

Copyright and intellectual property concerns of Australia's Indigenous people

Non-indigenous Australians have been slow to recognise that the land they inhabit was subject to legal systems prior to white occupation in 1788. The legal fiction that Australia was a *terra nullius*, a land without owners or occupation, was only put to rest legally with the Australian High Court decision in *Mabo v State of Queensland (No 2)*.¹

The misuse and misappropriation of intellectual and cultural material created by and belonging to Australia's Indigenous communities is often deeply offensive; the failure of mainstream, white-thinking, Australia to recognise the intellectual property systems of Indigenous communities may represent both misappropriation of property, and continuing dispossession.

The debate within Australia thus takes place alongside other Indigenous issues such as land rights, the unacceptable rate of deaths in custody, self-determination and the forced separation of children from their parents and communities (a practice which continued into at least the 1960s).

The nature of the concerns

The intellectual property systems of Australia's Indigenous communities are neither monolithic nor homogenous. Nonetheless, Indigenous communities generally include within the broad scope of "intellectual property" not only issues such as the creation and use of cultural material, but also issues such as the control of languages; bio-diversity; and knowledge of plants and animals (both for food and medicinal purposes). Underpinning the concept of Indigenous intellectual property is a holistic view that cultural products are intimately connected to Dreamings, ceremony, sacred sites and objects, and also land. The Working Party on the Protection of Aboriginal Folklore commented as follows:²

[Indigenous] beliefs and actions are sanctioned by reference to a complex concept which is commonly called in English "the Dreamtime". Conceptually, the Dreamtime is peopled by spirit-beings who created the world and established the patterns of Aboriginal society and culture. Topographical features of the land, created by the spirit beings, are visible signs of the Dreamtime. The life-sustaining power of the Dreamtime resides in the land and is concentrated at important places or sacred sites, joined by a network of tracks along which the spirit-beings travelled. The Dreamtime is embodied also in myths, visual designs, codes of behaviour and rights to property of different Aboriginal groups and individuals. Thus, "the Dreamtime" is a cultural complex which is composed of all of these elements and gives meaning to Aboriginal social life. Many works of folklore are produced from traditional themes derived from the Dreamtime.

¹ (1992) 175 CLR 1

² Working Party on the Protection of Aboriginal Folklore (Department of Home Affairs and Environment, 1981), at para 504. From a middle class white perspective, one thinks of the word "folklore" with some embarrassment. To me, the word connotes cultural products and processes occupying a lowly position in an imagined hierarchic cultural pyramid. Michael Davis has stated that the word derives from "an archaic ethnological discourse", *op. cit.*, at 7-8. Australia's Indigenous populations do not accept or use the word "folklore" in relation to their culture. In my view, the word must be replaced to ensure Indigenous control over Indigenous culture is taken seriously by the non-Indigenous population of Australia.

The intellectual property concerns of Australia's Indigenous people include access and control over physical items as well as over what might widely be understood as intellectual property. These items include sacred items and human remains.³

A related matter is the right of access to, and control over, photographic and film records of Indigenous people, particularly where those records are kept in public institutions. This matter has been of increasing concern as new avenues for the exploitation of this material, such as the Internet and multimedia products, have become available.

Indigenous communities are also concerned over the (mis)appropriation of imagery and styles of painting, without reference to the traditional owners or traditional contexts. This concern is heightened when the relevant image is sacred or secret, and is reproduced in an inappropriate context, for example, on objects such as tea towels, T-shirts or carpets. As Marcia Langton has stated of non-Aboriginal people borrowing Aboriginal designs:⁴

they are not simply borrowing a design, they are taking a religious meaning which doesn't belong to them and will never belong to them.

Margaret West, the Curator of Aboriginal Art and Material Culture at the Northern Territory Museum of Arts and Science, has stated that:⁵

In traditional Aboriginal society, the designs of a tribe are amongst the most important possessions of the members of the tribe.

Indigenous people also have concerns about the way information provided to outsiders such as anthropologists has been subsequently used. Professor Forrest, head of the Kurong-Kul Katitjin School of Indigenous Australian Studies at the Edith Cowan University in Perth, is reported as stating that:⁶

Indigenous knowledge is not open. Not everyone is exposed or allowed access to certain aspects of knowledge. In Western culture all knowledge is open for everyone to know.

