

## **One Law? Two Laws? Many Laws?**

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Prior to colonisation by Western powers, Indigenous customary law controlled and protected knowledge within Indigenous society. Colonisation introduced a new set of laws that often conflicted with, and undermined, Indigenous law systems. This complexity is compounded when considered in relation to developments in international law. As it stands, Western intellectual property legislation has provided very limited protection for Indigenous cultural and intellectual knowledge. There is much debate over what would provide the best protection of Indigenous cultural and intellectual property, both tangible and intangible. While some advocate amending current intellectual property laws to include Indigenous concepts of knowledge, others question whether the very system that legitimises the appropriation of Indigenous cultural and intellectual property in the first place could ever be used to provide the necessary protection. The complexities of these issues are evident in treatment of cultural and intellectual property issues by public institutions and international organizations.

Moreover, many aspects of Indigenous cultural and intellectual property are of an intangible nature. These include oral histories, music, songs, dances and ceremonies. Others, such as sand paintings, are ephemeral in nature. Because of their intangible nature, these aspects of Indigenous cultural and intellectual property have limited protection under Western intellectual property laws. Western laws only protect material expressions of knowledge. This means that whoever first reduces intangible ICIP to a tangible form will be granted legal ownership of that knowledge. This includes photographs and recordings of songs and dances.

Within the framework of this debate, this session explores the intersections of customary, national and international protections of Indigenous cultural and intellectual property. It provides a critical overview of contemporary issues and seeks to highlight those cases that are addressing the current limitations of protection.

## SESSION ABSTRACTS

### **U.S. Intellectual Property Law and Native American Imagery: Can Federal Trademark Law Be Used to Cancel Existing Trademarks that Native Americans Find Offensive?**

Donald Craib, Craib Law Office, PLC, USA

### **Knowledge trusts: a more efficient path for knowledge protection?**

Paul Martin, University of New England, Australia

### **Indigenous Heritage and the Digital Commons**

Eric Kansa, Alexandria Archive Institute, USA

### **Intellectual and Cultural Property in the Domains, Public and Cultural Institutions: Alternative measures to safe guarding cultural heritage in the Pacific**

Malia Talakai, World Intellectual Property Organisation and Radboud University of Nijmegen, The Netherlands

### **Restoring Connections**

David Guilfoyle, South Coast Regional Initiative Planning Team, Western Australia

### **A Case Study: The Register of Aboriginal Owners Aboriginal Land Rights Act 1983**

Megan Mebberson, ALRA, Australia

### **Indigenous knowledge systems and intellectual property laws in South Africa: the hoodia cactus and the Africa potato**

George Mukuka, University of South Africa

## **PAPER ABSTRACTS**

### **U.S. Intellectual Property Law and Native American Imagery: Can Federal Trademark Law Be Used to Cancel Existing Trademarks that Native Americans Find Offensive?**

**Donald Craib**, Craib Law Office, PLC, USA

The Chicago Blackhawks; the Atlanta Braves' tomahawk chop; the Washington Redskins; the University of Illinois's mascot, Chief Illiniwek; and the Cleveland Indians, to mention just a few. Are these names and imagery offensive? Native American mascots, names, logos, symbols, and imagery used by American sports teams have launched a firestorm of controversy over the past thirty years. Do these mascots honor Native Americans, as many sports fans would suggest, or do they exploit and disparage a forgotten community that has seen suffering from discrimination and rejection for the past four hundred years? Native Americans have now turned to the American legal system to fight to change American sports team names, mascots, and imagery containing references to Native American culture. This paper discusses the issue of whether U.S. intellectual property law, specifically federal trademark law, can be used to cancel a registered mark because it is offensive, disparaging, and scandalous. In *Harjo v. Pro-Football*, Native Americans sought to have the registered trademarks owned by the Washington Redskins football team cancelled on the ground that the marks were offensive and thus violated federal trademark law. In 1999, the Trademark Trial and Appeal Board (TTAB) of the U.S. Patent and Trademark Office ruled in favor of the Native Americans and ordered cancellation of the offensive marks. A subsequent reversal of this ruling by a federal district court and a succeeding reversal of the district court's decision by a federal appellate court have guaranteed that the issue will remain in litigation for the foreseeable future.

### **Knowledge trusts: a more efficient path for knowledge protection?**

**Paul Martin**, University of New England, Australia

In commerce, particularly high technology industry, knowledge is protected through a combination of contract and trust, which are proven, low cost and flexible mechanisms. Yet in protecting cultural property we seek to create cumbersome, legally strange and costly strategies. Perhaps it is time to learn from the 'big end of town' about how to protect the interests of the less advantaged. This

paper outlines just such a strategy and instrument and invites collaboration on its development.

## **Indigenous Heritage and the Digital Commons**

**Eric Kansa**, Alexandria Archive Institute, USA

The 21st century has ushered in new debates and social movements that aim to structure how knowledge is produced, owned, and distributed. At one side, 'access to knowledge' advocates seek greater freedom for finding, distributing, using, and reusing information. On the other hand, traditional knowledge rights advocates seek to protect certain forms of knowledge from appropriation and exploitation and seek recognition for communal and locally situated notions of heritage and intellectual property. Understanding and bridging the tension between these movements represents a vital and significant challenge. This paper introduces a project led by iCommons ([icommons.org](http://icommons.org)) in partnership with the Alexandria Archive Institute ([www.alexandriaarchive.org](http://www.alexandriaarchive.org)) to explore where these seemingly divergent goals may converge.

