

Protecting Australian Indigenous Art: ownership, copyright and marketing issues for NSW schools

Warnings

- This text might identify Aboriginal or Torres Strait Islander people who are now deceased in ways that inadvertently give offence to particular families or communities.
- Nothing in this document should be construed as legal advice. The purpose of this publication is to provide general information to teachers and students on issues relating to Indigenous cultural and intellectual property. Anyone needing legal advice should contact a qualified legal practitioner.

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Contents

Acknowledgements	4
A note on spelling	4
1 Background information	
1.1 Introduction	5
1.2 The nature and scope of Aboriginal art	5
1.3 Plunder and protection: attitudes to Aboriginal art	6
1.3.1 Permanence	7
1.3.2 Finders, keepers	7
1.3.3 Barak: a forerunner	8
1.3.4 Curios and souvenirs	8
1.3.5 Change and revival	9
1.3.6 The context of appropriation	10
1.3.7 Appropriation and postmodernism	11
Discussion points	11
1.4 Taking control	12
1.4.1 Art as a sign of ownership	12
1.4.2 Ownership among groups	13
1.4.3 Aboriginal artists' cooperatives, galleries and organisations	14
1.5 Protection: the issues	14
1.5.1 Regulating authenticity	15
1.5.2 Case study – Eddie Burrup	15
1.5.3 The Label of Authenticity and the Collaboration Mark	16
Discussion points	17
1.5.4 Cultural context	17
1.5.5 Dominant and marginalised cultures	19
Discussion points	19
1.5.6 Motives for appropriation	20
Discussion points	20
1.5.7 Criticism	20
1.5.8 Appropriation: a two way street?	21
Discussion points	21
1.5.9 Cultural integrity	22
1.5.10 Cultural integrity and 'urban' artists	22
1.5.11 Fair game: 'Aboriginal' designs in the marketplace	23
1.6 Mechanisms for protection in Australia	25
1.6.1 Copyright Act	25
1.6.2 Moral rights	28
Discussion points	28
1.6.3 Trade Practices Act (and equivalent State legislation)	29
1.6.4 Passing off	29
1.6.5 Breach of confidence laws	29
1.6.6 Cultural heritage laws	30
1.6.7 Designs Act	30
1.6.8 Contracts	31
1.6.9 International policies and protocols	31
1.6.10 Australian policies and protocols	32
1.7 Proposals for change	33
1.7.1 Indigenous Communal Moral Rights (ICMR)	33

1.7.2	The ‘Our Culture: Our Future’ discussion paper and report	35
1.7.3	The ‘Minding Culture’ report	37
1.7.4	Resale royalty rights	38
1.7.5	New technology	39
	Discussion points	39
2	Implications for teaching and learning	
2.1	Reproducing or displaying Aboriginal artworks	40
2.1.1	Ownership	40
2.1.2	Permanent public display	41
2.1.3	Permission	41
2.2	Appropriating Aboriginal artworks	42
2.2.1	Borrowing or stealing?	43
2.3	Before you make use of Aboriginal art: a checklist	45
3	Case studies of copying and appropriation	
3.1	Case study 1: The ownership of knowledge	46
3.2	Case study 2: Flash T-shirts	47
3.3	Case study 3: Terry Yumbulul and the ten-dollar note	49
3.4	Case study 4: ‘The carpets case’	50
3.5	Case study 5: John Bulun Bulun & M* v. R&T Textiles	52
3.6	Case study 6: R v. O’Loughlin	53
3.7	Case study 7: Australian Icon Products Pty Ltd (AIP)	54
3.8	Case study 8: Australian Aboriginal Art Pty Ltd (AAA)	54
	Glossary	55
	References	58
	Further reading	60
	Other resources	60

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A note on spelling

The anglicising of Aboriginal words has resulted in many of them having a variety of spellings. The spellings in this resource kit are generally consistent with those used by the Australian Institute of Aboriginal and Torres Strait Islander Studies in Horton, D (ed), *Encyclopaedia of Aboriginal Australia* (Aboriginal Studies Press, 1994), but it is acknowledged that there are other spellings that are equally as valid.

1 Background information

1.1 Introduction

This document is a revised version of a book that was part of a kit titled *Affirmations of Identity: Aboriginal and Torres Strait Islander Visual Artists Resource Kit*, which was published by the Board of Studies NSW in 2000.

The aim of this document is to provide information to teachers and students about appropriation, misappropriation, intellectual property and copyright in relation to Aboriginal and Torres Strait Islander visual arts.

The visual arts provide clear and accessible examples of the diversity of Aboriginal and Torres Strait Islander cultures. This text places particular emphasis on Aboriginal art forms that emerge from traditional stories and symbolism. Often, this means that the artists concerned are from recognised cultural and/or language groups that have retained or re-established a connection to tens of thousands of years of knowledge and cultural expression through art, language, ritual, music, dance, story and song.

In their work, the artists often have responsibility for representing elements of great cultural sensitivity. As this text examines ‘protection’, it is primarily concerned with Aboriginal peoples’ need to control images and styles that are integral to community identity and meaning.

Many aspects can be considered through the notion of protection. For example, teachers and students might consider Aboriginal artists’ rights to protection from:

- unauthorised copying of images
- adaptation of images or appropriation of styles
- display, presentation or sale of images in a way that gives offence
- reproduction, marketing, promotion or any other process that fails to appreciate elements that might be sacred, secret, or otherwise sensitive
- misleading commercial representations in which ‘Aboriginal designs’ are claimed, or false pretences by non-Aboriginal artists who claim to be Aboriginal people
- trivialisation or loss of value through mass production and merchandising.

In exploring these rights, students will consider Aboriginal perspectives on community ownership and control, and whether existing legal provisions adequately recognise these perspectives.

1.2 The nature and scope of Aboriginal art

For tens of thousands of years before their lands were occupied in the name of George III, Indigenous Australian peoples were expressing their cultural diversity in a rich variety of ways.

Among the million or more Indigenous people living on this continent at the time of the arrival of the British in 1788, the range of visual art practices included:

- the etching, and ochre painting, of designs onto possum cloaks
- the carving of weapons and other practical objects
- the ornate decoration of objects such as boomerangs
- rock painting and carving
- bark painting

- wood sculpting and the burning in of designs
- the carving, painting and feather decoration of burial poles
- the creation of headdresses and ornaments for personal adornment or gifts.

Evidence exists for all of these activities. But other activities that left less permanent records were also taking place, notably sand drawing and body painting.

Some of these practices continue today in ways that are very similar to those that existed before British occupation. More significantly, the styles and symbolism of these practices have continued, in all sorts of modified and extended ways, through the activities of post-colonial and contemporary Aboriginal artists. This change-with-continuity points to the dynamism and resilience of Indigenous Australian cultures. Among the more recognisable visual features are things such as concentric circles, cross-hatching, dotting and journey tracks. Figures with a long history of visual representation include the Mimi, Wandjina and Rainbow Serpent.

Contemporary Aboriginal and Torres Strait Island art is represented by older artists (eg Rover Thomas) and younger artists (eg Dennis Nona); by men (eg the early artists at Papunya) and by women (eg the artists at Ernabella); by those living in urban contexts (eg Rea) and by those living in remote communities (eg Paddy Fordham Wainburranga); by those with formal training (eg Fiona Foley) and by those with no formal training (eg Emily Kame Kngwarreye); by those with a traditionally defined role (eg Terry Yumbulul) and by those who range broadly over many social issues (eg Avril Quail).

Contemporary Aboriginal visual artists use the full range of artistic media and approaches, including acrylics, oils, watercolours, photography, multimedia, sculpture, textiles, weaving, screen printing, collage and installation. There is also an exciting diversity of activity that might fall within the field of ‘visual performance art’ – drama, dance, ceremony and so on – that is not covered in this resource.

1.3 Plunder and protection: attitudes to Aboriginal art

The perceptions of Aboriginal art among non-Aboriginal people have taken a long, slow turn since the period of first contact. Two currents lay under early attitudes. The first was the prevailing concept of ‘civilisation’, which placed Aboriginal people at the bottom of human cultural achievement. Art was held to be one defining characteristic of ‘civilised’ societies, and it was generally assumed that Aboriginal people had no art. This attitude was famously – or infamously – chronicled by William Dampier:

The Inhabitants of this Country are the most miserable People in the world. The Hodmadods of Modomatapa, though a nasty People, yet for Wealth are Gentlemen to these; who have no Houses and Skin Garments, Sheep, Poultry and Fruits of the Earth, Ostrich Eggs, &c. as the Hodmadods have: and setting aside their humane shape, they differ but little from Brutes. (Dampier, 1698)

The second current showed an awareness of the ills of contemporary European society coupled with an idealised vision of life that was lived close to the earth. This was the idea of the ‘noble savage’, prevalent among the educated classes and encapsulated by Captain Cook:

From what I have said of the Natives of New Holland they may appear to be the most wretched People upon Earth; but in reality they are far more happier than we Europeans, being wholly unacquainted not only with the Superfluous, but with the necessary Conveniences so much sought after in Europe; they are happy in not knowing the use of them. They live in a Tranquillity which is not disturbed by the Inequality of Condition. (quoted in Wharton, 1893)

However, even this romantic attitude did not attach the idea of ‘art’ to Aboriginal cultural expression.

1.3.1 Permanence

One of the main things that supported the assumptions of people like Dampier and Cook was the apparently non-acquisitive and transient character of Aboriginal life. This lifestyle was poorly understood. The absence of constructions for permanent habitation, and the absence of agricultural practices such as tilling and managing domesticated animals, led the newcomers to claim lands that were not, to their way of thinking, 'owned'. It was only later that a more detailed appreciation developed, including an understanding of the precise network of countries that had been defined across the continent, and the sophisticated intercultural relationships that negotiated and preserved their boundaries.

In other words, there *was* permanence – it had endured for 50 000 years or more in some Aboriginal countries. However, it was not a permanence that exhibited urban or village characteristics as understood by the Europeans. For the newcomers, ideas of permanence extended into the concept of art. To their way of thinking, art was set aside to endure – on walls, in galleries and theatres, and so on. The qualities of timelessness and immutability rated highly among the qualities that gave significance to creative works. This was particularly true of drawings, paintings, lithographs and so on – things that were dignified with frames, bindings or other processes that were intended to signify their ongoing value.

In European eyes, Aboriginal people were, at best, folk decorators – people who placed designs onto objects of utility such as baskets, or objects of ceremony such as didgeridoos. These were things that were not nurtured for their own sake, in the manner in which so much of European art was nurtured. They were not intentionally set aside, nor admired from a critical distance.

It is important to recognise that this Western notion of art continues in much of contemporary Australian society. It is, in fact, a key to the recent popular success of Aboriginal art forms, which are now available in conventional media through widely accepted modes of commerce and display.

1.3.2 Finders, keepers

Because of the perceptions described above, Australia's early colonists viewed expressions of indigenous culture from an anthropological or ethnographic stance. They dealt not with arts, but artefacts. Early encounters with Aboriginal cultures were often recorded in journal entries and illustrations. There was also, however, a process of active collection as the new occupants encroached into Aboriginal lands.

This process of collection continued to gather pace throughout the extended period of European occupation, reaching a peak in what Berndt & Berndt (1992) call the 'collation and preservation phase'. This phase began in earnest about a century after Australia was claimed for England. It was, by and large, a 'scientific' response to the fact that 'lost tribes' were seen to be passing away and records were few. Many objects (including human remains) were gathered and shipped off to European museums. Later, many more such 'cultural specimens' found their way into Australia's museums of natural history, where they shared space with plants and animals.

In all of this activity, one critical legal principle was at work: the acquirers of Aboriginal cultural heritage became the recognised owners. So long as these materials were not acquired by theft, European collectors had the support of the law in determining future use and presentation. This right extended to those who recorded and published Aboriginal languages;

that is, because they had produced the first written versions, these publishers had the status of *creators* – a status that gave them far greater control over the dissemination of the languages than the speakers of the languages had.

1.3.3 Barak: a forerunner

By and large, it was not until well into the twentieth century that most non-Aboriginal Australians recognised the creative or artistic dimension that was present in the visual expressions of Aboriginal culture. However, a number of Aboriginal people established themselves as ‘legitimate’ artists during the nineteenth century.

Perhaps the most notable of these artists is Barak. A Woiwurrung Elder, Barak’s country included land around the Yarra River in Victoria, including the present-day site of Melbourne. His work as an artist foreshadows much of what has taken place in Aboriginal art in the last few decades, because he worked in ways that had a commercial basis in the non-Aboriginal market while remaining concerned with exploring and retelling the ideas and meanings of his culture.

Barak’s images portray ceremonial activities and traditional life. Born in the early 1820s, his life extended from a period before any significant contact with Europeans to his time of residence at Coranderrk Aboriginal Station where his house contained a print of Queen Victoria, hung over the fireplace. Importantly, however, Coranderrk stood on Barak’s traditional lands; this allowed him to maintain a strong connection to his heritage.

One of the most significant aspects of Barak’s work is that he transcribed images that had been developed in other contexts onto art board – a process that is characteristic of much contemporary Aboriginal art. In particular, Barak’s drawings represented the intricate designs that were etched into possum-skin cloaks by his people. In doing so, he exercised an artistic proprietorship over these designs – the sort of proprietorship that Aboriginal artists are now calling for to protect images that belong to particular people and their regions.