The type of information given to outsiders includes pharmaceutical knowledge, and information about bush foods, and also includes knowledge about Indigenous

³ According to Henrietta Fourmile, there are some 150,000 items of Aboriginal cultural property in State and national museums (*Postmodernism: a consideration of the Appropriation of Aboriginal Imagery – Forum Papers*, ed Susan Cramer, Institute of Modern Art, Brisbane, 1989 at 7).

⁴ Marcia Langton, "Aboriginal art in 1988: a complex reality", (1988) 8 *Artlink* at 33.

⁵ Quoted by Damian Abrahams, "The Relevance of Representative Proceedings to Aboriginal Tribes in Arts Cases", (1996) 1 *Media and Arts Law Review* 155 at 166. The quote is taken from a deposition provided by West for a case which involved T shirts which infringed the copyright in works by Johnny Bulun Bulun. See further below, *The Bulun Bulun case*

⁶ Quoted by Debra Jopson, "Indigenous knowledge stolen", *Sydney Morning Herald* 23 February 1996. See also Michael Davis, "Competing Knowledges? Indigenous Knowledge Systems and Western Scientific discourse", unpublished conference paper presented at Science and Other Knowledge Traditions, *James cook University*, Cairns, Australia, 23-27 August 1996, and Kathryn Wells, "The cosmic irony of intellectual property and indigenous authenticity", (1996) 7 No 3 *Culture and Policy* 45 at 49-51.

society and stories.⁷ In other cases, Indigenous communities have been profoundly misrepresented.⁸

Value systems and viewpoints

Both Western and Indigenous artworks are circumscribed by a range of rules governing the ownership and use of images. However, the differences in the way the rules operate are enormous. As Sir Maurice Byers QC, counsel for the Thayorre people in the Wik land claim stated to the High Court, native title existed in a “different universe(s) of discourse” to that with which most lawyers or white people would be familiar.⁹ The principal conflicting discourses are the indigenous discourse, and the colonial, eurocentric discourse. We may also add postmodern discourse, which permits and encourages (“privileges”) appropriation as a creative and interpretive principle.

In some situations, there may be the same outcome under different discourses. For example, stories which may be told in public by anyone under Indigenous customary law may also be in the public domain under copyright law. Often discourses co-exist (for example, within Western society, scientific and legal discourses provide different means of approaching the world which barely touch upon each other). At other times, discourses may be in creative tension.¹⁰

Sometimes, however, a choice of one discourse will result in a suppression of rights granted under another, with pain or distress caused to one or other group within society.

Eurocentric intellectual property discourse

Generally, the central policies of eurocentric copyright law concern the rewarding (and thereby encouraging), of creative and intellectual effort. To this end, copyright owners and authors are given certain exclusive rights over how and when their work may be used. By about the middle of the nineteenth century, eurocentric copyright came to be predicated on complementary concepts of originality and authorship, and upon rights which give copyright owners both control and economic benefit from their work.

⁷ See, for example, cases described by Christine Morris in “Movieworld and Dreamworld: The Dreaming”, (1996) 7 No 3 *Culture and Policy* 69 at 72-75.

⁸ The most recent (and perhaps most notorious) example of this is the book *Mutant Message Down Under*, published in 1990 by the United States author Marlo Morgan. The book originally purported to be a factual account of Ms Morgan’s experiences in Australia with an Aboriginal tribe known as the “Real People”. Clearly, the book is a work of fiction. The book was very successfully marketed in the United States, and was translated into all major European languages. The book caused enormous concern among Indigenous communities who were outraged at the erroneous images of Indigenous Australia presented in the book, and at the way Ms Morgan presented herself as having been privy to secrets of a fabricated Indigenous group.

⁹ The High Court’s decision in the Wik case, which concerned the effect of pastoral leases in Queensland upon native title, was delivered on 23 December 1996.

¹⁰ See for example, Dr Paul Davies, *The Mind of God: Science and the Search for Ultimate Meaning*, Penguin Books 1992.

