Proceedings of the 2nd International Conference on Social Psychology and Humanity Studies
DOI: 10.54254/2753-7048/51/20240902

Better Ways to Protect Indigenous Knowledge and Cultures Through Intellectual Property

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Abstract: Indigenous knowledge can be understood as a network of knowledge, beliefs and traditions that can be preserved and have some commercial value over time. Along with the increasing visibility of indigenous cultures in the global marketplace, there are also significant challenges. These challenges are often related to the physical destruction and utilization of indigenous lands and knowledge. The historical context and uniqueness of indigenous cultures suggest that they require greater attention and special protection under the law. From the current provisions and judgments, some individual authors have been compensated while the rights of the broader indigenous community have not been adequately protected. From an international perspective, the focus of the work of international organizations has expanded to include indigenous peoples' land claims and cultural rights. In addition to various international organizations and related instruments, a number of countries and regions are working to protect the intellectual property rights of indigenous cultures. Australia is a country that is typically faced with the protection of indigenous intellectual property. For Australia, the effective protection of indigenous knowledge remains an issue that needs to be addressed and managed through the legal realm. The positioning of indigenous knowledge in the law is complex and incomplete. Australia has played an important role at the international level, but the actual response within Australia to the international level has been minimal. Australia should therefore recognize and respond to these developments in legislation as soon as possible.

Keywords: indigenous knowledge, indigenous culture, intellectual property

1. Introduction

As time passed, indigenous populations throughout the world retained unique comprehension grounded in cultural experience and developed their own cultures and knowledge. Indigenous knowledge is extensive and to some extent commercially valuable. However, intellectual property protection for indigenous knowledge in Australia is not straightforward. Historically, there have been a number of attempts to assert intellectual property rights over indigenous knowledge, and the courts have been positive about this. However, the courts do not have a legislative function and the Australian Government has not legislated in this regard. The content of existing intellectual property legislation may allow Indigenous knowledge to be plundered by those who record or write down or patent it in material form. This paper analyzes the content and characteristics of Aboriginal culture and the protection of Aboriginal culture in Australia. Also, the paper analyzes the international

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protection of indigenous culture and compares the protection behaviors of other countries. Through these analyses, this paper tries to find out the way to protect the intellectual property rights of indigenous culture that is suitable for the Australian situation.

2. Australian Indigenous Knowledge and Intellectual Property

2.1. Concept and Importance of Indigenous Knowledge

In various parts of the world, indigenous peoples preserved their unique comprehension grounded in cultural experience [1]. It is such comprehension as well as relationships that make up a system that is widely recognized as indigenous knowledge, which has been called indigenous knowledge. Indigenous traditional knowledge can be understood as networks of knowledge, beliefs and traditions [1]. This network can be preserved and exchanged indigenous over time. Indigenous cultures have a certain specificity. There is historical continuity between indigenous peoples and the societies that developed in particular territories prior to conquest or colonization [2]. It illustrates the historical nature of indigenous knowledge, that is to say, from one generation to the next, indigenous traditional knowledge, beliefs, arts and other cultural expressions are conveyed to the next. What is more specific is that indigenous knowledge is handed down formally or informally between groups of kin and communities through social exchanges, spoken traditions, symbolic practices and other activities [1].

Indigenous knowledge is broad in scope. Indigenous knowledge may include, for example, narratives of human history, ways of communication, both figurative and decorative, technology for cultivation and gathering, skills for hunting and collecting, an understanding of local ecosystems that is specialized, and production of specialized tools and techniques, and so on [1]. As a result of different historical and geographical circumstances, different traditional knowledge has been generated and preserved by various ethnic and tribal communities in different parts of the world. Regardless of the specific content of indigenous knowledge around the world, their existence is very important for a country. Indigenous knowledge may be tangible as well as intangible. They reflect history, they bring together wisdom, they give solutions to problems and they leave a lot of legacy for the country and the world.

2.2. Protection of indigenous knowledge under Australian intellectual property rights

The historical context and uniqueness of indigenous cultures suggests that they require additional attention and special protection under the law. The growing visibility of indigenous cultures in the global marketplace is accompanied by enormous challenges. They are usually related to the physical destruction and exploitation of indigenous lands and knowledge, but often go unnoticed [3]. The successful calls by indigenous peoples for the further acknowledgement of their rights to indigenous knowledge in international forums over the last few years [4]. It is true that indigenous forms of art and intellectual use are not well covered by intellectual property laws in Australia. The concept and content of indigenous knowledge is relatively well defined. However, the positioning of indigenous knowledge in the law is complex, contradictory and incomplete [5]. It has been firmly established that the issue of how to curb the challenge of unauthorized use of indigenous knowledge is an issue that needs to be resolved and managed within the legal sphere [4].