The materials Barak used indicate the remarkable transitions and the enduring heritage that characterised his life. He continued to use resources that were naturally available – earth pigments and charcoal – freely mingling these with pencil and watercolours (Sayers, 1994). His manner of representation is also a mixture of older and newer learnings: while the influences of European figure drawing are evident, the works integrate the animal world and combine different points of view rather than use perspective conventions such as foreground and background.

It was during the period of Barak’s artistic output, late in the 1880s, that Adelaide hosted Australia’s first exhibition of Aboriginal art, *Dawn of Art*. It featured drawings on paper by Aboriginal prisoners at the Northern Territory’s Palmerston gaol. The images were mainly animals, rendered in a naturalistic style and incorporating decorations that reflected elements of northern Australian rock art. Here, too, was evidence of a synthesis of older and newer modes of artistic representation.

1.3.4 Curios and souvenirs

While nineteenth-century artists like Barak, Tommy McRae and Mickey of Ulladulla were able to establish a demand for their works in Australia’s more populated south-east, a good deal of interest among non-Aboriginal people was based on preserving curiosities from what was regarded as the last generation of ‘true’ Aboriginal people. This curiosity factor was apparent in the souvenir trade that flourished in the early twentieth century.

The rise of purpose-designed ‘souvenir art’ coincided with the spread of squatters and pastoral leaseholders into vast areas of Aboriginal land. The resulting fragmentation of Aboriginal societies was supported by a policy of ‘protection’ involving contrived colonial settlements – Christian missions and Aboriginal outstations. Into each of these superficially European living environments were drawn displaced Aboriginal people from different dislocated communities.

Inevitably, the people in these communities were encouraged into activity that was economically productive. The making of decorated crafts was one such activity. Craft objects were believed to be those most likely to gain mainstream acceptance because of their appearance as ‘traditional’, and therefore ‘authentic’, expressions of Aboriginal culture. They fed the desire among non-Aboriginal people to experience the work of ‘real Aborigines’ – generally assumed to be people who were primitive and unchanging. Indeed, the only significant exhibition of Aboriginal art in the early part of the century – bark paintings at the National Museum of Victoria – was titled ‘Primitive Art’.

Two other misconceptions were reinforced by ‘souvenir art’: that Aboriginal people were craftspeople, not artists; and that visual design among Aboriginal people was the preserve of men, a belief deriving from the work of earlier anthropologists who tended to collect men’s portable works for display in galleries as evidence of Aboriginal peoples’ cultural activity.

A purist’s view of outstation and mission life might be that Aboriginal peoples’ art – and their culture generally – was ‘corrupted’. However, Aboriginal art and design seems to have always been receptive to intercultural influences. Perhaps this is most strikingly evident in Arnhem Land, where cultural and material commerce with the Macassans occurred for centuries before contact with Europeans.

The apparent purity of art forms was not, and is not today, the major concern of Aboriginal people. Rather, the important issue was (and is) ownership and control over cultural expression.

1.3.5 Change and revival

An ironic outcome, and a mark of the resilience of Indigenous Australian cultures is that outstation communities have become the focal points of a dynamic process of Aboriginal artistic revival. Places like Hermannsburg (1877), Balgo (1939), Ernabella (1939) and Papunya (1960) were set up to serve the protective and assimilationist policies of non-Aboriginal administrators, but they are now known internationally as the bases of some of Australia’s most important and acclaimed artists.

Albert Namatjira was Australia’s first indisputably famous Aboriginal artist, ushering in the modern period of recognition of Indigenous Australian art. An Arrernte man, Namatjira was stimulated by the watercolours of a non-Aboriginal artist at Hermannsburg in the 1930s. His school of painting continues among Arrernte people today.

Namatjira’s work was ‘acceptable’: here was an Aboriginal artist who painted ‘like a white man’, and whose sympathetic landscapes struck a romantic chord. In some ways, social critics felt his prominence to be counterproductive, since his work could be viewed as a demonstration of the success of assimilation. Reinforcing this idea, the first overseas touring exhibition of Aboriginal art, *Art of Australia 1788–1941*, included images that were intended to represent the first wave of Aboriginal artists working in the European tradition. Along with these others, Namatjira was largely written off as a serious artist because his work seemed obviously derivative.

It is only recently that critical orthodoxies about Namatjira’s work have been revised. Recent rereadings have been much more sympathetic; increasingly they interpret Namatjira’s work as

emphasising his attachment to significant country rather than simply portraying the beauty of the landscape (Caruana, 1993). In any case, he undoubtedly paved the way for the acceptance of later Aboriginal artists who, from a market perspective, have been much freer to work in their own cultural idiom.

1.3.6 The context of appropriation

The ownership rights of Aboriginal artists before the 1960s can be judged from the fact that it was not until 1957 that an exhibition of non-European-style Aboriginal art – *The Art of Arnhem Land* – actually identified individual artists and indicated their communities.

It is important to appreciate this context in order to understand the basis upon which there was so much appropriation of Aboriginal art forms. Under the generic banner of ‘Aboriginal art’, a great diversity of cultural, regional and individual approaches had been disseminated. This led to the assumption that, rather than being owned, design elements fell under the vast collective notion of ‘heritage’ and ‘tradition’ – they belonged, in a sense, to everybody. From a copyright perspective, this was equivalent to assuming that they belonged to nobody.

Today, many Aboriginal communities are fighting for recognition that there *is* a form of collective ownership. However, this ownership is not diffuse and meaningless. It involves real and particular communities with real and particular cultural expressions. In the same way, the nature of Aboriginality is not an abstract concept that can be freely tapped into; it is contextual, and may combine individual heritage and identity with community recognition and acceptance.

The inclination of non-Aboriginal artists to adopt Aboriginal art forms was given impetus by Margaret Preston in 1930, when she urged readers of *Art in Australia* to ‘be Aboriginal’. Preston’s urgings were the result of her disaffection with Australian art, which she felt to be generally undistinguished. It was her belief that an Aboriginal perspective could somehow be infused to produce art that was distinctively ‘Australian’. In retrospect, Preston’s ‘Aboriginal phase’ is widely seen as appropriation, and she has been described as the ‘Mother of Kitsch Australiana’ (Marrie, 1995).

De Lorenzo (1988) suggests that Preston’s response to Aboriginal art was both aesthetic and mystical – a response typical of contemporary modernists, who sought abstracted, geometric designs as a way to express universal human experience:

So strong was her conviction that she enthusiastically raided any available Aboriginal art. In her paintings and prints she incorporated and freely adapted a range of motifs.

Preston’s influence is evident from the fact that fabric and ceramic designers began to faddishly lift and adapt Aboriginal designs in a way that attached no meaning other than the decorative. They may have taken encouragement from her waiver of responsibility in 1930: ‘Please do not bother about what the carver means in the way of myths, rites, etc; this is not the decorator’s affair.’ Timms (1986) observes that Aboriginal motifs were immensely popular in arts and crafts societies throughout the 1930s.

The equation of Aboriginal imagery with decoration clearly persists. It is evident in T-shirts, coffee mugs, place mats, earrings and any number of other products. Visual richness and the sense of the aesthetics are valued by Aboriginal and non-Aboriginal people alike (even if in a range of different ways). Once again the issue is the degree of control: to what extent are Aboriginal people able to determine the uses and dissemination of their art? Even where Aboriginal artists do appear to be exercising artistic control, critics such as Germaine Greer (1977) have suggested that they may be under irresistible market pressure to mass-produce works.

1.3.7 Appropriation and postmodernism

The exploratory urges of modernist art have not ended in the era of postmodernism. Many artists continue to look for representations that are transcendent and symbolism that is universal. The climate is even more conducive to appropriation, and the ethics more complex, because of the tendency of postmodern art to reposition images (or ‘signs’) so that the interpreter is provided with questions or challenges about what the images signify. A non-Aboriginal artist, therefore, might make a very conscious attempt to challenge assumptions about the ‘primitive’ or the ‘traditional’ by providing new contexts for recognisable indigenous images or styles. In this approach, the artist is said to be ‘referencing’, not ripping off.

There is also a tendency towards a ‘global consciousness’ in this era of close and immediate cultural exchange. Artists of all kinds are making apparently sincere attempts to open up their thinking and their sources of influence. Inevitably, this leads to the adoption of forms and styles that are ‘outside’ the artists’ cultural traditions.

Discussion points

- Is it possible for present-day art to be monocultural? Why or why not?
- What is valuable about artists focusing on their cultural heritage? What negative aspects might there be?
- Aboriginal artists are not free to borrow from other Aboriginal cultural styles in their work unless they have the consent of the original owners (note the comments by Peter Skipper and Banduk Marika as quoted in 1.5.11). Does this mean that there is a ‘level playing field’ in the art world?
- What connections can you make between mass media and artistic appropriation or misappropriation?
- Once an image is widely disseminated, its meanings can rapidly change. Consider the associations or feelings that you might attach to the following and how they might be different from the associations intended when the images were first created:
 - a McDonald’s sign
 - a gold-leaf Madonna
 - a bowl of fruit painted in oils
 - a linocut bottle-brush
 - a stencilled hand.

1.4 Taking control

From the late 1950s, Aboriginal art was framed by the rapidly growing movement for social, political, cultural and land rights. Often drawing on newer materials and techniques, Aboriginal artists reflected the impetus of this movement by making exciting new declarations of identity and heritage.

The reinvigoration of art in remote communities is exemplified by developments at Papunya. There, Aboriginal artists from five main language groups took inspiration from the availability of acrylics and art board. Encouraged by non-Aboriginal art teacher Geoffrey Bardon, the male elders began to translate the imagery of sand, shield and body painting, infusing new ideas and colours with older conventions.

Many commentators consider the movement at Papunya to be the most significant in Australian art. Parallel developments occurred in areas across central and northern Australia. Aboriginal people were giving renewed expression to their knowledge, stories and symbols in places that had been established, in many cases, with the purpose of ending their cultural 'separateness'. More than this, communities such as that at Utopia were established by and for Aboriginal people – the beginning of a new 'outstation' movement proclaiming both self-determination and the importance of ancestral land.

At the same time as the Papunya movement began, Harold Thomas designed the Aboriginal flag, providing a symbol of identity that would carry forward the struggle for Aboriginal rights. It was also a time of great change in Australia at large. The election of the Whitlam government in 1972 brought with it a new level of support for Indigenous communities and for the arts in general. The Aboriginal flag continued to be used in ways that signified survival and resistance, perhaps most potently by Avril Quail, whose 1982 work *Trespassers Keep Out* used the image of the flag to subvert the symbol of Australian suburban property rights, the picket fence.

Harold Thomas was identified as the original designer of the Aboriginal flag in the case of *Thomas v Brown* (1997), proving that copyright exists for that flag and should be acknowledged and respected.

1.4.1 Art as a sign of ownership

The close relationship between art and cultural revival gives some clue to the depth of concern that surrounds the use and reproduction of Indigenous visual forms. For many Aboriginal people, art is linked with the reclamation or reinforcement of their identity, story, language, place, symbolism, and techniques and practices. It has had a key role in social activism, building solidarity and providing an economic base for self-determination.

As much as anything, contemporary Aboriginal art has stood for *ownership*. It has operated as a visible sign through which individuals and communities have publicly identified themselves with the things that are particular to them, and which they value:

The dancing and artwork is your whole life – you have to know your traditional artwork that ties in with the land and ties in with the creation, where your boundary is, how far your ancestral creator has travelled. It's all written in the art. That is what the traditional art means: owner to the land.

– Banduk Marika (quoted in Isaacs, 1992)

I believe that art is a language for interpreting who you are, and I can't find any satisfaction other than painting ... Aboriginal people have always had a vast, rich culture and I am part of this. There are many things, which are too numerous to mention about the treatment of Aboriginals, but through my art I have identity and strength.

– Raymond Meeks (quoted in Isaacs, 1992)

The observations of Banduk Marika and Raymond Meeks bring into focus the idea of attachment. This is not something that is easily generalised, because the experience is different for all artists. However, Marika, Meeks and others seem to suggest that the important ideas of their culture are *more fully brought into being* by art. Art is capable of continually revitalising social, natural and spiritual realities.

The significance of this attachment might be explored in the form of a parallel. Take, for example, some wearable urban symbols from mainstream Australia's female youth culture – midriff top, nose ring, skin-tight synthetic pants. Now use them to dress an elderly woman from a small country town. The translation is by no means impossible, since the clothes are

cheap and easily obtained; rather, it seems incongruous, because the clothes are bound up with an idiom, or form of expression, that places them within a particular cultural territory.

However, we find it apparently much less incongruous (if at all) for a non-Aboriginal artist to develop and mass produce 'Dreamtime' or 'desert' designs, even though they are not congruent with the artist's cultural identity. The reason for this is complex, but it is partly explained by the convention that allows artists, through their work, to be temporarily located outside the social current. That is, they are narrators, but they do not belong to the story. Most commercial artists do not 'wear' their art in nearly the same way that the elderly woman wears her clothes. While we might believe that their art speaks *for* them, we are much less likely to believe that it speaks *of* them in a way that is capable of defining who they are. We are even less likely to believe that the work of these artists could speak of the identity of other people who are connected to them (unless they are explicit subjects).