Particularly within those countries whose legal systems are based upon British law, copyright is an economic and policy instrument, by which the production and dissemination of work will be encouraged, thereby benefiting society both economically and culturally.¹¹

Indigenous discourse

As in all discourses, the indigenous complex of beliefs and actions provides certain prohibitions in the creation of cultural material. The Report of the Working Committee noted that:¹²

The creation of a work by an Aboriginal artist ... is constrained by considerations other than the artist's own æsthetic motivation. Because other members of the community have vital interests in the correct transmission of folkloric themes, the selection of artists and the contexts of creativity are controlled ... By these means an artist's individual creativity is kept within the bounds of cultural norms. He [sic] may follow his own æsthetic inclinations only so far as they do not infringe the rights of others over the themes employed.

In other words, communal design traditions are regulated by mechanisms outside the common eurocentric conceptions of *individuated* legal entitlements, powers and property.¹³

An overview of relevant case law

The relevant Australian case law charts growing awareness both on the part of the eurocentric and indigenous communities that indigenous artists are granted the same rights and protections as other artists under the Australian Copyright Act. The cases also plot the growing awareness, acceptance and acknowledgment, particularly among the Western legal community, of indigenous legal discourse within mainstream law.

Foster v Mountford (1976) 29 FLR 233

Dr Mountford was an anthropologist who had been given information by the Pitjantjatjara people some thirty five years previously (in 1940) about tribal sites and objects, communal legends, secrets, paintings, engravings, drawings and totemic geography. Mountford subsequently published the information in a book, which was displayed for sale in the Northern Territory in 1976. The plaintiffs, who were members of the Pitjantjatjara Council (an unincorporated body which represented those people who traditionally inhabited the Pitjantjatjara lands) sought an order from the Court to prevent the sale of the book in the Northern Territory. Their action was brought as a breach of confidence action, rather than a copyright claim (the material which formed the basis of the action was not

¹¹ The copyright system applies in most countries of the British Commonwealth, including Australia, and in certain other countries which inherited British principles in this field, including Israel and the United States of America.

¹² Working Party, *op.cit.*, at para 506.

¹³ See generally Wendy J Gordon, "An inquiry into the merits of copyright" (1989) 41 *Stanford Law Review* 1343 for an analysis of the terminology of entitlements and powers.

protected by copyright, being material in which copyright either did not subsist, or in which copyright had expired).

The court held that the publication of the information of deep religious and cultural significance to the Aborigines amounted to a breach of confidence. In particular, his Honour noted that the revelation of the tribal secrets by continued publication in the Northern Territory could give rise to serious damage by way of disruption to Aboriginal culture and society: “revelation of the secrets to their women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community”.¹⁴ His Honour granted the plaintiffs an injunction to prevent the sale of the book, as he found that financial compensation for the distribution of the book would be inappropriate in all the circumstances.

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

This case concerned a land rights claim. Insofar as general principles are concerned, the case was largely overturned by the decision in *Mabo v State of Queensland (No 2)*.¹⁵ However, for the purposes of this article, the decision is of interest in that, while finding against the Aboriginal applicants, Blackburn J acknowledged that indeed Aboriginal customary law was a “system of law”.¹⁶

The Bulun Bulun case

The first high-profile copyright action concerning the work of an Indigenous artist was the action brought in 1988 by Johnny Bulun Bulun and thirteen other plaintiffs against a T-shirt manufacturer and two retail outlets. The pleadings in the case alleged passing off;¹⁷ direct and indirect infringements under section 36 and section 38 of the Copyright Act;¹⁸ and breaches of the Trade Practices Act.¹⁹ While interlocutory injunctions were consented to before the Federal Court in Darwin, the proceedings were settled for \$150,000.

While the case did not proceed to judgment, it was considered that a number of parameters had been set as a result of the action. In particular, the settlement of

¹⁴ (1976) 29 FLR 233 at 236

¹⁵ (1992) 175 CLR 1, discussed below.

¹⁶ per Blackburn J at 266-270

¹⁷ The passing off action is an action to prevent others from profiting unduly from the reputation created by a trader – for example, by adopting the trader’s name or other distinctive features so as to misrepresent the origin or endorsement of the product to consumers.

¹⁸ Section 36 of the Act deals with infringement of copyright by way of dealing with a copyright work in one of the ways reserved to the copyright owner (for example, by reproducing a copyright work without permission); section 38 provides that it may be an infringement of copyright to make certain commercial dealings with infringing copies.