Free, prior and informed consent, integrity, attribution and benefit-sharing are all recognized as indigenous cultural and intellectual property rights (ICIP) [6]. In other words, ICIP describes the rights of indigenous peoples to their heritage. This heritage is part of indigenous peoples' expression of their cultural identity and also includes objects that are potentially to build on this heritage at a later date [4]. Unregulated use of indigenous cultures not only undermines the rights and dignity of indigenous peoples, but also damages their economic opportunities and cultural sentiments. The determination that indigenous cultures have intellectual property rights has, in fact, gone through a

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lengthy process. Taking the perspective of copyright law in intellectual property, for example, challenges arise in determining the boundaries and markings of property with indigenous subject matter [7]. The copyright laws do not cover all the types of rights that indigenous people desire to have over their indigenous cultural property rights [4]. The content of intellectual property laws gives some people the opportunity to plunder indigenous intellectual property rights, offering exclusive property titles to people who document or pen down content in material form or patent knowledge. There have been arguments for copyright protection for Aboriginal art.

Historically, the recording of much indigenous knowledge has been done without the capacity of indigenous peoples to exercise their right to prior informed consent [4]. *Foster v Mountford* is an example of a case where information was provided in confidence [8]. As time passes, it is clear from Australian cases that Australian courts are increasingly willing to take indigenous beliefs and values into account [9].

There was an action in 1983 by the Aboriginal artist Yanggarrny Wunungmurra and the Aboriginal Arts Agency against a fabric designer/manufacturer and the proprietor of a retail store for copyright infringement [10]. The result of the case was that the first defendant was awarded damages and a list of all the people to whom he had supplied fabric. However, the case has not attracted much attention. This case is not featured in any of the Intellectual Property Case Reports; neither is it reviewed in any of the extensive documents addressing Aboriginal art and copyright [7]. The case of *Milpurrurru & Ors v Indofurn Pty Ltd* has attracted more attention and this case provides a clear judicial confirmation [11]. The protection of copyright in Aboriginal art can be legally obtained and there can be some degree of legal protection for the collective interests of Aboriginal owners. It also shows that Aboriginal culture expressed through art can become a marketable commodity. A legal perspective, there is also an indication from the outcome of the case that intellectual property law must find ways to incorporate this element of indigenous knowledge.

As a whole, the Court has taken a proactive approach to Indigenous intellectual property law. However, there were some regrets in the judgments. In the Milpurrurru case, the court made its decision based on traditional copyright law, despite the culturally offensive nature of the commercial activity [11]. This meant that only the individual authors were compensated and the rights of the wider Aboriginal community were not properly protected. Despite their shortcomings, historical Australian cases promoted greater protection of Aboriginal rights in Australian copyright law and led to an improved understanding of Aboriginal culture in mainstream Australia [9]. The inability of the courts to provide a legislative response to the ICIP aspect of protection, and the slow progress of the Australian government's legislative efforts, means that the legal framework for ICIP protection remains far from reality.

3. International Practices to Protect Intellectual Property Rights on Indigenous Knowledge

From an international perspective, there has been an expansion of the focus of the work of international organizations to include indigenous peoples' land claims and cultural rights. In the early 1980s, UNESCO and the World Intellectual Property Organization (WIPO) convened a Committee of Governmental Experts on Intellectual Property Rights (COGEPRI) with the aim of protecting expressions of folklore [12]. There is a Model Provisions of the National Law on the Protection of Expressions of Folklore against Illegal Exploitation and Other Unfavorable Acts developed by the Committee of Governmental Experts. It was noted therein that because of gaps in individual ownership and copyright duration, the statutory provisions of copyright laws and treaties for the legal preservation of folklore are not fully effective [13]. In 1997, UNESCO and the World Intellectual Property Organization launched a universal platform on the protection of folklore, the report of which summarizes the discussions on the International Committee on Folklore and discusses community property rights, moral rights and the development of new regulations [6]. In the years 2000 and 2001,

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WIPO organized independent international fact-finding missions and reported on the questions that needed to be answered regarding the protection of traditional knowledge in the intellectual property system, including patents, genetic material and cultural expressions [14]. In 2000, the member states of WIPO agreed to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC is mandated to develop practical approaches, as well as political objectives and standard principles for the preservation of traditional knowledge, however, they have made very slow progress in their work, repeating the draft articles over and over again [6]. A specific convention seems unlikely to be agreed upon by member states [12].

During the 1990s, there were several indigenous declarations on indigenous cultural property rights, and the international community's response to the documents on indigenous cultures and intellectual property had a significant impact. There have been many other international initiatives over the years. For example, the United Nations Permanent Forum on Indigenous Issues was established in 2000 and it serves to provide expert advice to the Economic and Social Council on the existing framework for indigenous peoples. It includes aspects relating to indigenous traditional knowledge. Three key issues - terminology, the nature of sui generis systems and intended beneficiaries - were scoped out in a study submitted in 2007 [12].

In 1992, the United Nations Convention on Biological Diversity (CBD) was established as a legally binding international treaty. It seeks to safeguard the intellectual knowledge, creativity and experiences of indigenous and local communities. There is an international level where both treaties and declarations can enforce intellectual property and international intellectual property agreement rights between the signatories to these agreements. Under the CBD, Australia has enacted the Environment Protection and Biodiversity Conservation Act 1999 (Cth) at the national level. This has led to the protection of Indigenous knowledge in Australia at an international level, but one problem is that there are no clear procedures. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is groundbreaking in addressing issues related to indigenous ICIP rights. Article 31 is a paradigmatic provision that clearly establishes that indigenous peoples must control and maintain their indigenous intellectual property rights and that nation-states should take the necessary measures to assist them.