1.4.2 Ownership among groups

An important effect of the practice of art is that it enhances the sense of cultural ownership that is held by Aboriginal practitioners and their communities. It is notable that the new wave of Aboriginal art in remote communities has carried with it a significant proportion of older people. Often without formal training, these people have been able to reassert their place as elders and give further expression to the task of keeping and transmitting knowledge. (This is particularly important given that, on average, the Aboriginal population is significantly younger than the rest of Australia's peoples.)

At the same time, younger people have found art to be one important means of laying claim to their cultural heritage. Lin Onus, for example, began painting at the age of 26:

I realised that by the time I left school at thirteen I had absorbed everyone else's history and values but not those that were rightfully my own. The school system was insensitive and uncaring for Koories and I now realise that one of my greatest motivations is a fear of inferiority ... My relationship with the Wunuwun family and my visits to Gamerdi are the most important influence on my painting now. For the first time I feel I am truly painting for my people ...

– Lin Onus (quoted in Isaacs, 1992)

At the age of 32, Brownyn Bancroft wrote:

The things that I create are all personal stories, some understood, some not ... I just allow my creative drive to take me on continuous journeys that enable me to tell stories from what is instinctively in my heart. The journey to be human, to feel, to be Koori.

(Bancroft, 1990)

Another change accompanying the commercial popularity of Aboriginal art forms has been the increased participation of women. This has been an especially important development in the more remote areas, where male roles have so far tended to be given more recognition and exposure. Equally, it has provided a way for women to declare the ownership over knowledge and symbolism that they have always had:

In the traditional context, women found a variety of ways of expressing themselves, not just as nurturers of children and important economic producers, but also as singers, dancers and sometimes painters and carvers in the ritual domain. As landowners, women from a variety of different groups owned or managed, along with the men, a body of ritual knowledge relating to their land. This was well illustrated during a number of land claim hearings in central Australia, where the women demonstrated their ownership of country by 'painting up' and performing their own ceremonies for the Aboriginal Land Commissioner.

– M West, 'Aboriginal Women as Artists', in McGuigen (ed)

In remote areas today, most Aboriginal art and craftwork is produced by women. Some women have attained new authority; for example, bark painters Namiyal Bopirri and Dorothy Djukulul have been permitted by fathers or other male relatives to paint subject matter that is usually confined to male elders and their sons.

1.4.3 Aboriginal artists' cooperatives, galleries and organisations

As the commercial interest in Aboriginal artists has gathered momentum, so too has the collection and exhibition of their works, and the mass circulation of reproductions. In these circumstances, many communities in which art is produced have community art centres determined to secure greater economic and moral ownership over their artistic material. These centres, which helped to develop today's booming market, are cooperative structures for the development, display, marketing and distribution of artworks.

In some cases this collective response reflects the quite collective manner in which the art community first organised and established itself, for example Warlukurlangu Aboriginal Artists Association at Yuendumu. In other cases – for example, Boomalli Aboriginal Artists Co-operative in Sydney – it is a mechanism to support artists who work in a range of communities and circumstances.

The support offered by Aboriginal arts organisations can be far-reaching. The collegial support of arts and advocacy groups and government organisations has been important in actions taken to protect the copyright and commercial and cultural interests of Indigenous artists. In the case of Johnny Bulun Bulun this support involved a sustained period of investigation that was able to uncover a number of other Aboriginal artists whose rights were being infringed.

This network of organisations and cooperatives has emerged in a relatively short period of time. It was in 1971 that the Commonwealth Government established a company, Aboriginal Arts and Crafts, to market Aboriginal art. Two years later, it set up the Aboriginal Arts Board of the Australia Council, providing for arts advisers in remote communities. This turned around the ad hoc processes that had existed up to that time, in which explorers, anthropologists, missionaries and private collectors had obtained 'artefacts' for museums or private collections, or for sale in the few existing retail outlets.

The arts advisers combined their responsibilities for documenting works and organising exhibitions with encouraging the production of work for both the fine art and tourist markets. This was a sign that Aboriginal art had moved firmly onto a commercial footing, putting Aboriginal artists into closer contact with the demands of the marketplace.

Despite the growing interest, however, only a very few Aboriginal artists are able to support themselves through sales; this also applies to the art industry generally. In order to build a sustainable industry, governments subsidise most art-producing communities. Artists' income might also be supplemented by general employment or social security benefits.

1.5 Protection: the issues

Many of the issues related to the protection of Aboriginal art fit in with more general concerns over 'cultural piracy'. In keeping with the dynamics of postmodern culture, many non-Aboriginal artists have been quick to make use of music, stories, dance, designs, tools, artefacts (and even personal identities!) that derive from Aboriginal communities.

Concerns about misappropriation are by no means restricted to the non-commercial realm. To Aboriginal artists and communities, the income that can be earned from the often painstaking production of artworks is just as important as it is to non-Aboriginal artists.

Two principles underlie the concerns of Aboriginal people about the use of their products and ideas for economic benefit:

- The right to show, reproduce, publish or market these ideas and products must rest with the owners and creators. This means that any other party wishing to make use of the work of Aboriginal artists must always seek permission.
- Any material benefits that arise from such activity should return in fair proportion to the owners and creators.

1.5.1 Regulating authenticity

In April 2006, following media reports of widespread irregularities in the Indigenous art sector, the Federal Minister for the Arts and Sport, Senator Rod Kemp, announced moves to combat the exploitation of Indigenous artists. Senator Kemp said the Government would engage in a process of consultation in order to ‘map out strategies for dealing with issues like trade practices, consumer education and awareness, and the need for regulation and enforcement’.

These concerns have dogged the commercialisation of Indigenous art practices for decades and previous efforts to establish a mechanism for authenticating Indigenous art and cultural practices have failed.

1.5.2 Case study – ‘Eddie Burrup’

Early in 1997, 82-year-old painter Elizabeth Durack (now deceased) was reported to have produced a number of paintings under the persona ‘Eddie Burrup’. Under this pseudonym, Durack produced images of some Kimberley country in an Aboriginal style. Many Indigenous artists attach to their paintings a text that talks about their life experiences, their world-view and their relationship to the land. The Burrup works attached similar biographical information to the paintings. Durack had spent decades associating with Aboriginal people in the Kimberley region, as had her family since their arrival in the 1880s, and she believed this ‘gave her the right to paint as one’ (Debelle, 2000).

In response, Wayne Bergmann, acting head of the Kimberley Aboriginal Law and Cultural Centre, said: ‘...in Aboriginal law, no-one can take another’s work or another’s identity. Miss Durack has failed to respect the very law and culture in which she claims empathy and understanding’ (McCulloch, 1997). Another critic of Durack was Doreen Mellor, who was the curator of the 1996 Aboriginal Art Centre Exhibition in Adelaide at the time when the true identity of Eddie Burrup came to light. ‘I was terribly angry,’ Mellor said. ‘At that point she was definitely representing the work as being by an Aboriginal artist’ (Debelle, 2000).

However, other responses were not so condemnatory of Durack’s paintings. There were some senior Nyungar men who backed her, saying she had been possessed by the spirit of an Aboriginal artist. Also in her favour was the fact that she had been painting pictures depicting Aboriginal themes long before the Aboriginal art boom of the 1970s. It could also be said that the Eddie Burrup pictures represented a huge leap in her creativity in the twilight of her career. (Earlier in her career Durack’s paintings used Aboriginal people as subjects in the Western tradition.) That she chose to reveal the truth voluntarily shows that perhaps there was no evil design at work.

Durack claimed that Eddie Burrup was a compilation of several Aboriginal men she had known. In the furor that followed her disclosure of being Burrup, she asserted that she was astonished that it had hurt or offended. Whatever Durack's intentions were, the consequences served to fuel a debate on the issue of the authenticity of Aboriginal artworks including the question of non-Indigenous artists painting under Aboriginal pseudonyms.

It is clear that Aboriginal cultural products suffer as a whole whenever 'Aboriginal' works are alleged, or revealed, to have been produced by non-Aboriginal creators. So great were the concerns to guard the credibility of Aboriginal works, that a label of authenticity was developed. But as we shall see in the next section, the label became ineffective when the organisation administering it was disbanded.

1.5.3 The Label of Authenticity and the Collaboration Mark

In 1999, the National Indigenous Arts Advocacy Association (NIAAA) launched the 'Label of Authenticity' ('Label') which was designed to provide a national certification system for the authenticity of Indigenous art. The Label was used to show that goods or services were:

... derived from a work of art created by an Aboriginal or Torres Strait Islander person or people, [and] reproduced or produced and manufactured by Aboriginal or Torres Strait Islander people.



The NIAAA 'Label of Authenticity'

The NIAAA also established a second kind of label, the Collaboration Mark which was used to certify works which were the result of a collaboration in which an Aboriginal or Torres Strait Islander had a significant creative input with a non-Indigenous manufacturer or other collaborator under the terms of a fair agreement.

The labels still have protection under the *Trade Mark Act 1995* (Cth). In part, the labels safeguard the property and economic rights of Indigenous creators. They also reflect a recognition that consumers are keen to discriminate between 'rip-offs' and 'the real thing'. It was expected that buyers and traders would respond positively to the labels (as occurred with other labels such as the 'Woolmark' label which indicates that products are made from 100% Australian wool).

However, the NIAAA was disbanded in 2002 and failed to assign control of the labels to another organisation. The ramifications of this are that it is difficult to gauge the extent of the protection afforded to works that already have the Label of Authenticity or the Collaboration Mark attached, and the labels cannot be used on any new work. Currently there is no national or state body that regulates the authenticity of works created.

Nowadays, in the absence of a certification body or authentication process, artists, art organisations and the like are developing alternative certificates. These generally contain information about the artist (such as their name, date of birth, skin group, clan etc) and perhaps a catalogue number that can offer some protection in terms of determining the provenance of the work. But the primary weakness of the certificates is that, unlike the Label, they do not verify the authenticity of a work.

Discussion points

- Consider the things that you would need to establish before you considered an artwork to be authentic.
- What difficulties would be involved in attaching a mark of authenticity to products such as painting and literature?
- What benefits do you think the labelling system offered?
- The labels required verification that the artwork was created by an Indigenous artist. Do you think the labels would have been more effective if they represented geographical zones?
- What alternative measures, if any, do you think could fill this gap now that the labels are no longer in use?
- What difference, if any, is there between an author who adopts an Aboriginal pseudonym and one who pretends to be, for example, of Ukrainian descent as did the writer Helen Darville (Demidenko)?
- Does the appropriation of Aboriginal identity have purely commercial motives, or do you think social and/or spiritual factors are involved?
- What dangers could be associated with the requirement to prove Aboriginal identity?
- What difference, if any, would it make to you if you learnt that an artwork you had believed to be created by an Aboriginal person had actually been done by a non-Aboriginal person?
- Responding to an outcry over the alleged ‘co-authorship’ of Kathleen Petyarre’s *Storm in Atnangkere Country II*, Kathryn Sherer (of Sydney’s Coo-ee Aboriginal Emporium and Art Gallery) said: ‘It is completely appropriate for other people to work partly on the canvas under Kathleen’s tutelage. That’s the way Aboriginal people do it’ (Morgan, 1997). What does this suggest about Ms Sherer’s view of authenticity?
- It is feared that art buyers and collectors will be reluctant to invest in Aboriginal art if doubts continue to be raised about the authenticity of works. Suggest measures that could be taken at various points of distribution (dealers, art centres, galleries) to ensure that products are genuine Aboriginal art.

1.5.4 Cultural context

A recurring theme in the fight of Aboriginal artists for legal protection (see Part 3, ‘Case studies of copying and appropriation’) has been the need to recognise that many works embody elements of deep spiritual significance. This means that the artworks do not have a life of their own, separate from their places and communities of origin. This indivisibility of art and its origins creates some tension when set alongside ideas about art that prevail in Australian society generally. In the European tradition, art has had a long history as a tradable commodity. ‘Works of art’ have had a discrete and objective existence, appreciated as objects of decoration, cultural commentary and individual expression.

In order to appreciate the issues involved in ownership and protection, it is therefore essential to consider the cultural context in which art arises. Notions of ‘the artist’ are important here. Western culture has tended to define the artist in individual terms. Many of the qualities ascribed to the artist – interpreter, visionary, storyteller, skilled craftsman – can be identified across cultures, but it is the place of the artist within the community that is markedly different.

In the Western tradition, the activity of the artist tends to be described as singular, solitary, and ‘outside’ the community; the artist is a watcher (voyeur) or commentator, and the work is taken to represent a personal vision. Aboriginal artists often have an entirely different social role. In Aboriginal communities, it is often the artist’s role to carry the messages and meanings shared by the people. The right to take this role might be acquired very slowly, with revelations entrusted over an extended period of time so that the artist gradually achieves permission to represent stories and figures of spiritual significance.

This contrast has implications for artists when it comes to their choice of subject matter and source material. For many of Australia’s contemporary artists, the broadest range of ideas and influences may be freely entertained. The same might not be true for an Aboriginal artist, who is often required to work within carefully established parameters. This could involve the retelling of some part of a Dreaming story.