¹⁹ Sections 52, 53 and 75; in general terms, these sections provide actions where a corporation misleads or deceives the public as to the origin of goods, or as to the endorsement they carry.

the case indicated that works in traditional styles may qualify for protection under the Australian Copyright Act, albeit that they incorporated traditional themes.²⁰

Yumbulul v Reserve Bank of Australia (1991) 21 IPR 481

This case arose after the Reserve Bank of Australia was licensed by the agent acting for Mr Terry Yumbulul to reproduce his design “Morning Star Pole”²¹ on a commemorative ten dollar bank note. In his judgment, Justice French noted that evidence had indicated that Yumbulul had come “under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank”.²²

The judge noted that Yumbulul had authority within his own clan to paint certain sacred designs (an authority he derived from his father, the leader of the Warimiri clan group, and from having passed through several levels of initiation and ceremonies). Yumbulul inherited the right to make Morning Star Poles from his mother (a member of the Galpu clan). The following unchallenged evidence was presented by Mandawuy Yunupingu:²³

The attainment of the right to make such a pole is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity ...

The case is interesting in that the judge accepted without comment that the Pole was an original artistic work in which copyright subsisted, and that Yumbulul was the owner of the copyright in it. It is also important insofar as various obiter comments of French J are concerned, relating to the problems Indigenous artists face in reconciling obligations flowing from their communal responsibilities with eurocentric copyright and with the entry of their works into galleries and museums, and the eurocentric sphere generally.

²⁰ For further discussion of the case see Colin Golvan’s articles, “Aboriginal Art and Copyright – Overview and Commentary concerning Recent Developments” (1996) 1 *MALR* 151 and “Aboriginal Art and Copyright: the Case for Johnny Bulun Bulun”, [1989] 10 *EIPR* 346. At the time of writing, Bulun Bulun and George Milpurrurru are involved in action against an importer of fabric containing reproductions of designs by Bulun Bulun. The respondents, R & T Textiles Pty Ltd have consented to having judgement entered against them insofar as infringement of copyright is concerned. The trial will consider two issues: namely, whether rights holders according to traditional Indigenous law are equitable owners of the copyright ; and whether an infringement of either the legal or equitable rights constitutes a nuisance which has interfered with native title rights. See further, Martin Hardie, “Current litigation in native title and intellectual property: *Bulun Bulun and Milpurrurru v R & T Textiles*”, (1997) Vol 3 No 90 *Aboriginal Law Bulletin* 18.

²¹ The judge, Justice French, noted as follows at 482: “The poles ... are wooden, decorated with painted designs, feathers and string ... Traditional belief has it that the Morning Star Pole is imbued with the power to take the spirits of the dead to the Morning Star, which will return them to their ancestral home”.

²² 21 IPR 481 at 490

²³ 21 IPR 481 at 483

Mabo v State of Queensland (No 2) (1992) 175 CLR 1

In this case, the Australian High Court recognised that, under Australian common law, Indigenous rights in land survived European occupation unless a valid and express appropriation of those rights had been made by the Crown (for example, by grant of freehold to a third party). The Court held that the rights of Indigenous inhabitants of a colony are the same as the rights of a *conquered* nation: local law remains in place except to the extent that it may be in conflict with British law, and until it is over-ruled by the colonisers.²⁴

The case therefore also recognises that legal discourses (that is, complexes of rules and regulations, systems of rights and obligations) existed prior to white occupation. In other words, the Australian High Court recognised that Australia was not in fact either a wild and lawless place, or a legal blank slate. Indigenous customary law, which had hitherto been of anthropological and ethnographic interest only, was thereby given both recognition and validity.

It is important to note the inherent limitations placed upon the recognition of Indigenous customary law. As Mason CJ stated in *Coe v Commonwealth of Australia*:²⁵

Mabo (No 2) is certainly at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a “domestic dependent nation” entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the law of the Commonwealth, the [relevant] State ... and the common law.

