

Article for Copyright World

Copyright in indigenous works: communal title, constructive trusts and fiduciary duties

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John Bulun Bulun & George Milpurrurru v R & T Textiles Pty Ltd

Federal Court of Australia, 3 September 1998, unreported

R & T Textiles admitted infringing Bulun Bulun's copyright by importing and selling fabric on which one of Bulun Bulun's artworks, *Magpie Geese and Water Lilies at the Waterhole*, was reproduced. R & T Textiles consented to declarations to the effect that Bulun Bulun's legal title to the copyright had been infringed, and consented to comprehensive permanent injunctions.

The second applicant, George Milpurrurru, continued his claim despite the consent orders in favour of Bulun Bulun. Milpurrurru claimed on his own behalf and in a representative capacity as the most senior person of the Ganalbingu people, as equitable owner(s) of copyright in the painting. Neither Milpurrurru nor any of the Ganalbingu people had painted any part of *Magpie Geese and Water Lilies at the Waterhole*. Rather, the claim was based on the fact that the Ganalbingu people, under Indigenous customary law, are the traditional owners both of the body of ritual knowledge from which the painting was derived, and of the subject matter of the painting.

The issues were:

- whether there is scope within the Copyright Act 1968 (Cth) for recognition of communal ownership by members of a group who have rights under customary Indigenous law; and
- whether Bulun Bulun holds the copyright in the painting on trust for the Ganalbingu people; and/or
- whether Bulun Bulun's holds the copyright in the painting as a fiduciary.

Justice Von Doussa refused to recognise any scope for communal title under the Copyright Act. While he noted that "it is superficially attractive to postulate that the common law should recognise communal title", to do so would "involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia". His Honour indicated that, while there may have been scope for continued recognition of Indigenous intellectual property law from the time of European occupation of Australia in 1788 until at least the codification of copyright law in the Copyright Act 1912 (Cth), copyright now is entirely a creature of statute. In particular, section 8 of the current Copyright Act provides that "copyright does not subsist otherwise than by virtue of this Act".

Insofar as the current Act is concerned, section 35(2) provides that copyright is owned by the *author* of an artistic work. The statute thus effectively precludes any notion of group ownership in a work unless it is a "work of joint authorship" within the meaning of the Act. His Honour then referred to cases, including *Kenrick & Co*

v Lawrence & Co (1890) 25 QBD 99, in which it was held that a person who suggests an idea is not, on that ground alone, a joint author in any work embodying that suggestion.

His Honour also held that there was no evidence on which he could find or infer an intention on the part of Bulun Bulun to create a trust in respect of the painting: there was nothing to suggest that Bulun Bulun's sale of the painting was contrary to customary law, and the sale of the painting and its licensed reproduction in a book "forecloses any possibility of arguing that the imagery in the artwork is of such a secret or sacred nature that it could be inferred that the artist must have had the intention in accordance with customary law to hold the artwork for the benefit of the Ganalbingu people".

His Honour did, however, find that the relationship between Bulun Bulun and the Ganalbingu people is a fiduciary relationship, under which "the artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge". However, this fiduciary relationship does not vest any equitable interest in the copyright in the Ganalbingu people. Rather "their primary right, in the event of a breach of obligation by the fiduciary is a right in personam to bring action against the fiduciary to enforce the obligation".

In this case, Bulun Bulun had taken appropriate action to enforce the copyright in *Magpie Geese and Water Lilies at the Waterhole*, and had therefore fulfilled the obligations he owed as a fiduciary. There was therefore no occasion to grant any additional remedy in favour of the Ganalbingu people.

Von Doussa J did, however, canvas situations in which a court might be minded to impose a remedial constructive trust on the copyright owner: for example, if Bulun Bulun had denied the existence of fiduciary obligations and refused to take steps to protect copyright in his painting, or if the legal owner of a work could not be identified or found, and the fiduciaries were therefore unable to join the legal owner of the copyright in an infringement action.

The issue of whether intellectual property rights are an incident of native title in land such that they constitute some recognisable interest in the land itself was not pressed.

The decision is available on the Internet:

http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1082.html