We are not like American artists. American artists make the story up in their imagination. Ours are not like that. Our stories are given to us to carry and pass on to our children.

– Michael Nelson Tjakamarra (1991)

Historically, this role has not been appreciated by non-Indigenous Australians; original works have been subject to misappropriation and theft on the assumption that they are ‘traditional’ designs that do not bear the distinctive characteristics of their authors. It is only relatively recently that this misconception has been formally recognised and set to rest in the courts (see Part 3, ‘Case studies of copying and appropriation’).

Many Aboriginal artists have a deep obligation to their communities to faithfully render and protect symbols, sites, characters and stories endowed with sacred meaning. Many paintings are actually part of Dreaming ceremonies, perhaps depicting the journey of a spirit-ancestor. The relationship of the artist to the community can involve a reciprocal respect and sensitivity that is rarely, if ever, present in the non-Aboriginal community.

Given this relationship, the artist’s motivation is of some interest. Western culture has largely fostered the idea that an artist serves an individual ‘muse’. As an extension of this, there is another strand that might be defined as that of the ‘commercial artist’, whose motive is to target and profit from the marketplace. Both ideas apply, to varying degrees, to contemporary Aboriginal artists; however, many desire to go beyond ‘ways of seeing’ and enter into a process in which land, spirit and kinship are touched and experienced. This desire carries with it the will to both preserve and carry forward the connection of people to their sources of meaning. Lin Onus put it this way:

In the areas in which I spend much of my time the artist sees himself or herself as the custodian of a story or image – it is the custodian’s responsibility to ‘look after’ story and image and to pass it on undamaged to a new generation in the future.

... When we look at artists in the traditional areas we can see that not only are they superb craftspeople but they have other important roles as law-keepers, cultural repositories and leaders-by-example. Their role in community cohesiveness should not be underestimated.

I believe that the artists’ relationships and responsibilities to the greater Aboriginal community are paramount. We are presently witnessing an Australia-wide cultural revival. People who had lost their language, their songs, their art and their law are very slowly but surely finding their roots. In this context, the role of the artist takes on a special significance.

(*Artlink*, 1990, pp 38-9)

While gender distinctions can be observed in art generally, some Aboriginal communities are extremely prescriptive in the roles that men and women can play and in the subject matter of their art. A number of ceremonies are restricted to women or men only. Body decorations and

designs used in these ceremonies remain secret within the particular groups. This makes the protection of art inseparable from the protection of knowledge and the preservation of culture (see ‘Case study 1: The ownership of knowledge’).

1.5.5 Dominant and marginalised cultures

Misappropriation may be defined as ‘to apply fraudulently or dishonestly to a wrong use and is clearly an unethical act. Appropriation is more complex but may be even more damaging when it is part of a social relationship consisting of a dominant (non-Aboriginal) culture and a marginalised (Aboriginal) culture. When this relationship is considered, it is easy to understand why some Aboriginal commentators call the appropriation of art ‘a new phase in colonisation’.

Others see the use of Aboriginal styles and symbols by non-Aboriginal artists as a return to ‘assimilation’ – a discredited social policy pursued by Australian governments from the 1940s to the early 1970s. In essence, the policy of assimilation sought to integrate ‘new Australians’ (immigrants) and Aboriginal Australians into mainstream society by encouraging their adoption of dominant (Anglo-Celtic) values and lifestyles.

Art critic Juan Davila has described this appropriation as ‘the collapse of differences’. It is ‘an operation which selects from reality only those items which function to patch together the illusion of a reconciled society’ (Davila, 1987).

Davila’s observation reveals how easy it is for those in control to assert their identity; that is, those in power have the authority to describe themselves – to say who they are. On the other hand, Aboriginal Australians have had to continually strive to assert and define their identity in ways that are not allowed automatic recognition and authority.

Art forms and symbols (eg the Aboriginal flag) have played a huge part in the process of proclaiming identity. The theft or misuse of these forms weakens their distinctive character, and therefore weakens the declarations that are being made through them.

The emergence of [Aboriginal culture] as a renewed historical subject cannot be treated ideally or promoted from the centre. For in this sort of scenario, the Aborigines will become all the more that obstacle which the White subject has always surmounted by his traditional ability to absorb every single object, surface, body or economy that is not his own.

– Juan Davila (1987)

What does Davila mean when he talks of this ‘ability to absorb’? If one considers the kinds of images that most commonly signify ‘Aboriginal art’, the first step in absorption can be seen to be the process in which a particular artistic device (eg x-ray, dotting) or a particular symbology (eg concentric circles, turtle) has come to signify ‘Aboriginal art’ in general, rather than certain Aboriginal artists or groups. In the second phase icons that were once intimate to particular Aboriginal groups become the symbols of the Australian nation.

Discussion points

- Most Aboriginal people take pride in their cultural heritage, including art. Why wouldn’t Aboriginal people be proud whenever governments and large corporations use their styles and designs?
- If you were trying to describe the distinctive character of Australian culture, what items, objects or symbols would you name? Are any of those names particular to Aboriginal communities? If so, how do you feel about them? Do you think they are a part of your cultural heritage?

1.5.6 Motives for appropriation

The ethics of appropriation are complex, especially when the motives of ‘borrowing’ artists are taken into account. The Sydney-born contemporary artist Imants Tillers has developed much of his distinctive work by incorporating a mixture of existing images and words (Williams, 1995). Of Latvian descent, Tillers explores in his art the nature of dispersal, migration and multiculturalism. The fragmentation and new alignments that are created by these processes are built into the construction of Tillers’ works.

For example, Tillers has worked since 1981 in a patchwork or jigsaw manner, arranging a number of small, separately painted canvases into larger, complete works. This gives a very literal meaning to themes of human fragmentation and re-arrangement. Additionally, Tillers regularly employs words or lines of text from diverse cultures – Latvian, Maori, Australian and Aboriginal Australian. In all, his works reveal the instability of cultural expressions in a world in which art reproduction and intercultural synthesis continually change people’s perceptions.

Tim Johnson is another contemporary Australian painter whose work has attracted criticism because of a perceived intrusion into the cultural domain of Aboriginal artists. A collector and advocate of Aboriginal art, Johnson has visited and worked in remote communities with Indigenous Australian artists.

Johnson has readily acknowledged the influence of this association. However, he has argued that his development of a dot style – a characteristic of Papunya Tula artists – is not an act of ‘cultural theft’:

... the dot screen or matrix ... has obvious affiliations in Western culture. For example: halftone screen images, television screens, grain on photographs and films, Pointillism and mosaic.

(Johnson, 1993)

Discussion points

- Many Aboriginal or Maori people argue that the appropriation of their symbols strips the symbols of their meaning. On the other hand, an artist such as Imants Tillers might argue that this is precisely the kind of thing that his works call our attention to. What are the competing concerns here and how could they be resolved?
- Tim Johnson’s works are unique but they reveal the stylistic influences of Aboriginal and Asian cultures. Do you think artists have any responsibility to the art communities or traditions that influence them? If so, what do you think this responsibility is? If not, why not?
- Explain your understanding of the difference between copying, appropriation and influence.

1.5.7 Criticism

Aboriginal art and culture can be stripped of meaning through the processes of translation and criticism. Inevitably, Aboriginal artists and their works are often received into popular consciousness through commentators and critics who act as ‘interpreters’ for the non-Aboriginal community. Those who control communications and the art ‘establishment’ will remain, in many ways, the most powerful agents in the presentation of, and discourse about, Aboriginal art. Fry & Willis (1989) wrote:

... the Western desert dot painting ... in which a complex and unknowable symbology of body painting and ground diagrams is transferred to canvas, often gets read as abstract art. Typical of this Western response is what Kay Larson, art critic for New York Magazine, wrote: ‘Aboriginal art at its

best is as powerful as any abstract painting I can think of. I kept remembering Jackson Pollock, who also spread the emotional weight of thought and action throughout the empty spaces of his canvases'. This comparison naively maps Modernist self-expression onto the cultural practices of non-Western artists.

... Thus Western knowledge confirms itself and its superiority.

1.5.8 Appropriation: a two way street?

It is evident that the popularisation of Aboriginal art has been strongly connected with the artists of the Western Desert, who transcribed Dreaming imagery from sand designs and body ornamentation onto canvas, using acrylic paints. In particular, the dotting techniques employed by many of these artists have become internationally recognised in association with Aboriginal art. However, these artists do not define Aboriginal art any more than they define Aboriginality. (It is worth noting that while Aboriginal people comprise a significant proportion of the population of the Northern Territory – around 23% – a much greater number of Aboriginal people live in other areas of Australia, for example, in New South Wales.)

Among the diversity of work by Aboriginal artists are portrayals of stark social realism and confronting political commentary. The artists themselves take various perspectives to the question of personal identity, ranging from 'discovery' of Aboriginality (eg Sally Morgan) to freer, less labelled, self-descriptions (eg Gordon Bennett).

The work of Bennett is particularly interesting in relation to the issue of appropriation. A number of his works incorporate existing images that are modified or reframed in order to pose a challenge or question. In an interview in 1993, he had this to say about the process:

The strategy I'm employing is a rereading of images that exist within the pages of history books or school texts or just images that have kind of been put to sleep in a way and now exist between pages on library shelves. Images that people rarely see but which have become a part of the visual referencing of how Australians see themselves.

... My strategy using appropriation has been to dig these images out and recontextualise either part or all of them in some way so that they can be reread in the present context ... It's like bringing them back to life, resuscitating them, and exploring their meanings given what we know about Australia now.

(Gordon Bennett, 1996)

On the question of self-identity, Bennett observed:

I'm very conscious of being appropriated to fit whoever's particular theory about Aboriginality or even post-colonialism. Sure, I'm exploring identity, but I'm trying to make it obvious about how open it is ... I'm not naive in the sense I believe I can recapture some essence of identity that colonisation has denied me, some sense of an original identity that only I can speak of and defend. However, paradoxically, I do keep insisting on defining myself, but in ways that are creative and fluid and not static and essentialist. One of my strategies is constantly to take issue with imposed names such as 'urban Aboriginal artist'.

(Gordon Bennett, 1996)

Discussion points

- Describe your own identity as it relates to Australia's colonial occupation.
- How do you think artists' relationships to the mainstream arts community and institutions might affect the way that they develop?

1.5.9 Cultural integrity

In the same way that the dispersal of Aboriginal peoples broke cultural ties to language, ritual, land and family, the ‘breaking up’ of art can threaten the wholeness of communities. Owners have a need to keep control over the things that they make and, through this, to maintain the integrity of their cultures.

Aboriginal artworks often embed characteristics of story and place that are unique. Stories, of course, might not exist in any permanent form – one reason why they are susceptible to unauthorised use (see 1.6, ‘Mechanisms for protection in Australia’). However, under Aboriginal law stories are a form of intellectual property; they are ideas that are owned by those who are specially authorised to keep and transmit them. Any republishing or commercial exploitation of the ideas may be a matter of serious legal and cultural offence. An illegally reproduced symbol or motif might involve the theft of not only a physical design, but also of part of a story. In this way, meaning might be effectively stolen. Storytelling through art is a form of cultural exchange – something that many Aboriginal artists are keen to foster. This exchange does not mean, however, that the story has been ‘given up’ by the teller. The ideas can be considered to be ‘on loan’; they are not a free gift to be used in whatever way the receiver sees fit.

The situation is made more complicated and sensitive by the fact that many artworks incorporate secret elements in which the meaning remains undisclosed to those outside the group that owns the story. Sometimes these elements are literally concealed through the use of particular methods. For example, the dotting technique of Western Desert artists seems to have come into use as a method of hiding secret/sacred components from the probing of non-Aboriginal people (Bardon, 1991).

Another important aspect of cultural integrity is that it cannot be restricted to an individual. When individual artists represent stories of their heritage, the respect that the artworks receive is a matter of vital interest to others. Furthermore, some works are produced in partnership, or cooperatively, while others remain unsigned simply because the mark of the author is not considered appropriate. So for some Aboriginal communities, the right to extended community involvement in protection and permission is of the utmost importance. This fact does not sit comfortably with current copyright law, which only protects individuals who can be identified as authors, and licence holders.

1.5.10 Cultural integrity and ‘urban’ artists

It is clear that those Aboriginal communities with relatively traditional social arrangements have very particular needs. However, most of Australia’s Aboriginal people live in circumstances in which they are largely alienated from ancestral country language, ritual and symbolism. Does the idea of cultural integrity apply in the same way to such people?

A number of perspectives on this question have been expressed by Aboriginal artists. Gordon Bennett’s earlier observations are notable in this discussion; he has indicated that there is an element of restriction, or social control, at work when commentators position him as an ‘urban Aboriginal artist’.

It should be pointed out that the idea of integrity is quite distinct from ‘preservation’. Integrity, or wholeness, is strongly connected to the ability to control or determine outcomes. In other words, a culture might develop in a way that is fluid and dynamic and yet still retain an essential integrity, because it is able to carry its people with it. Gordon Bennett, for example, quite consciously explores the many traditions of Aboriginal art and culture, since they bear upon his self-understanding.