The 'Commons' is envisioned as a context to re-imagine communication, culture, knowledge sharing, science, and the public sphere and how they relate to new, empowering technologies and social relations. Inherent in this re-imagination is the recognition that privacy, propriety, and spirituality all vary widely across cultural systems. A key concept that may help bridge these movements centers on the Creative Commons concept of 'some rights reserved,' a model underlying their globally popular copyright licenses. The 'some rights reserved' model is an attempt to navigate a course between polarized states of 'all-or-nothing,' protections found in current international intellectual-property frameworks. It can help formulate strategies that encourage reciprocity, participation, and meaningful consultation between members of different communities. Participation and leadership of indigenous community organizations can help extend this model to better meet the needs of these communities.

## **Intellectual and Cultural Property in the Domains, Public and Cultural Institutions: Alternative measures to safe guarding cultural heritage in the Pacific**

**Malia Talakai**, Radboud University of Nijmegen, The Netherlands

The domains: public and cultural institutions, house vast amounts of both tangible and intangible heritage. Some can be protected by intellectual property legislation but some cannot be because of the limitations of the current regimes of intellectual property. The limitation of the current intellectual property laws to protect traditional knowledge and traditional cultural expressions or expressions of folklore, have become the focus of concerns and complains from indigenous peoples and communities. Particular concerns have been given to cultural heritage that are in the domains public and in cultural institutions such as museums, archive, libraries and so forth.

In 2005-2006, The World Intellectual Property Organisation (WIPO) commissioned a Research Project which I was part of. The WIPO project looked at how cultural institutions deal with intellectual property issues that arise in their day-to-day practices and how they deal with these issues. Therefore, this paper will draw of the WIPO Project findings and it will discuss the domains: public and cultural institutions, as both spaces which house cultural heritage, their differences and how their day to day practices can offer alternative measures for the safeguarding of cultural heritage.

## **Restoring Connections**

**David Guilfoyle**, South Coast Regional Initiative Planning Team, Western Australia

The role of the Restoring Connections Project is to work alongside Noongar groups in both the South West and South Coast Regions and implement management plans that integrate cultural heritage places and values into Natural Resource Management (NRM). Noongar people have a strong desire for their role in caring for country to be recognized and supported through the regional NRM processes. Noongar lands extend across south-western Australia and encompass areas recognized as high priority for biodiversity, water, marine and other values. The Noongar country is where biodiversity loss and land degradation are at their worst in Western Australia. Using several case studies, this paper outlines how this project was implemented, integrating current work with Indigenous approaches, leading to direct on-ground works to protect and/or restore degraded segments of Noongar cultural landscapes. The notion, and the action, to restore segments of cultural landscapes was one principle mechanism to ensure the protection of Indigenous cultural and intellectual property rights. The work has informed on clear pathways forward in heritage management, aimed at the protection of places, values, and rights; including tangible methodologies for moving beyond site-specific assessments and

toward more culturally-appropriate, landscape-level approaches that are central to NRM.

### **A Case Study: The Register of Aboriginal Owners Aboriginal Land Rights Act 1983**

**Megan Mebberson**, ALRA, Australia

This paper briefly outlines the process involved in registering Aboriginal owners and the sensitivity surrounding obtaining cultural knowledge. The identification of Aboriginal owners is an essential step towards the joint management of lands in New South Wales. The Register of Aboriginal Owners is established and maintained in accordance with the Aboriginal Land Rights Act 1983 (ALRA). The Registrar, ALRA undertakes extensive research to assist Aboriginal people in their applications including gathering personal family information and cultural knowledge. This information is collected under strict guidelines. The consideration of intellectual and cultural property rights is paramount to this process. Consequently, the Registrar has mechanisms in place to protect such information which is used and reproduced exclusively by Office of the Registrar for the purpose of entering an applicant on the Register of Aboriginal Owners.

Requests for access to this information pose poignant issues for the Registrar. The information being sought is, in essence, not available to the public in accordance with the procedure set up by the Registrar. This paper explores the methods used to safeguard Aboriginal people's intellectual property.

### **Indigenous knowledge systems and intellectual property laws in South Africa: the hoodia cactus and the Africa potato**

**George Mukuka**, University of South Africa

The aim of this paper is to outline the current status of indigenous intellectual property rights protection in South Africa. The paper begins by looking at the definition of Indigenous Knowledge Systems and intellectual property laws. The paper suggest that in order for us to understand fully the developments of intellectual property in South Africa we need to look at such developments in the United States and Australia. The paper then examines two cases dealing with the hoodia cactus among the Khoisan community and the African potato used among the Zulu community in Natal and Gauteng. The methodology used in this paper is interviews and case studies which were largely influenced by theoretical perspectives which, among other things, highlight the fact that one of the consequences for indigenous knowledge systems of colonialism and

apartheid was the fundamental erasure of indigenous cultures effected across the rich knowledge heritages of non-Western people.