Milpurrurru v Indofurn Pty Ltd (1995) 30 IPR 209²⁶

Indofurn Pty Ltd imported about two hundred carpets (about 850 square metres) from Vietnam over a period of time. These carpets reproduced either all or parts of well-known works, based on creation stories, created by eight Indigenous artists.²⁷ Indofurn had neither sought nor received permission to have the carpets made or

²⁴ For historical information and discussion, see in particular Henry Reynolds (for example, *Aboriginal Sovereignty: three nations, one Australia?* Sydney, Allen & Unwin, 1996) and Frank Brennan (for example, *One Land, One Nation: Mabo – towards 2001*, St Lucia, UQP, 1995).

²⁵ (1993) 68 ALJR 110 at 115. See also *Walker v State of New South Wales* (1994) 182 CLR 45.

²⁶ An appeal from the decision is reported as *King v Milpurrurru* (1996) 34 IPR 11. The appeal concerned the liability of directors of Indofurn Pty Ltd who were not involved in its day to day operations.

²⁷ The artworks included various bark paintings, a six-colour lino cut and “Papunya” style paintings in acrylic on canvas. Licensed reproductions of each of the artworks had been widely distributed through a number of channels, including two portfolios of aboriginal art published by the Australian Information Service and the National Gallery of Australia, and a calendar published by the National Gallery.

imported. The case concerned breaches of section 37 of the Copyright Act,²⁸ and Trade Practices issues.²⁹

The defendants wrote to the plaintiffs before proceedings were brought, informing them of the reproduction of the paintings and the importation of the carpets. The letter enclosed photocopy reproductions of a number of the painting and carpets, gave information of the number and size of the carpets landed in the initial shipment, and enclosed a cheque for \$750. It is understood that the cheque represented 8% of the landed cost of \$180 per carpet. Some of the carpets, however, were later to sell for over \$4,000.³⁰ The cheque was returned to the respondents by the agency representing the applicants.

Justice von Doussa commented that “the recognition of the sacred and religious significance of these paintings, and the restrictions which Aboriginal law and culture imposes on their reproduction is only now being understood by the white community”.³¹ One suspects, however, that the position of the respondents, in sending a cheque for a derisory amount, is closer to the “feel” most Australians have for the issues. Further, in their communications with the agency representing the plaintiff artists, one of the defendants insisted that her exploitation of the works could only benefit the artists.³²

As I said in my last letter to you, it is indeed a shame you or the artists you represent do not approve or like the medium of woollen rugs to present their work. Apart from royalties, it is a great way to promote aboriginal art and culture world wide.

Also, throughout the trial the respondent’s lawyers repeatedly (and erroneously) referred to the proceedings being run by the agent otherwise than in the interests of the artists – as if the respondents and their legal advisers knew better than the artists and their agents as to whether the actions should be pursued.³³

Von Doussa J found that the customary and statutory approaches to authorship co-existed in the case before him and that each of the artworks reproduced in the carpets was an original work for the purposes of copyright. This finding was clearly right: on general principles, provided a work is not a mere copy of a pre-existing work, it will be protected as an original work for the purposes of copyright. His Honour also found that each carpet reproduced a “substantial part” of one of the artworks, and therefore infringed the relevant artist’s copyright.

Insofar as the assessment of damages is concerned, von Doussa J noted that “The statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming

²⁸ Section 37 prohibits importation of items containing copyright material for commercial purposes unless the permission of the copyright owner is obtained.

²⁹ Indofurn Pty Ltd advertised the carpets in a way which made it appear as if the permission of relevant copyright owners had been obtained.

³⁰ See Colin Golvan, “Aboriginal art and copyright – an overview and commentary concerning recent developments”, (1996) 1 *Media and Arts Law Review* 151 at 152.

³¹ 30 IPR 209 at 216

³² *ibid* at 222

³³ *ibid* at 223

stories and the imagery such as used in the artworks of the present applicants”.³⁴ It is not clear exactly what his Honour had in mind in making this comment, as he later discusses the way the anger and humiliation of the creators and their communities may impact upon the size of the monetary compensation which a court orders as damages. Also, His Honour noted how the success or failure of an Anglo-Australian court action for infringement may affect the reaction of the community whose rights have been infringed.³⁵ It may be that his Honour meant to refer to the fact that the remedies under the Copyright Act do not match the remedies that may have been applied were the matter governed by customary law.