Preservation suggests a more limited ambition. It tends to imply that cultures can be frozen in time. It also has an unfortunate connection to the anxieties of the dominant culture: people are fearful of losing marginalised cultures in a way that is similar to their fears about endangered landscapes, species and the trappings of a nostalgic past.

Some Aboriginal artists, such as Fiona Foley, have made it clear that they believe the issue of cultural integrity is important to people living and working in Australia's urban centres. She says:

It is impossible to ignore the fact that our culture is still vital to us. I have real trouble saying 'urban'... I think it would be helpful and true to recognise different people's countries. I am a Butchulla person.

... Certainly my own choice of symbol reflects what I consider 'traditional'. A lot of my imagery about ceremony draws on my being allowed to go into Arnhem Land – a considerable privilege for me as a young woman ... I make images in my head and they are put down in a few days' time like a map from an aerial perspective ... I also use bones a lot; this image relates to the middens on Fraser Island, which are significant to my people, the Badtjala people. Bones, like the pippi shell heaps, signify that there was a traditional people there for thousands of years who must not be forgotten.

(Foley, 1991)

1.5.11 Fair game: 'Aboriginal' designs in the marketplace

Perhaps of more concern than the illegal reproduction of Aboriginal art is the erosion of value that occurs when 'imitation' Aboriginal art is mass-produced and merchandised.

In a research project that began in 1992, Dr Vivien Johnson and her students examined the popular distribution of Aboriginal art styles in commercial forms such as T-shirts, cloth bags, greeting cards, packaging and craft works. The project identified a great number of commodities that are neither produced by Aboriginal people nor return any benefit to Aboriginal people, and yet make quite deliberate use of styles and images that are perceived in the community as 'Aboriginal art'.

The project also identified commodities such as tourist kitsch that were designed and/or made by Aboriginal people but which some say reinforce the commercial trivialisation of Aboriginal art forms. These products bear designs that have been drawn from existing sources and then adapted to produce the kitsch, in a method similar to that of many non-Aboriginal commercial designers.

Examination of such commodities reveals the limits of legal protection that exist for Aboriginal (and other) artists. Although many distinctly 'Aboriginal' features can be identified, most of these derivative objects are created in such a way that copyright infringement is almost impossible to establish. (Bear in mind also that recourse to the legal system tends to be a last resort for many Aboriginal people, for whom it is expensive, intimidating and associated with law enforcement and other power structures.)

The use of 'adapted' Aboriginal art on earrings (Johnson, 1998) shows the way in which the souvenir trade is able to walk the legal line of appropriation. Identified in the sociology project mentioned above, the earrings bore the label 'Dreamtime: Aboriginal designs'. The hand-painted earrings did not draw from any particular artwork in a way that would allow them to be described as a copy. Rather, they referred to Aboriginal designs by taking on a form and character that is associated with Aboriginal art. The earrings did not infringe any artist's individual rights, but, as the policy statement of NIAAA declared (see below), Aboriginal people are concerned about their artistic styles and symbols.

To understand this concern, it is worthwhile to consider the cross-hatching styles employed by artists from Arnhem Land. Rarrk cross-hatching is more than a decorative device. Ownership and spiritual significance are embedded in the use of the technique.

Moreover, the right to use, and modify, cross-hatching styles is carefully restricted in many Arnhem Land communities. Artists may go through a long process, in which they receive increased authority and responsibility, before they are able to use the technique freely. Western Arnhem Land painter Peter Marralwanga, for example, only began to produce works for sale at the age of 50, because it was not until then that he had the seniority to produce his distinctive rarrk patterns, with their unusual angles and colours (Caruana, 1993).

Under these circumstances, it is not difficult to imagine how such artists – and their communities – might feel when non-Aboriginal artists use imitative cross-hatching to produce works for publication and profit. Similarly, the portrayal of totemic animals and figures in quasi-traditional styles may give great offence to people for whom similar representations have special meaning.

The potential degree of offence is all the greater for the fact that many Aboriginal people set such careful jurisdictions over what symbols, and what country, they are entitled to portray in their art. Kimberley artist Peter Skipper has said:

I still think about right back where I come from ... I don't put him riverside, I can't draw him riverside. I want him that my side desert. This one mine – I been walking round here. I can't paint him 'nother place belong another country. That's a danger. And I don't want to paint business way [secret designs].

(Skipper, 1991)

Similarly, Banduk Marika said:

I have to worry about what designs I use. I can't use a design from Western Australia or Central Australia. I couldn't do that; I have to use a design that comes from North-Eastern Arnhem Land – a design that comes from my clan only.

(Marika, 1987)

Vivien Johnson's sociology project referred to above also identified another means of getting around copyright restrictions – the 'repackaging' of images. In one instance, works by Papunya Tula artists were removed from a publication, fastened onto board and laminated to produce 'Western Desert place mats'. Such *re-use* of a product is an infringement of the artist's moral rights as it is presenting the images in another form from which it was created, diminishing the value of the artwork and the standing of the artist (see 1.6.2 for a discussion of moral rights).

Although NIAAA no longer exists, the sentiments expressed below, which are based on its policy statement, reflect the views of many who aim to protect Indigenous cultural and intellectual property (ICIP).

Statement on the use of ‘Indigenous’ images and designs by non-Indigenous artists
(based on the policy statement of the former NIAAA)

Proponents of Indigenous cultural and intellectual property (ICIP) rights are concerned about the number of non-Indigenous artists, writers and performers who have been incorporating Indigenous Australian cultural expression into their works.

Images such as the rainbow serpent have been employed by non-Indigenous artists in their artwork. Specific Indigenous styles have also been used such as the rarrk and x-ray styles. Even more flagrant is the use of sacred images such as the wandjina and the distortion of significant cultural items such as the Torres Strait Islander head-dress. These are distinctly Indigenous images and designs and are associated with central themes in Indigenous Australian cultures.

Recognition of ICIP rights will protect the legal and cultural rights of Indigenous artists. In line with international developments concerning the rights of World Indigenous peoples, specifically the principles and guidelines of the Special Rapporteur of the United Nations Economic and Social Council’s *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, non-Indigenous artists, writers and performers must respect the cultural and spiritual significance of Indigenous people and refrain from incorporating elements derived from Indigenous cultural heritage into their works without the informed consent of the traditional custodians. It is important that Aboriginal and Torres Strait Islander people have control over the development of their own forms of artistic and cultural expression, as well as its interpretation and use by others.

1.6 Mechanisms for protection in Australia

Australian artists have a range of legal protection. Chief among these is the *Copyright Act 1968* (Cth). Aboriginal artists have also successfully used the *Trade Practices Act 1974* (Cth) to protect their interests (see Part 3, ‘Case studies of copying and appropriation’). These Acts and other relevant legislation are briefly discussed in what follows.

1.6.1 Copyright Act

The provisions of the *Copyright Act* relating to the visual arts are explained more fully in an information sheet produced by the Australian Copyright Council (go to www.copyright.org.au/publications/infosheets.htm and click on “Artworks G033”). It also has answers to some frequently asked questions.

In general terms, the purpose of the Act is to ensure that the creators of artworks maintain reproduction rights over their materials. This allows copyright owners to exploit their works for economic gain as a reward for their creative activities. It also provides an incentive for further creations.

In order to benefit from copyright protection, artists must demonstrate that their work is original, while the work itself must be in some permanent material form. The requirement that a work be original is not very demanding. Generally a work will be considered to be original enough for copyright protection if it has not been copied or if skill or effort has been put into its creation. The test of originality is, of course, somewhat subjective. In making the

assessment a court will seek to determine whether the creator has imparted a degree of labour, skill and judgement to give the work a quality or character that differs from other works. For the artist using elements created by Aboriginal artists, it is quite possible to modify or reinterpret styles and symbols in a way that does not infringe the copyright that protects those Aboriginal works.

Furthermore, copyright protection recognises the individual creators of works, rather than communal ownership.

Copyright is automatic upon the creation of an artwork; it is not necessary to apply, register or pay to obtain copyright protection. Copyright generally remains with an artwork for the author's lifetime plus 70 years.

Copyright owners have the exclusive right to reproduce their work; to make their work public for the first time; and to communicate the work to the public (broadcast it or perform it live). Copyright owners may grant a licence to use their works to another party. This does not have the effect of relinquishing copyright; rather, it permits the other party to reproduce, market, distribute and sell works under agreed terms. An artist is at liberty to set restrictions and conditions when negotiating such agreements. In giving permission for reproduction, copyright owners may specify limits as to term, territory, quantity and purposes of use. They may also establish or negotiate payment and forms of acknowledgement.

When a person reproduces, communicates to the public or publishes a copyright work without the permission of the copyright owners, this is known as infringement. While it might be relatively easy to establish an infringement of copyright where a work has been directly copied and reproduced in its entirety, the issue can become difficult and complex when parts of a work are copied or incorporated into another work, especially because collage and 'referencing' are generally accepted artistic devices. By and large, the 'borrowing' artist is under the same obligation as the 'source' artist; that is, she or he must create a work that is original. Further, copyright only provides an artist with protection from copying. This means that, when there is no evidence of copying, copyright cannot prevent an artist from creating an artwork that is similar to another artist's work. To prove copying, the copyright owner must establish that the alleged copier had access to their work at some stage.

Although the extent of copyright protection is open to constant interpretation, one thing is clear: it is not possible for an artist to simply change a certain percentage of an original work in order to avoid infringement. Recent legal determinations have stated that the use of a component that is significant to the character of another work may be infringement of copyright.

Under the provisions of the *Copyright Act*, a copyright owner has a number of remedies available against infringers. It is possible to obtain damages from infringing parties or damages on account of profits made by an infringer. In addition, a court may order that the infringing works be seized, barred from reproduction, distribution and sale, or destroyed.

Other issues include the following:

- Copyright law protects individual and commercial interests, rather than communal and cultural interests.
- One work may contain several different and separate copyrights. For example, a song may contain copyright in the lyrics, in the musical work in the artwork on the CD cover, and in the sound recording embodying the works and music.
- Artists who use ideas and styles from Aboriginal culture without copying a particular artist's work are not required under the *Copyright Act* to acknowledge the source.

However, proponents of ICIP rights (see section 1.5 above) say that permission should be gained and acknowledgement of sources of Aboriginal styles should be given.

- Copyright protects forms in which an idea or information is expressed and not the idea or information itself. Copyright will also not protect names, titles or slogans.
- The antiquity of many rock art images means that they are not protected by copyright because many of the artists have been dead for more than 70 years. Being in the public domain, rock art is susceptible to copying.
- Since works must be recorded in some permanent material form to attract copyright, body paintings and traditional oral stories are not protected by copyright and may be adopted by artists outside their communities of origin. In *Merchandising Corp of America Inc v Harpbond Ltd* [1983] FSR 32 the English Court of Appeal decided that make-up on a pop singer's face would not be protected by copyright, because it could be easily removed. From this decision it follows that tattoos, such as those common in Maori culture, might be protected by copyright as they are more permanent than body paintings but Aboriginal body painting might not.
- No special protection is provided for secret or sacred material under copyright law although some protection may be available under certain common law principles of confidentiality (see 1.6.5 below).
- There is an exception in the *Copyright Act* which provides that sculptures and works of artistic craftsmanship on permanent long-term display in public places (including art galleries) may be reproduced in paintings, drawings, engravings, photographs or films without infringing the creators' copyright.
- Copyright collecting societies exist to license or administer certain uses of copyright material on behalf of artists. These not-for-profit organisations collect license fees and distribute them to members. VISCOPY is the copyright collection society for Australian visual artists, craft workers, photographers and designers.
- Some artistic works, for example images on T-shirts, are eligible for dual copyright and design protection.
- There are some circumstances in which an artistic work may lose copyright protection. This occurs when the work is embodied as a design in a product and registered under the *Designs Act 2003* (Cth). If the design is registered the work loses copyright protection. If the design is not registered and the work is applied industrially (for example, approximately 50 copies of it are made) it loses copyright protection from the date of the first sale of a copy. The artist is then unable to register a design as they no longer meet the requirement that the design is 'novel'. Although there is an exception to this restriction in the case of works of artistic craftsmanship, buildings and models of buildings, it is unclear which works will be considered to be works of artistic craftsmanship. Given the potential for an artist to be left with no protection against copying at all, it is very important to carefully consider registering a design before applying it industrially. (See also 1.6.7 below.)
- There are a number of specific situations in which people can use copyright material without permission as long as certain procedures are followed. For example, reviewers, news reporters and students can use some copyright material without permission as long as their use is 'fair' and the artist is acknowledged. There are also special exceptions for copying by libraries, educational institutions and government bodies. There is no general exception for 'personal use' or for use by not-for-profit organisations.

