

## Episode 86: Summary

**Episode name:** Verified Authentic: Ensuring Respectful Use of Indigenous Cultural and Intellectual Property

**Guest(s):** Stephanie Parkin

**What area(s) of law does this episode consider?**

Indigenous cultural and intellectual property.

**Why is this topic relevant?**

Indigenous cultural and intellectual property (**ICIP**) refers to the rights Aboriginal and Torres Strait Islander Peoples have in their cultural knowledge and expression.

In December 2022, the Productivity Commission published its report into Aboriginal and Torres Strait Islander Visual Arts and Crafts (**Report**). The Report found that sales of Indigenous visual arts and crafts - authentic and inauthentic - reached \$250 million dollars in 2019-2020, and it recommended that new cultural rights legislation be introduced to address gaps in current Australian IP law.

**What legislation is considered in this episode?**

*Copyright Act 1968* (Cth)

**What cases are considered in this episode?**

*Milpurrrru, G. v Indofurn P/L* [1994] FCA 975; 130 ALR 659 (the Carpet Case) ([Jade link](#))

- An Australian company was distributing carpets made in Vietnam that featured designs by prominent Aboriginal artists without their permission. The FCA found that the carpets infringed copyright in a way that was “*plainly deliberate and calculated*”. The damages were the largest award for copyright infringement at the time.

**What are the main points?**

- ICIP is an important part of respecting and acknowledging culture and identity.
- Stephanie notes the distinction between the copyright of the Aboriginal Flag and its actual use by the community.
- The Aboriginal Flag was created by Harold Thomas. Mr Thomas had exclusive licensing agreements in place with specific companies that allowed them to manufacture the Flag.
- Infringement notices eventually prompted community backlash and an inquiry. As a result, the government acquired the copyright from Mr Thomas and subsequently made it available for public use.
- ICIP refers to knowledge generated by Aboriginal and Torres Strait Islander people that is often tied to a place and passed down through generations.
- It includes information about seasons, land management, artwork styles, and cultural expressions. Stephanie uses an example of traditional knowledge

passed to her from her mother - where the timing of the mullets running can be inferred from the blooming of a particular flower.

- Existing laws surrounding ICIP are in need of reform. Copyright legislation, designed for individual works with limited time protection, does not align with the communal and timeless nature of ICIP.
- Recommendation 6.1 of the Productivity Commission Report recommended a new cause of action to address the infringement of traditional owners' rights when cultural assets are used without authorisation.
- This introduces new concepts to the traditional IP landscape, recognising cultural assets, cultural expressions, and traditional ownership. While the proposed model acknowledges existing rights and enforcement, challenges in enforcement and accessibility remain.
- Exploitation of ICIP is a significant issue particularly in licensing arrangements. Examples include unfair payment and unauthorised use beyond initial agreements.
- The cultural harm caused by unauthorised use extends beyond copyright infringement. Resolving such issues requires education, understanding, and recognition of the importance and process surrounding ICIP.
- When seeking to use the work of an Aboriginal or Torres Strait Islander person, there may be some additional processes and protocols that you should comply with.
- You should allow time for consideration, ensure they have access to independent legal advice and ensure that the agreement accounts for different payment structures.
- The agreement should be clear on the use of ICIP and consider the status of the artist, where they come from and their reputation.
- Building relationships based on trust and respect is also vital in engaging with Aboriginal and Torres Strait Islander communities.
- If you want to begin practicing in ICIP law, start to learn about the history of Aboriginal culture and to know why ICIP is important. This includes understanding exploitation and the drivers of it.

### What are the practical takeaways?

### Show notes

[Productivity Commission, Aboriginal and Torres Strait Islander Visual Arts and Crafts Study Report \(2022\)](#)