Secondly, referring to cases in which plaintiffs had been subject to insulting behaviour³⁶ and humiliation,³⁷ his Honour assessed damages under section 115(2) of the Act on the basis that damages had to compensate the applicants for the personal distress they had suffered and for their potential exposure to embarrassment and contempt within their communities. His Honour also noted that:³⁸

The losses arising from these risks are a reflection of the cultural environment in which the artists reside and conduct their daily affairs. Losses arising from tortious wrongdoing experienced by Aborigines in their particular environments are properly to be brought to account.

Thirdly, his Honour noted that the anger and distress of those around the copyright owner constituted part of the copyright owner’s injury and suffering, and therefore were appropriate matters for the court to take into consideration in assessing damages under section 115(2).³⁹

Fourthly, his Honour accepted anecdotal evidence that Aboriginal law and custom would treat each of the applicants equally, and that “fruits of the action would be shared equally between the named parties”. His Honour noted that such a treatment would not be in accordance with the principles under the Copyright Act, and indicated the basis of his assessment according to the established requirements of copyright law. However, his Honour also expressed his judgment in terms which defined the aggregate liability of each respondent to the applicants as a group. His Honour left the applicants collectively to distribute the proceeds of the action “to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist”.⁴⁰ The applicants

³⁴ *ibid* at 239

³⁵ *ibid* at 215

³⁶ *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 268

³⁷ *Nichols Advanced Vehicle Systems Inc v Rees* [1979] RPC 127 at 140

³⁸ 30 IPR 209 at 190-191. His Honour referred to the following cases: *Napaluma v Baker* (1982) 29 SASR 192; *Weston v Woodroffe* (1985) 2 MVR 475; 36 NTR 34 and *Dixon v Davies* (1982) 17 NTR 31.

³⁹ His Honour relied upon *Williams v Settle* [1960] 1 WLR 1072 at 1086-7 in this regard.

⁴⁰ 30 IPR 209 at 240. See also Stephen Gray, “Aboriginal Designs and Copyright”, (1993) Vol 9 No 4 *Copyright Reporter* 11. In both the *Bulun Bulun* and *Milpurrurru* cases it is notable how financial compensation was obtained by reference to the remedies available under the Copyright Act, but how those monies were then divided on a communal basis. In the *Bulun Bulun* case, it had been suggested that there should be a pro rata allocation according to the

therefore were awarded a judgment sum jointly, with permission given for individual applicants to come back to the court for individual judgments if they so desired.

In attempting to quantify compensatory damages, his Honour also showed a certain creativity. As his Honour stated, “the evidence led on behalf of the applicants indicates that the prospect of the artworks being commercially exploited in the carpet or other fabric market was extremely remote”. Nonetheless, his Honour was able to award a sum on the basis that the reproduction of the artworks on the carpets and the associated advertising and promotion had diminished the designs’ “freshness”. Miller notes that, in that the case concerned unauthorised excerpts which “diminish the appetite of the buying public for the subject matter”, it is unclear how loss of “freshness” in the works could have been worth any sum at all, albeit only \$1,500 awarded per design.⁴¹

Relevant government enquiries and reports

Over the past twenty years, there have been a series of government-sponsored or initiated reports and enquiries on either the recognition of Indigenous traditional laws, or the protection of Indigenous culture. Reports and enquiries include the *Report of the Working Party on the Protection of Aboriginal Folklore*, (Commonwealth Dept of Home Affairs and Environment, 1981); the Australian Law Reform Commission report, *The Recognition of Aboriginal Customary Law* (1986); the Report of the Review Committee, *The Aboriginal Arts and Crafts Industry* (Dept of Aboriginal Affairs, 1989); and the *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* conducted by the Hon. Elizabeth Evatt, AC (1996).

In 1994, the then Ministers for Justice, for Aboriginal and Torres Strait Islander Affairs, and for Communications and the Arts released an Issues Paper entitled *Stopping the Rip Offs – Intellectual Property Protection for Aboriginal and Torres Strait Islanders*. The Paper aimed to stimulate discussion on how to give effective intellectual property protection to Aboriginal and Torres Strait Islander material.