1.6.2 Moral rights

As indicated in the preceding section, copyright law provides one form of legal protection for Aboriginal and other artists. Until the late 1990s copyright law in Australia was designed to only protect economic rights (that is, the right of a copyright owner to exploit the work for financial gain by way of assignment or licence of the work). However, by the end of the 1990s Federal Parliament began to engage in a debate about introducing a Moral Rights Bill as an amendment to the *Copyright Act*. The Bill was seen as landmark legislative reform for the Australian arts community. Moral rights protect the rights of authors to be identified in relation to their works and also provide rights against derogatory treatment of works.¹ These rights are the personal rights of creators and cannot be given away. Moral rights attach to the ‘creator’ of a work and primarily recognise the special relationship between the creator and the work. Moral rights exist *independently* of the economic rights in the work.²

The *Copyright Amendment (Moral Rights) Act 2000* (Cth) was passed in December 2000.³ While the Act was touted as a comprehensive regime, it contains only three rights *per se*: the right of integrity (an author’s right to object to derogatory treatment which may prejudicially affect his or her honour or reputation),⁴ the right of attribution (the right to be identified as the author of the work)⁵ and the right of an author to take action against another who falsely attributes a work to another author.⁶

The moral rights legislation only vests rights in individual creators. This means that traditional custodians would not be able to take advantage of moral rights laws to protect their arts and other cultural material, unless they were able to link their claims to an individual artist. Former Democrat Senator Aden Ridgeway was deeply concerned that the legislation provided that moral rights should only subsist in individual creators, not communities. During the course of the moral rights debate he proposed an amendment which provided that:

Moral rights in relation to an Australian Indigenous cultural work created by an Indigenous author, under the direction of an Indigenous cultural group, may be held and asserted by a custodian nominated by the relevant Indigenous cultural group as its representative for this part.⁷

The Australian Labor Party refused to support the amendment, protesting that there had been insufficient consultation. The issue of Indigenous Communal Moral rights will be discussed in more detail below.

Discussion points

- Moral rights legislation gives artists the opportunity to take action against people who use their artworks in derogatory ways. Consider what impacts this might have on:
 - art exhibitors
 - advertisers
 - other artists.
- Should people be exempt from moral rights provisions in certain situations – for example,

¹ The term ‘moral rights’ is a literal translation of the French *droit moral* or *droit moraux*: S Ricketson, ‘The Case for Moral Rights’ (1995) *Intellectual Property Forum*, October, 38.

² S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886 – 1986* (1987) 456.

³ The Act repealed the existing Part IX of the Act and substituted a new part IX titled ‘Moral Rights of authors or literary, dramatic, musical or artistic works and cinematographic film’.

⁴ *Copyright Act 1968* (Cth) Part IX Div 4.

⁵ *Copyright Act 1968* (Cth) Part IX Div 2.

⁶ *Copyright Act 1968* (Cth) Part IX Div 3.

⁷ A Ridgeway, ‘Second Reading of the Copyright Amendment (Moral Rights) Bill 1999’, Senate Hansard, 7 December 2000, p.21062.

if it is reasonable not to identify an artist or if derogatory treatment or action was reasonable? Under the Act, the right of integrity is not infringed in the case of movable artistic works or artistic works that are fixed to buildings. Moral rights are also not infringed if they are waived under the terms of a contract or if it is reasonable in the circumstances.

1.6.3 Trade Practices Act (and equivalent State legislation)

There are provisions in the *Trade Practices Act 1974* (Cth) (Sections 52 and 53) and equivalent State legislation (such as the *Fair Trading Act 1982* (NSW)) which prevent corporations and individuals from engaging in commercial conduct that is misleading or deceptive. These provisions are primarily geared to protecting consumers and may be used against individuals and organisations who mislead consumers into thinking that products are the work of Aboriginal artists or originate from a particular Aboriginal community. It may also protect against a distributor who misleads consumers into believing that reproductions have been made with the permission of Aboriginal artists, or that the sale proceeds are being returned to the artists (see 3.4 ‘Case study 4: Carpet art’). As discussed above, the March 2006 announcement by Senator Kemp of an investigation into irregularities into the Indigenous art sector will focus on how improper trade practices in the Indigenous art sector can be prosecuted under the *Trade Practices Act*. While proponents of ICIP rights are supportive of these measures, they warn that any protection measures should focus as much on the rights of Aboriginal artists as the protection of consumers.

1.6.4 Passing off

The law of ‘passing off’ protects business reputation and goodwill. It can be used to stop other people ‘cashing in’ on an Aboriginal artist’s name or image, or on other distinctive features of their art work. For example, if a person or business creates and signs a certificate stating that a well-known Aboriginal artist made an artwork when this is not true and then sells the work, the well-known artist could bring an action against the person or business for misrepresenting that its goods are those of the artist.

1.6.5 Breach of confidence laws

These laws may apply when it can be shown that information has been shared under an obligation of confidentiality, and that the information is later used or disclosed in a way that is likely to harm those who first parted with the information. To succeed the artist would have to show that:

- the information shared is of a confidential nature, ie it is not trivial or publicly known;
- the information was given in circumstances where there was an obligation of confidence accepted or implicit from the context;
- there was an unauthorised use or threatened use of this information; and
- disclosure of the information would harm the artist in some way.

The laws were used in an unprecedented way in 1976, when Pitjantjatjara people prevented the sale and distribution of a book within the Northern Territory because it contained secret knowledge (see 3.1 ‘Case study 1: The ownership of knowledge’).

Although it is not essential to have a written document to prove that an obligation of confidence exists, it is always advisable to confirm in writing that certain information should

be kept confidential. This can usually be achieved simply by marking such information ‘Confidential’.

1.6.6 Cultural heritage laws

These laws have been established under Commonwealth, State and Territory jurisdictions. They give governments differing degrees of authority in maintaining heritage assets, including relics, sites, objects and environments. They are generally to do with tangible, rather than intellectual, assets. They are of benefit to the extent that they can be used to give formal recognition to places and products that are of particular sacred, ritual or ceremonial significance to Aboriginal peoples.

The most notable limitation of cultural heritage legislation is that it relies essentially on the discretion of a government minister. It is the State, Territory or Commonwealth minister who ultimately determines whether action should be taken to protect things because they have heritage value. There is a tendency to overlook intangible aspects associated with significant sites (eg stories, songs and Dreaming tracks); rather, the emphasis is placed on the scientific and historical aspects of sites and objects.

1.6.7 Designs Act

Under the *Designs Act* a person may register a design with Intellectual Property Australia to protect the visual appearance of manufactured goods. The registered owner has the exclusive right to use the design to gain a marketing advantage and prevent others from commercially exploiting the design or a design substantially similar in overall appearance to the registered design without permission.

This Act is not centrally relevant to the protection of original artistic works but it offers more extensive protection than the *Copyright Act* for a work that is applied as a design to a product. The Act grants an absolute monopoly to an owner of a registered design in relation to the making and commercial exploitation of the design.

A design can only be registered in relation to a product. A product is anything manufactured or handmade. Visual features such as shape, pattern and colour can be registered as a design. The fact that a visual feature also serves a functional purpose such as an interesting shape for the handle of a teapot does not exclude it from being registrable. Registration requires lodgement of an application and payment of a fee. On registration the design owner obtains title to the design. A registered design is considered personal property and like copyright, it can be licensed or assigned to another person.

To enforce your design rights against someone who infringes your design, the Registrar of Designs must examine your design and find it valid. The Registrar must be satisfied that the design meets the innovation threshold of being new (not identical) and distinctive (not substantially similar in overall impression) when compared to pre-existing designs that were known worldwide or used in Australia before the date the design application was lodged. If you intend to register a design it is important not to publish it or commercially use it before lodging the design application as this would have the effect of destroying the newness or novelty of the design. Because many Indigenous designs are traditional, following pre-existing themes that have been developed over centuries, they might not meet this novelty requirement.

Once a three-dimensional design such as a design for a ceramic vessel or woven object is registered, it loses any copyright protection it may have had. As mentioned above, two-

dimensional designs such as a pattern applied to a textile or image printed on a T-shirt are eligible to have both copyright and design protection at the same time.

The *Designs Act* might offer some protection for Indigenous artistic works and designs that are commercially applied. However, the total possible period of protection is for 10 years from the date that the application for registration is lodged. Many Indigenous people would maintain, on the other hand, that their traditional rights to Indigenous designs exist in perpetuity.

1.6.8 Contracts

One of the most effective means by which to protect Australian Indigenous art is through contract. There are many international policies and protocols that work to protect the rights of Aboriginal artists where other legal protections such as copyright law, design law, trade practices law or moral rights law are not sufficient. Including these protocols or guidelines in a contract will protect an artist's or community's rights as it will ensure that these policies and protocols are legally binding.

A contract is an exchange of promises that is legally enforceable. A contract can be made verbally, in writing, partly verbally and partly in writing, or by people's actions. For a contract to be enforceable there must be:

- an offer by one party to another;
- the other party must accept the offer without conditions (if the offer is accepted subject to certain conditions this is considered to be a counter-offer rather than an acceptance);
- something of value which the party making the offer gives to the other party as the agreed price for the other's promises; and
- both parties must intend to create legal relations with the other.

It is usually a good idea to have a contract written down so that there is a clear record of what each party has agreed in order to prevent any future disputes about the agreement. You can include a wide range of terms and conditions in a contract. Many organisations provide sample contracts, which can be modified and used.

1.6.9 International policies and protocols

In recent years, various international agreements and documents have recommended greater recognition of Indigenous cultural rights. While these documents do not directly impose obligations on Australia to protect Indigenous art forms, they serve as reference points for Australian policy and law. These policies and protocols can become legally binding if they are included in a valid contract.

Significant developments include the following:

- The Berne Convention for the Protection of Literary and Artistic Works, while not setting any particular requirements in relation to Indigenous art, does have an optional provision for the protection of unpublished works of unknown authority. This is thought to apply to expressions of traditional culture.
- The World Intellectual Property Organisation (WIPO) and United Nations Educational, Scientific and Cultural Organisation (UNESCO) have set out *Model Provisions for the Protection of Expressions of Folklore from Illicit Exploitation and Other Prejudicial Actions*. Developed in the early 1980s, these model provisions target 'expressions of folklore' in order to extend protection to elements not effectively covered by copyright laws, such as intangible expressions. The Model Provisions use the term 'expressions of

folklore' to refer to productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community, or by individuals reflecting the artistic expectations of their community. Such expressions are protected whether or not they are in fixed form, and they include expressions of word, music and movement, as well as craft products and musical instruments. Since the 1980s there have been a number of interesting developments. In December 1996 WIPO member states adopted the *WIPO Performances and Phonograms Treaty*, which also provides protection for a performer of an expression of folklore. In April 1997 the *UNESCO-WIPO World Forum on the Protection of Folklore* took place in Phuket, Thailand. In October 2000 WIPO set up an *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* to act as an international forum for debate and dialogue concerning the interplay between intellectual property, and traditional knowledge, genetic resources, and traditional cultural expressions.

- The Working Group on Indigenous Populations has produced a *Draft Declaration on the Rights of Indigenous Peoples*. The Declaration sets down the right of Indigenous peoples to protection for traditional cultural manifestations. (Established by the United Nations, the Working Group is unique in UN forums in that governments do not control it.)
- In 1993, New Zealand (Aotearoa) hosted the first *International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples*, at which the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* was prepared. The Declaration sets out the principle that Indigenous peoples are entitled to define for themselves what their intellectual and cultural property is, and it calls on governments to recognise that Indigenous peoples are guardians of customary knowledge and should have the right to protect and control the dissemination of that knowledge.
- In 1993, the United Nations' Sub-Commission on the Prevention of Discrimination and Protection of Minorities endorsed a study on the protection of cultural and intellectual property of Indigenous peoples. The study was undertaken by Erica-Irene Daes and produced a document titled *The Final Report on the Protection of the Heritage of Indigenous Peoples* which included 'Principles and Guidelines for the Protection of the Heritage of Indigenous People'. Principles 46-48 relate to artists, writers and performers. Article 46 states that 'Artists, writers, performers should refrain from incorporating elements derived from Indigenous heritage into their works without the informed consent of the traditional owners'. These Principles and Guidelines were adopted and elaborated on by ATSIIC's Reference Group on Indigenous Cultural and Intellectual Property in 1997.

1.6.10 Australian policies and protocols

In addition to international policies and protocols there have been significant Australian policies and protocols which support greater recognition of Indigenous cultural rights including the following:

- In 2001 the National Association for the Visual Artists (NAVA) introduced *Valuing Art, Respecting Culture: Protocols for working with the Australian Indigenous Visual Arts & Craft Sector*. This document sets out protocols to guide non-Indigenous people in their relationships with Indigenous artists and communities, and also to assist Indigenous artists to define their rights.
- In 2003 Community Cultural Development NSW published the first Indigenous protocols for Western Sydney titled 'Respect, Acknowledge, Listen: practical protocols for working with the Indigenous Community of Western Sydney'.

- The ABC's *Message Stick* has an Indigenous protocols website (<http://www.abc.net.au/message/proper/default.htm>) which aims to assist journalists, filmmakers, producers and documentary makers to understand the importance of abiding by Indigenous protocols. This website also lists a variety of other resources on Indigenous protocols.
- *Message Stick* has also produced its own protocol as a guide to help bridge the gap between the needs of journalists and the customs of Indigenous people ('Cultural protocols for Indigenous reporting in the media' available at <http://www.abc.net.au/message/proper/culturalprotocol.pdf>).
- The Australian Film Commission is currently working on a protocol which establishes a framework to assist and encourage recognition and respect for the images, knowledge and stories of Indigenous people as represented in documentaries and drama (including short dramas, feature films and television drama). The protocol will include principles for working on Indigenous content and working with Indigenous people and Indigenous communities. It will include sections on copyright law and related legal issues; case studies; information for Indigenous communities on their rights and obligations when working on film projects; information for non-Indigenous filmmakers working with Indigenous subject matter; a general contacts directory; and a resource bibliography.