In addition to various international organizations and relevant documents, some countries and regions are trying to protect the intellectual property rights of indigenous cultures. A number of African countries are actively involved in international forums. In these countries, there is a great deal of reflection on indigenous knowledge and intellectual property rights. A concern has also been expressed by the Group of African States participating in WIPO with regard to the slow progress in the consideration of international instruments [15]. It is also for this reason that some African countries have tried to find a regional response. By adopting the Swankepmond Protocol on the Protection of Traditional Knowledge and Expressions of Folklore in 2010, the African Regional Intellectual Property Organization (ARIPO) called for the development of national legislation. The conduct of New Zealand is also a good reference. The Waitangi Tribunal of New Zealand released its WAI 262 report on the nature of Maori culture and intellectual property in 2011, finding that the New Zealand government had failed to protect Maori traditions under the 1940 Treaty of Waitangi [16]. Similar to Australia, the New Zealand Government did not act in a timely manner. In addition to this, some countries have developed their own national laws on the protection of intellectual property rights of indigenous cultures, such as South Africa and Peru. Other countries and regions, such as the Pacific, have developed regional approaches.

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4. Possible Ways to Preserve Indigenous Cultures in Australia

For Australia, the effective protection of indigenous knowledge remains an issue that needs to be addressed and managed through the legal sphere. The positioning of indigenous knowledge in the law is complex and incomplete. The main controversy and anxiety now faced is how to get the law to recognize this new subject and category. International treaties and the prevailing international view are worthy references. While Australia accepts that the historical development of rights in the international intellectual property system has sometimes confluenced with international initiatives, there is also often a contradiction with the standards being developed [6]. International developments have had an impact on Australia, prompting the work of the Working Group on Australian Indigenous Folklore. An important reference from international theory and practice was the establishment of a Folklore Commission. Although the Australian Government had not implemented that recommendation, it was certainly an approach that could be tried. In accordance with the CBD, Australia has enacted the Environment Protection and Biodiversity Conservation Act 1999 (Cth) at the national level and introduced legislation in the Northern Territory and two states, Queensland. At the legislative level, the protection of indigenous knowledge became a possibility. However, the problem in the implementation process after the legislation is that there is no clear procedure, and this is the direction that the Australian government should go to supplement and improve in the next step. There are many similar approaches, such as UNDRIP, which is a breakthrough in the implementation of ICIP rights in Australia. At present, Australia has no national legislation to assist with formal legal rights.

Rather than adherence to international treaties, the legal framework has the potential to provide important rights and recognitions. While these rights and recognitions are partial and incomplete, it is clear from current practice that the protection that legislation can bring is difficult to obtain elsewhere. While law may be a key player in the production of meaning, there are a range of other factors involved. In Australia, for example, shifting political contexts and emerging international markets for Aboriginal art have all been important factors in bringing legal attention to the misuse of Aboriginal designs, and are important issues for legislation to take into account. While in the absence of a treaties between the Australian Government and indigenous peoples, the protection of indigenous rights is also necessary from a human rights perspective.

It is also important to note that every country's history is different. While many countries around the globe face the issue of protecting the intellectual property rights of Aboriginal cultures, there may also be diversity in the characteristics and types of Aboriginal cultures in each country. Australia should research as much as possible about indigenous cultures before legislating, and indigenous peoples need to be more involved in government. Specifically, possible ways of doing so included comprehensive, prior consultation with indigenous peoples and increased representation of indigenous peoples in relevant meetings.

In general, Australia cannot rely on the implementation of international treaties to address the protection of Indigenous cultural and intellectual property rights. Many organizations around the world have played an extremely important role in the establishment of international indigenous cultural and intellectual property protection regimes. Australia has played an important role at the international level, but there has also been little actual response from within Australia itself to the international level. There are already a number of international instruments that create a strong foundation for indigenous peoples' right to receive and share the benefits of the use of their genetic material and traditional knowledge. Australia should recognize and respond to these developments in legislation as soon as possible, taking into account indigenous realities and the current legal issues that arise.

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5. Conclusion

For historical and political reasons, indigenous cultures exist in many countries around the world. The protection of indigenous cultures is complex and diverse. Many international organizations have been promoting the protection of indigenous cultures for decades, which also involves the protection of intellectual property rights of indigenous cultures. Over the decades, there have been very critical developments and advances in the design of international systems for the protection of intellectual property rights for indigenous cultures. However, the pace of development has, in general, been slow. For Australia, domestic recognition of these developments has also been slow. It is clear from a number of Australian judgments that Indigenous peoples in Australia are in need of rights to protect Indigenous knowledge. The overall positive attitude of the Australian courts in protecting the intellectual property rights of indigenous cultures can be found through the historical judgments. With reference to the solutions of other countries, Australia should develop its own national laws in line with its domestic realities. Considering that each country is different, Australia should do as much research as possible into Aboriginal cultures and previous judgments before legislating, and could also allow for the need for Aboriginal people to be more involved in government.

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