Principally the Issues Paper sought to facilitate consultation with Indigenous people, and asked communities for information and opinions about perceived limitations in eurocentric law, and how best to protect Indigenous cultural expressions from “rip offs”. The policy expressed in the document is that “widespread consultation with Aboriginal and Torres Strait Islander people is vital to determine the most appropriate way to address the limitations in the present protection of Aboriginal and Torres Strait arts and cultural expression”.⁴²

number of T-shirts of a particular artist’s work which had been manufactured. However, this suggestion was rejected by the artists, who decided to split the moneys equally, on the basis that they had all suffered equally: see Golvan, op. cit., and “Aboriginal Art and Copyright: the Case for Johnny Bulun Bulun”, [1989] *EIPR* 346.

⁴¹ See Duncan Miller, “Collective Ownership of the Copyright in Spiritually-Sensitive Works: *Milpurrurru v Indofurn Pty Ltd*”, (1995) *AIPJ* 185 at 198.

⁴² Attorney-General’s Legal Practice (Cth), *Stopping the Rip Offs – Intellectual Property Protection for Aboriginal and Torres Strait Islanders* (Attorney-General’s Legal Practice, Canberra, 1994), at 7.

It is clear that the discussion points within *Stopping the Rip Offs* were framed to stimulate open ended discussion. Initially, submissions were requested by 27 January 1995. This period of time was later extended, with members of an Interdepartmental Committee (IDC) visited a number of communities to gather views on the issues raised in the Paper. In the meantime, in early 1996 the Aboriginal and Torres Strait Islander Commission (ATSIC) established an Indigenous Reference Group on Intellectual Property, comprised of twelve Indigenous people with expertise and experience in intellectual property, cultural heritage and art. The Reference Group is chaired by the ATSIC Commissioner responsible for arts and culture. It has been organising community consultations, will provide advice and will report the outcomes of the consultations to the ATSIC Board of Commissioners.

In June 1996, ATSIC retained consultants to continue the process, under the auspices of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). A Steering Committee was established to oversee the project, with representatives from ATSIC, the IDC, AIATSIS and the Indigenous Reference Group. The consultants have prepared a discussion paper entitled *Our Culture, Our Future: proposals for the recognition and protection of Indigenous cultural and intellectual property*, was released at the end of July 1997. The discussion paper will form the basis for consultations with the Indigenous Reference Group and Indigenous communities. Submissions are to be received by 31 October 1997.⁴³

Where to next?

Generally, “law” is an instrument by which conflicts in discourse are managed: it defines the situations in which one discourse prevails over another. “Law” will generally only do so, however, where conflicts become either sufficiently irritable to warrant action on the part of law-makers, or where intervention becomes sufficiently attractive (socially, politically or economically). In my view, it is likely that these preconditions are increasingly present in relation to the recognition and incorporation of aspects of Indigenous intellectual property systems into Australian law.

Copyright law it allocate preferences between different discourses by creating and maintaining property rights in existing material and in material yet to be created,⁴⁴ albeit that these rights are limited in time, and subject to exceptions. To date, an allocation of preference between eurocentric and Indigenous discourses has been by default; Indigenous intellectual property has been protected by Indigenous customary law systems which are invisible to most non-Indigenous observers, and a non-Indigenous person or company wishing to make some use of that material has generally been presented to no Western legal impediment in appropriating that material.

The question now is both whether and how Indigenous customary intellectual property systems are to be recognised in mainstream Australian law.

⁴³ The consultants have established a website at <http://www.icip.lawnet.com.au>.

⁴⁴ Section 196(1) of the Copyright Act states that copyright is personal property; section 197 of the Act deals with ownership of copyright in future copyright.

Difficulties arise: When we refer to protecting Indigenous culture, what precisely needs protection? What are the best mechanisms to provide that protection? And who monitors and/or modifies any mechanisms which are put in place? Further, should the prime objective be to preserve continuing Indigenous traditions? (If so, any legal mechanisms should insulate Indigenous culture from the influence of the market.) Alternatively, should the prime consideration be economic protection? (In which case, issues would arise as to how to distinguish the work of the Indigenous artist from his or her non-Indigenous counterpart, and whether the legislation should prescribe or regulate the distribution of proceeds between the artist and his or her community.)

A number of areas of common law have been canvassed to provide protection to Indigenous intellectual property, including blasphemy and the extension of Crown prerogative rights.⁴⁵ It has also been suggested that the principles embodied in the *Mabo* decision may extend protection to Indigenous intellectual property systems.⁴⁶

Areas of legislation have also been canvassed as possible ways of protecting Indigenous intellectual property systems. Relevant legislation includes the Copyright Act; a system of *domain public payant*;⁴⁷ the Native Title Act (1995) and the Aboriginal and Torres Strait Islander Heritage Protection Act (1984).