1.7 Proposals for change

1.7.1 Indigenous Communal Moral Rights (ICMR)

ICMR are not legally protected in Australia. The enactment of ICMR would enable Indigenous communities to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.

There have been a number of studies and reports documenting the concerns of Indigenous communities over the misrepresentation or misuse of their culture. (Terri Janke's *Our Culture: Our Future*, discussed in 1.7.2, is one such report.) The concerns stem from instances in which people use Indigenous cultural material without regard for the way in which their use of that material is perceived by the communities from which it is derived. Whatever the cause, the end result is the same: misappropriation of Indigenous cultural traditions and knowledge that is deeply resented by traditional custodians.

The Commonwealth Government first signalled its commitment to developing a framework that would specifically recognise the communal moral rights of Indigenous people within the law in 2001. This commitment was reiterated in the Coalition's pre-election arts policy *Arts for All*:

Amendments to the moral rights regime will give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.⁸

In what was its firmest commitment to the acknowledgment of ICMR the Government stated in May 2003:

Indigenous communities will be able to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material under new legislation proposed by the Government. Amendments to the *Copyright Act*, to be introduced into Parliament later this year will give

⁸ Liberal Party of Australia, *The Howard Government: Putting Australia's Interests First: Election 2001 – Arts for All* (2001) 21, <www.liberal.gov.au/documents/arts.pdf> (viewed May 14 2005).

Indigenous communities legal standing to safeguard the integrity of creative works embodying community knowledge and wisdom.⁹

By mid-December 2003 copies of the draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* were distributed for comment. However, to date the Bill has not been made available to the public and was only distributed to ‘several organisations and one individual for comment’.¹⁰ Attorney-General Philip Ruddock suggested that ‘the protection of Indigenous culture depends upon strong and effective copyright laws’.¹¹ It appeared, therefore, that Indigenous communal images and knowledge were going to be protected within the framework of copyright law.

However, although the new Bill provided an opportunity to implement meaningful reform, it has been widely criticised. Some commentators claim that despite the Government’s assertion that the legislation’s intent is to ‘provide a simple, workable and practical schema for Indigenous communities, artists, galleries and the public’,¹² the focus appears to be on creating legal solutions rather than developing realistic and practical outcomes for Indigenous people. The Bill has been criticised for being impractical as it is phrased in highly complicated and legalistic language,¹³ which raises serious questions of access for the Indigenous communities for whom the Bill is supposed to be designed.

Furthermore, there are five requirements that must be met before ICMR can be recognised.¹⁴ The first requirement is that, as with the existing moral rights legislation (see 1.6.2), there must be subject matter that is protected by copyright (that is, literary, dramatic, musical or artistic works or cinematographic works). This then raises the problem of works of art, dance, rituals and songs that are centuries old. Protection of copyright in the *Copyright Act* only subsists for 70 years after the death of the author.¹⁵ Therefore many Indigenous works are not just ‘out of copyright’, they *preceded* any copyright legislation. The Bill does not take this unique circumstance into consideration.

The second requirement is that the work must draw on the particular body of traditions, observances, customs or beliefs held in common by the Indigenous community.

The third and highly contentious requirement is that an agreement must be entered into between an Indigenous community and the individual creator of the work acknowledging the communal nature of the work. This is a *voluntary* agreement that can be oral. The presumption here is that at the time of executing the final work the ‘individual artist’ will first attend to the legal affairs and formally consider the question of communal moral rights management – presumably in anticipation of the commercial reproduction of the work. A particularly contentious and paradoxical aspect of this requirement is that the onus is on

⁹ Department of Communication Information and Technology, Commonwealth Attorney General’s Department, and the Department of Immigration and Multicultural and Indigenous Affairs, ‘Indigenous Communities to Get New Protection for Creative Works’ (Press Release, 19 May 2003) <www.atsia.gov.au/medi/ruddock_media03/r03031.htm> (viewed 10 May 2005).

¹⁰ See J Anderson, ‘Indigenous Communal Moral Rights: The utility of an ineffective law’ (2004) 30(5) *Indigenous Law Bulletin* 8.

¹¹ Philip Ruddock, ‘The Government’s Copyright Policy Agenda’ (Paper presented at the Eleventh Biennial Copyright Law and Practice Symposium, Sydney, Nov 2003)

¹² Department of Communication Information and Technology, Commonwealth Attorney General’s Department, and the Department of Immigration and Multicultural and Indigenous Affairs, ‘Indigenous Communities to Get New Protection for Creative Works’ (Press Release, 19 May 2003) <www.atsia.gov.au/medi/ruddock_media03/r03031.htm> (accessed 10 May 2005).

¹³ Justice Lindgren, Federal Court Judge, President of the Australian Copyright Tribunal, and one of the most learned judicial authorities on copyright issues in this country is critical of the complex and ambiguous language of the Bill: see C Sexton, ‘In Conversation with the Honourable Justice Lindgren’ (2004) *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and NZ* 6, 8–10.

¹⁴ Dr Jane Anderson also identifies these five requirements: see J Anderson, ‘Indigenous communal moral rights Bill – failure of language and imagination’ (2004) 17(2) *Australian Intellectual Property Law Bulletin* 26.

¹⁵ This protection has changed from life of the author and 50 years to life of the author and 70 years in light of the Free Trade Agreement with the United States. However, whether the protection period is 50 or 70 years, it is completely insignificant in light of how old these traditional Indigenous cultural customs are.

the *Indigenous people and the communities* to initiate contact and negotiation with parties who have an interest in using the cultures and customs of the community.

It is implied here that the community will know or will find out, presumably through the benevolence of the creator, that a work is being created that draws on the community's 'traditions, customs and practices'. This requirement could be particularly onerous on Indigenous communities in isolated parts of Australia. In addition, because the agreement is voluntary, there is no obligation on the creator to enter into the agreement with the community.

The fourth requirement is that there must be acknowledgement of the Indigenous community's association with the work.

Finally, 'interested parties' need to have *consented* to the rights arising, and this consent must be provided through written notice – so it is not only the community that needs to consent to the rights arising but *all* interested parties.¹⁶ If an interest holder does not consent no protection is provided. The Bill does not define who exactly 'interested parties' are, but it can be assumed it includes 'interests' other than just the author and the community, such as a gallery owner. What is certain is that because all interest holders need to consent, this effectively takes control away from Indigenous communities.

Another important practical difficulty in relation to entering into formal agreements is that such agreements do not take into account the difficulties of language, legal translation and legal mediation. With difficulties in basic service delivery for remote and rural communities, it is important to recognise that the challenge in accessing legal advice on any matter, let alone complex copyright matters, is substantial for the communities that are the target of the Bill.

Although the Bill has been met with criticism, in February 2006 the Commonwealth announced that a revised version of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* would be on the legislative agenda later in 2006.

1.7.2 The 'Our Culture: Our Future' discussion paper and report

In 1997, the now abolished ATSIC commissioned the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to coordinate a project to develop reform proposals for the protection and recognition of Indigenous cultural and intellectual property. Terri Janke's discussion paper titled 'Our Culture: Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property' outlined several proposals for change that are discussed in this section. More than 70 submissions were received in response to the discussion paper, and the final report, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, sets out the framework for recognising and protecting ICIP.

The recommendations include legal and non-legal measures and aim to guide Indigenous peoples, government and industry concerning the rights Indigenous Australians want in relation to their cultural and intellectual property and the range of measures that could be adopted and implemented in order to provide these rights.

ATSIC and the Indigenous Reference Group on ICIP accepted the report.

¹⁶ Once parties have agreed on the terms of the voluntary agreement a notice must be displayed on the work identifying the community that has the association with the work and stating that all people with an 'interest' have consented.

What rights do Indigenous people want recognised?

Our Culture: Our Future found that there are certain fundamental rights that Indigenous people need in order to maintain and continue their cultures. These rights include:

- the right to own and control ICIP
- the right to control the commercial use of Indigenous ICIP in accordance with traditional laws and customary obligations
- the right to benefit commercially from the authorised use of ICIP
- the right to full and proper attribution
- the right to protect sacred and significant cultural material.

New laws

Our Culture: Our Future calls for new laws, based on respect and understanding of culture and recognising two parallel and equal systems of law. In particular, it calls for specific legislation to protect ICIP property in preference to amending existing laws, such as the *Copyright Act*, *Designs Act* or *Trademarks Act*. The new laws would aim to preserve Indigenous cultural tradition and at the same time protect the economic interests of Indigenous people with respect to their rights to commercialise (or otherwise) their intellectual property on their own terms and conditions. The report recommends that the new laws recognise that Indigenous rights to cultural heritage exist in perpetuity and that the laws contain specific provisions prohibiting the misrepresentation and wilful distortion of Indigenous cultural material.

Amendments to the *Copyright Act*

Since many Aboriginal art forms are out of copyright, the *Our Culture: Our Future* report suggests that in the absence of specific legislation, an additional category should be established under the *Copyright Act* for ‘Indigenous cultural work’ – defined as ‘a work of cultural significance to Aboriginal and Torres Strait Islander people’. This category would include artworks that currently are no longer protected by copyright but that are still governed by Indigenous customary laws.

A central agency, such as the National Indigenous Cultural Authority, could then be established to list such works and to administer applications for their reproduction. Upon application, this agency would identify owners, obtain their permission and terms of use, and collect fees on their behalf.

Designs

The *Our Culture: Our Future* discussion paper raised the question of whether the *Designs Act* should be amended to allow, for example, particular rarrk designs to be registered by an artist or community that wishes to use the designs in the course of industry.

The *Our Culture: Our Future* report recommended that the enactment of specific legislation would be a better way to address these issues. It also recommended exploring the feasibility of registering communal interests in designs for commercial exploitation of the designs. These recommendations remain matters for future consideration.

Trademarks

The use of Aboriginal symbols, words and designs in the company trademarks of non-Aboriginal organisations is a matter of concern to many artists and communities. Apart from the issue of cultural appropriation, there is a potential for trademarking to exclude Aboriginal communities from their own cultural property, because it allows individuals or companies to register words, designs and symbols in a way that gives them exclusive entitlement.

A solution to this situation could be to modify trademark regulations in order to empower the Australian Trade Marks Office to undertake certain inquiries whenever the Office is considering an application involving elements drawn from Indigenous cultures. Such applications might require, for example, the prior written consent of the relevant community.

New Zealand adopted this practice in 2002 when it enacted the *Trade Marks Act 2002* (NZ) to establish the Maori Trade Marks Advisory Committee. The Advisory Committee, whose members are appointed by the Commissioner of Trade Marks are required to have knowledge of te ao Maori and tikanga Maori. Other desirable attributes include having an understanding of and experience in te reo Maori, matauranga Maori, as well as business and/or legal expertise and strong Maori networks.

The Advisory Committee is charged with advising the Commissioner of Trade Marks about whether the registration of a trademark that is, or appears to be, derivative of Maori text and imagery, is likely to be offensive to Maori. However, the key limitation of this process is that the advice of the Committee is not binding on the Commissioner. The Commissioner considers the advice together with other factors affecting the eligibility of the application for the trade mark and may come to a decision that is different to the Committee's recommendation.¹⁷

Cultural heritage

Our Culture: Our Future also suggests amendments to cultural heritage legislation so that it better protects the rights of Aboriginal and Torres Strait Islander people. The suggestions have two key emphases:

- the transfer of the management of heritage sites, objects etc from governments to their communities of origin
- the establishment of an authority to coordinate the multitude of heritage provisions under Commonwealth, State and Territory legislations. This body would consist mostly, if not entirely, of Aboriginal and Torres Strait Islander people.

The report also says Indigenous people should advocate for the Commonwealth Government to demonstrate leadership in these rights-based areas to ensure that Australia's standards adhere to international standards.

1.7.3 The 'Minding Culture' report

In 2000, WIPO commissioned Terri Janke to prepare 'Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expectation'. Terms of reference were drawn up and consultation with community people and government representatives was conducted in 2000 over several months.

¹⁷ New Zealand Ministry for Economic Development < http://www.med.govt.nz/templates/Page_____1291.aspx >

The result was that Terri Janke researched and wrote up eight case studies to show actual examples of where Australian Indigenous communities had used or attempted to use the intellectual property system. The case studies introduced readers to the strengths and weaknesses of the prevailing Australian legal system in protecting ICIP. The case studies dealt with:

- ‘the carpets case’ (see 3.4)
- the use of trade marks to protect traditional cultural expressions
- *Bulun Bulun v R & T Textiles* (see 3.5)
- industrial designs and their application to Indigenous cultural material
- the protection of Indigenous dance performances
- the unauthorised reproduction of Indigenous rock art
- the marketing and merchandising of art: Desert Trade Mark and copyright licensing
- Indigenous art labels of authenticity (see 1.5.3).

The report can be found on the World Intellectual Property Organisation’s website (www.wipo.int/tk/en/studies/cultural/minding-culture/index.html).

