and educationalist has observed that:

`Governments and institutions need to see and to find ways of working with different knowledge. Part of this is beginning to see European-type knowledge as just one sort of knowledge among many ... Some white Australians are beginning to accept that European and Aboriginal ways of knowing have different logics. Non-Aboriginal people need to take time and make the effort to understand the logic of Aboriginal knowledge.'[32]

The Australian Government has correctly recognised that the protection of Aboriginal knowledge transcends copyright, and has thus recently announced an independent review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) [Ed's note: see `Update', page 2]. Hopefully, this review will recommend an accessible, and culturally appropriate legislative framework that accommodates Aboriginal ownership and control of common law Aboriginal knowledge. This outcome is consistent with the Australian Government's recognition of the significance to many Aboriginal people `... of their cultural life, their relationship to land, their cultural heritage and the importance of cultural property'.[33] Anything less would leave Australia liable to a complaint to the United Nations by Aboriginal people alleging a breach of their human rights of inheritance, property ownership and equality before the law, and their indigenous rights to cultural integrity.[34]

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[1] `Daatiwuy' by M Ganambarr in *Macquarie Aboriginal Words*, N Thieberger and W McGregor (eds), Sydney, Macquarie Library, 1994, page 235.

[2] `Exporting Truth from Aboriginal Australia: Portions of Our Past Become Present Again, Where only the Melancholy Light of Origin Shines' by T Miller, (1995) 76 *Media Information Australia 7*, page 7.

[3] See generally `When Australia Become Modern', T Miller (1994) 8 (2) *Continuum* 206.

[4] In *Foster v Mountford* (1976) 29 FLR 233, the Federal Court granted an injunction prohibiting publication of a book containing photographs of Aboriginal ceremonies.

[5] *Aboriginal Sacred Sites Protection Authority v Maurice; Re Warumungu Land Claim* (1986) 10 FCR 104, per Woodward J at 114-115, and per Toohey J at 119; and *Onus & Anor v Alcoa of Australia Ltd* (1981) 149 CLR 27, per Stephen J at 42, per Mason J at 43, per Wilson J at 62, and per Brennan J at 77.

[6] `Aboriginal Design and Copyright' by S Gray in (1991) 9 (4) *Copyright Reporter* 8; and `Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?' by S Gray in (1992) 66 (1) *Law Institute Journal* 46.

[7] `Aboriginal Science, Western Science and the Problem of Conceptual Interference' by JW Harris in (1978) 24 (3) *The Australian Science Teachers Journal* at 61.

[8] `Protection of the Heritage of Indigenous Peoples', E Daes, UN Doc E/CN4/Sub2/1994/31 at 6 and 3.

[9] *National Aboriginal and Torres Strait Islander Survey 1994*: *Detailed Findings*, Australian Bureau of Statistics, Australian Government Publishing Service, Canberra, 1995, page 4.

[10] *The Loss of Australia's Aboriginal Language Heritage*, A Schmidt, Aboriginal Studies Press, Canberra, 1990, page 4; and *The Encyclopedia of Aboriginal Australia*, D Horton (ed), Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1986.

[11] *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition*, N M Williams, Australian Institute of Aboriginal Studies, Canberra, 1986.

[12] `Tribal Ownership of Aboriginal Art', C Golvin, (1992) 3 *Arts & Entertainment Law Review* 15; `Aboriginal Art and the Protection of Indigenous Cultural Rights', C Golvin, (1992) 7 *European Intellectual Property Review* 15; and `Enlightment or Dreaming? Attempting to Reconcile Aboriginal Art and European Law', S Gray (1995) 2 *Arts & Entertainment Law Review* 18.

[13] *Milirrpum v Nabalco Pty Ltd & The Commonwealth* (1971) 17 FLR 141 per Blackburn J at 266-267.

[14] *Amoudu Tijani v Secretary, Southern Nigeria*, [1921] 2 AC 399 per Viscount Haldane at 409-410.

[15] (1993) 104 DLR (4th) 470 per Lambert JA at 644.

[16] (1992) 175 CLR 1 per Deane and Gaudron JJ at 89, per Dawson J at 133.

[17] *R v Sparrow* (1990) 70 DLR (4th) 385 per Dickson CJC and La Forrest J at 411; and *Guerin v R* (1984) 13 DLR (4th) 321 per Dickson J at 339 (Beetz, Chouinard and Lamer JJ concurring).

[18] (1993) 104 DLR (4th) 470 per Macfarlane JA at 494.

[19] `Copyright Protection for Australian Aborigines in the Light of Mabo' by K Puri in *Mabo: A Judicial Revolution* by M A Stephenson and S Ratnapala (eds), University of Queensland Press, Brisbane, 1993, page 159.

[20] 'Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post-Mabo' by S Gray, (1993) 3 *Arts & Entertainment Law Review* 5, pp 10-11.

[21] *Re Waanyi People's Native Title Application* (1995) 129 ALR 100 per French J at 114; and *Mason v Tritton* (1994) 34 NSWLR 572 per Kirby P at 584.

[22] 'Applications for a Determination of Native Title to the National Native Title Tribunal: Basic Procedures and Some Problems of Proof', B A Keon-Cohen in *Mabo: The Native Title Legislation*, M A Stephenson (ed), UQP, Brisbane, 1995, page 98.

[23] 'Aborigial Property in Western Theory: Recovering a Middle Ground', J Tully in *Property Rights*, E F Paul, F D Miller and J Paul Jnr (eds), CUP, Cambridge, United Kingdon, 1994, page 154.

[24] (1992) 175 CLR 1 per Deane and Gaudron JJ at 79-80.

[25] (1993) 106 DLR 94th) 720 per Lambert JA at 726 (Hutcheon and Hinds JJA concurring).

[26] 'Onus of Proof for Native Title', R Bartlett, Vol 3, 75 *Aboriginal Law Bulletin*, 8. See also *Western Australia v The Commonwealth* (1995) 128 ALR 1; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1; *R v Sparrow* (1990) 70 DLR (4th) 385; *Calder v Attorney-General v British Columbia* (1973) 34 DLR (3d) 145; and *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680.

[27] See generally *An Intoduction to Intellectual Property Law*, C Golvan, Federation Press, Sydney, 1992, pp 51-54, and *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209 per Von Doussa J at 239.

[28] 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims', S Anaya, (1991) 13 *Human Rights Quarterly* 403.

[29] For example, the*Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ATS 2; the *International Convention on the Elimination of All Forms of Racial Discrimination* [1975] ATS 40; the *International Covenant on the Rights of the Child* [1991] ATS 4; and the *Convention on Biological Diversity* [1993] ATS 32.

[30] *Minister for Immigration v Teoh* (1995) 69 ALJR 423 per Mason CJ and Deane J at 420.

[31] *Western Australia v The Commonwealth* (1995) 128 ALR 1 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 323-324.

[32] 'Yothu Yindi: Finding Balance', M Yunupingu (1994) 35 (4) *Race & Class* 113, pp 119-120.

[33] *Commonwealth of Australia National Action Plan*, Australian Government Publishing Service, Canberra, 1994, page 37.

[34] 'Added Impetus for Legislative Protection of Aboriginal Culture and Intellectual Property Rights', N Lofgren, (1994) *4 Arts & Entertainment Law Review* 63.

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