In addition, suggestions have been made for trade mark and labelling systems to authenticate items produced by Indigenous communities and individuals. Education of the non-Indigenous population and the development of ethical guidelines and codes of practice are also likely to secure greater respect for Indigenous sensitivities insofar as the production and use of cultural material are concerned.

The rôle of copyright in protecting Indigenous intellectual property

Clearly, to the extent to which individual Indigenous creators are creating works which fall within the categories of copyright protection, copyright law in its current form is available to prevent misappropriation. It may be that remedies under the current copyright law may be further fashioned to protect the communities of individual Indigenous creators.⁴⁸ In particular, the Act might be amended to oblige a Court to take cultural harm into account in assessing damages, without such an award reducing damages under other heads of damages. It may also be appropriate to amend copyright to take into account issues such as traditional rights in respect of ownership. It would certainly also assist individual Indigenous creators for the Copyright Act to be amended to introduce a resale royalty right.

In my view, however, copyright is not generally an appropriate vehicle for the protection of Indigenous intellectual property. While copyright is clearly not either

⁴⁵ See for example, Miller, *op. cit.*

⁴⁶ See for example, Stephen Gray, "Aboriginal Designs and Copyright – can the Australian common law expand to meet the Aboriginal demands?", [1992] *LIJ* 47.

⁴⁷ That is, a royalty payable for the commercial use of works in the public domain.

⁴⁸ As in *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209

immutable or sacrosanct, I have real concerns as to the damage potentially inflicted upon both copyright and Indigenous intellectual property by trying to fit the circle of Indigenous intellectual property into the square of copyright. Distinctions between Indigenous intellectual property rights and copyright rights broadly include the following:

- copyright is principally concerned with cultural creation and investment, while Indigenous intellectual property is concerned holistically with value and belief systems, land, community identifications and social functioning;
- copyright centres on individual works, while Indigenous intellectual property is as much concerned with types and styles;
- copyright is concerned with outcomes, while Indigenous intellectual property is also concerned with processes;
- copyright creates limited individualised monopoly rights, while Indigenous intellectual property creates socialised rights;
- copyright aims to stimulate new creation, while Indigenous intellectual property is concerned with preservation and the integrity and authority of a culture; and
- copyright is concerned with form, while Indigenous intellectual property is as much concerned with content.⁴⁹

Perhaps the most fundamental discrepancy between copyright and Indigenous intellectual property, however, lies in how Indigenous intellectual property is concerned with the traditional knowledges which underpin all aspects of Indigenous identity and lifestyle.

Insofar as Anglo-Australian law either fails adequately to address the concerns of Indigenous intellectual property, or is unable to be moulded into providing protection, it may be necessary to construct special legislation, perhaps along the lines of the existing heritage protection legislation or the scheme advocated by the Working Party, but informed by Indigenous intellectual property concepts and controlled by relevant Indigenous communities. The approach to the protection of “folklore” adopted by WIPO and UNESCO in the Model Provisions⁵⁰ also will provide a useful guide, particularly in providing an international touchstone as mainstream Australia tries to act honourably in resolving the intellectual property concerns of Australia’s Indigenous people.

The deep challenge may be for Australia’s non-Indigenous society to accommodate the implications of Deane and Gaudron JJ statement that “The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, ... past injustices”.⁵¹ That statement presents a political challenge. The legal challenge is to identify and house Indigenous intellectual property

⁴⁹ I acknowledge that these oppositions may be unduly simplified. For example, eurocentric legal regimes are just as concerned with social functioning as Indigenous intellectual property systems; and by creating property rights, copyright is equally predicated on constructs of cultural authority.

⁵⁰ That is, the *Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*.

⁵¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 109

principles either within existing legal frameworks or within purpose built legislation.

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⁵² The views presented in this article are personal views, and do not necessarily represent the views of the Australian Copyright Council. This article represents a brief overview of issues discussed in greater detail in Ian McDonald, *Protecting Indigenous Intellectual Property* (Australian Copyright Council, Sydney, 1997).