1.7.4 Resale royalty rights

In 2002, following a Commonwealth Government inquiry into the contemporary visual arts and crafts sector, Arts Minister Rod Kemp released the Myer Report. This report recommended the introduction of legislation that would entitle artists to a share of the sale price each time their art is resold. This is known as a resale royalty.

In March 2006, the Federal Member for Fraser, Bob McMullan, announced he would introduce a private member’s Bill into Parliament that would grant artists resale royalties. The introduction of a resale royalty was motivated by record sales achieved for Indigenous artwork. Sales now exceed \$10 million a year. ‘All of which’, as one commentator observes, ‘is good for the Indigenous art market, if not, in the absence of a resale royalty, for the artists who painted the works’ (Strickland, 2005).

Resale royalty rights provide that visual artists continue to share in the economic returns that their works attract after the original sale. In introducing the Bill, Mr McMullan said that a resale royalty is a means to address perceived inequities arising from and compounded by the resale of art, including Indigenous art, for large sums without benefit to the artists.

Visual artworks are distinct from other forms of artistic expression in the way that the artist is usually remunerated. For writers, composers or filmmakers, the income stream to a creator usually flows from the licensing of editions, performances or screenings of the work rather than the sale of the original. But for most visual artists, the sale of the original work generates the largest income stream. Artists do not typically have an equivalent means for gaining an economic return for the use of their works. This is because the value is in the original work, not reproductions, and their original artworks are usually not ‘performable’.

A resale royalty seeks to correct this imbalance by providing that a proportion of the price paid when an artist’s original work is resold is paid to the creator of the work. Resales of artworks often occur in art auction houses, in commercial galleries and increasingly through electronic trade. Artists are among the lowest paid workers in Australia and a resale royalty scheme could provide a significant reward for their creative effort and improve their economic status.

Some major reasons to support a resale royalty scheme are that:

- it will provide an additional income stream to some artists (and their families)
- it recognises the value of artists to Australian society
- it provides Australian artists with an internationally recognised right.

1.7.5 New technology

Like others, Aboriginal artists are vulnerable to unauthorised online dissemination of their works. There is great potential for works with sensitive and sacred content to be ‘lifted’ and incorporated into electronic designs, or for the works themselves to be distorted through digital manipulation. *Our Culture: Our Future* recommends the introduction of self-regulatory guidelines that address the distribution and publication of ICIP online. These should be developed by Indigenous communities.

Discussion points

- Why do you think Aboriginal peoples believe that they are better placed than governments to identify and manage many heritage sites, objects and cultural practices?
- Design, trademark and patenting provisions encourage Australians to secure rights over distinctive images, names and products so that they can carry out an enterprise with some protection from theft and imitation. In what ways might these provisions be a bad thing for Indigenous Australians?
- All Australians can establish a connection to one or more lines of cultural descent. Why have people recognised that Indigenous Australians need special recognition and support in establishing and maintaining their heritage?
- If someone had the intention to use Aboriginal artwork for their own benefit without permission, what measures do you think would most effectively prevent them from doing so?

2 Implications for teaching and learning

2.1 Reproducing or displaying Aboriginal artworks

This section discusses uses of Aboriginal art that do not involve any alteration to, or breaking up of, the artworks. Such uses include reproduction (eg in books, on fabrics, posters, websites) and display.

In the school context, such uses might occur where students are:

- establishing a temporary ‘gallery’ of Aboriginal artworks (eg by framing poster reproductions)
- giving a presentation on an Aboriginal artist or style of art (eg by showing posters, slides or scanned images)
- designing and producing a calendar of Aboriginal art
- designing and establishing a website to provide information on Aboriginal art
- preparing, for publication or exhibition, a photographic record of rock paintings/carvings, sculptures or other items on permanent display.

It is important to consider not only the strict legal obligations involved in these activities but also the social responsibility involved.

From a strictly legal point of view, two generalisations apply:

- the ownership of artworks gives extensive rights to display and exhibit the works
- the permanent public display of a sculpture or work of artistic craftsmanship permits the making of a painting, drawing, engraving or photograph of the sculpture or work, and the inclusion of it in a film or television broadcast.

2.1.1 Ownership

Australian law protects individual property rights. When an artwork is sold, the artist enters into a form of contract in which physical property rights are exchanged. The buyer is the new owner of the object that is traded, and enjoys considerable freedom in determining the future uses of their property. This freedom includes choices about display and exhibition. It may even extend to making profit by setting conditions of access to an artwork, for example, charging a fee to viewers. When schools or students buy Aboriginal craftworks or artworks, they are at liberty to exercise this discretion.

However, the buyer of an artwork does not buy the copyright. Copyright is generally vested primarily in the creator of an artwork¹⁸ and another type of agreement is necessary in order to transfer this right. For copyright to be transferred, an agreement must be in writing and signed by the person assigning ownership of the copyright. This agreement may be in the form of an assignment (in which copyright is entirely signed over to another person or organisation) or a licence (in which copyright is transferred for particular purposes under specific, agreed conditions).

By extension, similar rights are held by the owners of calendars, magazines, posters etc that contain images by Aboriginal artists. That is, the owners have rights of display but not

¹⁸ There are some exceptions to this such as works produced under a contract of employment where copyright vests in the employer, and works produced under the control of the Crown where the Crown can assert copyright ownership over the resulting works.

reproduction. Students should be aware that if they photocopy, scan or republish such images, they may be infringing the copyright of the artist, the publisher, or both.

Ownership and Moral Rights

Students must also recognise the moral rights that artists and communities have. For example, in giving a class presentation, a student might want to use a poster or calendar reproduction of an Aboriginal artwork. A student who is the owner of such a calendar or poster may legally display it but is not legally able to draw over the work, to fasten pins or stickers, or to cut it into sections in order to assist the presentation. Such acts would infringe the moral rights of the artist(s). Also, the use of an artist's work means that they must be named as the creator. While there is currently no law stating that a community is to be named as creator or contributor to an artwork, a student might want to consider this.

Through discussion and debate, students could consider what the significance of the original image might be (and whether there might also be meanings that are hidden). They could discuss whether some images (such as those that contain sacred/totemic imagery) have more sensitive content than others and whether this means that they should be treated differently. Students could also discuss or debate whether the buyers of artworks have a responsibility to the creators, or if the exchange of money should give complete freedom to the purchaser. They could consider the differences, if any, between owning an original work and owning a reproduction: should any responsibility attach to the use of reproductions?

Another element of moral rights might be explored where students are involved in design. For example, students may use art reproductions, which they have purchased, to create a collage or to create a tray through decoupage, without infringing copyright as they have made no reproductions. But students should be mindful of the issue of artistic integrity. Artists have the lawful right to ensure the integrity of their artistic reputation is protected. It is an illegal act (in most circumstances) to alter an artistic work in a way that harms the honour or reputation of the artist without the permission of the creator. (The use of Aboriginal art reproductions to create place mats has been noted in 1.5.11.)

2.1.2 Permanent public display

Under Australian law, there is a good deal of freedom to photograph or copy sculptures and other artistic three-dimensional works considered to be on 'other than temporary' public display. According to the law, permanently exhibited sculptures in public places can be freely sketched or photographed by students, and the resulting images published.

2.1.3 Permission

In general, it is most unlikely that students would be the assigned or licensed holders of copyright in a work by an Aboriginal artist. This means that students wishing to reproduce works by Aboriginal artists might be required to seek permission from the copyright holders if the purpose of the reproduction is other than for the purposes of research and study.

Increasingly, student projects involve the scanning or photocopying of images that are reproduced in paper form as information/research reports. Computer-based technologies are also being increasingly used to create products (eg multimedia presentations, webpages) that are published in electronic form.

In general, it is safe to say that such reports may be created for restricted (ie personal or

classroom) use. Schools are covered by a special agreement that provides for reasonable use of images in this restricted way. However, art reproductions may not be made public (published) without the permission of the relevant copyright holders. Students who distribute paper-based reproductions to an audience beyond the school, or who place reproductions on an electronic network, are probably in breach of copyright law unless they have first obtained permission for such use. (Teachers might reinforce that the same principle applies to the direct quotation and re-publication of written source material.)

Some people may be inclined to take the view that Aboriginal artists will support educational activity involving the exploration of the artists' work. However, teachers and students should never presume that approval will be given. It is a matter of respect and of legal principle to seek permission before reproducing and publishing any element of an artist's work.

It may be that students are able to consult with one another in order to develop a group approach in obtaining artists' approvals. This might be possible where a number of students (or the whole class) are studying the work of a particular artist. In any case, students' requests should be written and should clearly state:

- the title of the work(s) to be reproduced
- the purpose for using the work(s)
- the publication in which the reproduction is to appear (with an indication as to the form of publication, eg paper-based, electronic)
- the number of copies that will be published
- any details that might affect the integrity of the work (eg whether it will be cropped or overwritten in any way; reproduced in black and white or in colour).

Students' requests should also seek the artist's terms of use, so that the artist may specify the form of acknowledgement that should accompany the reproduction and any payment required.

2.2 Appropriating Aboriginal artworks

(**Note:** Indigenous Australian students should be encouraged to draw from and express their cultural heritage. In art and design activities, these students might be subject to the conventions (including possible restrictions) of their community. In other cases, students might find that there is particular value in investigating and adapting the design forms associated with the regions or language groups with which they have a connection.)

This section considers uses of Aboriginal art that involve the fragmentation or modification of existing artworks. Such uses include the adoption of recognised styles.

There are many learning contexts in which students' activities may be inspired or influenced by Indigenous Australian art forms. Visual Arts students might produce works that follow on from an exploration of a particular artist or school of art. Perhaps Technology students will look at designs created by Indigenous Australians in the investigation phase of a project and then incorporate elements of the designs in their own design solutions. Students producing reports or presentations in Human Society and Its Environment (HSIE) subjects might wish to include visual references to Indigenous Australian culture where this is relevant to the topic being considered.

For students producing their own artworks, it is important to restate that there is no percentage of an original work that may allowably be borrowed in the creation of a new work. When students copy distinctive portions of another work in a way that is recognisable, they might be infringing copyright.

2.2.1 Borrowing or stealing?

Using elements in a new design

Today's students live in an era of referencing. As a preliminary investigation, students could identify and/or collect examples of the ways in which art, advertising and other visual texts borrow from existing images to create new texts. Students could consider:

- what portion of the original work is used
- the purpose of using the original work
- whether, and how, the value or perception of the original work is changed
- whether they think that the use of the original work is fair to its creator.

This analysis might lead students to discuss, and form an opinion on, the qualitative differences in referencing – *how* a work is referred to, rather than *how much*.

The 'sliding' position of the viewer could be reinforced by an activity in which students, or groups of students, create a design element which is then used in a number of different mock-ups. These could include:

- the cover of an art catalogue
- a taxi display advertisement that includes a slogan to sell a product
- a postcard
- a page in a children's picture book
- the logo of a government department.

Students then nominate the uses of their design element that they would be happy to allow, and those uses that they believe should be prevented, and they give their reasons. Students could then consider whether there might be qualitative differences between the parts of a work that are appropriated. Could one element of an image have more sensitivity for people than another? If so, why?

Using elements in a new medium

The question of artistic elements being used in a new medium is central to 'Case study 4: Carpet art'. The issue involves the translation of artistic elements into wooden, metal, fabric, ceramic or electronic media. It includes products such as furnishings, coins, rugs, tea towels, T-shirts, hats, cups, bowls and multimedia products.

A particular image might be perceived in different ways, depending on the medium of reproduction. Students could consider the following questions. Do some products attach more status to the image than others? Are some products more appropriate to, or 'in keeping with', the image than others? Are there types of products into which students would hate to see elements of their own artworks incorporated?

Another aspect of this issue involves the right of artists to represent three-dimensional designs in two-dimensional form. It is regarded as an infringement of copyright to make a two-dimensional version of a three-dimensional artwork (for example, a photograph of a ceramic vessel). It is also an infringement of copyright to make a three-dimensional version of a two-dimensional form (for example a sculpture derived from a drawn or painted image). These are classed as reproductions. (See Section 21(3) of the *Copyright Act*.)

If students are inclined to draw inspiration from the designs of objects such as headdresses, boomerangs and morning star poles, the opportunity arises for an important discussion. Although the present legal provisions give students a good deal of freedom to take the designs of such three-dimensional artistic works that are on 'other than temporary' public

display and to use them in paintings, drawings and prints, it is important to consider how Aboriginal communities might feel about such use.

There is some incompatibility between the concern Aboriginal people have in maintaining control of their cultural property and the copyright law that assumes artworks have individual creators. The *Designs Act* also assumes ownership vests in the individual designer or designers. In addition, the *Designs Act* deems that designs are only worthy of protection if they meet the innovation threshold of being new (not identical to pre-existing designs) and distinctive (not substantially similar in overall impression to a pre-existing design). Since Aboriginal designs are very often traditional (as well as communal) in origin, they might be precluded from registration under the *Designs Act* because they are not able to satisfy the requirements for novelty.

Using stylistic qualities

This is an aspect of appropriation that presents students with complex issues of ownership. The history of visual art testifies to continuing cross-fertilisation in style and technique, and it is apparent that stylistic qualities – unless they are capable of being expressly defined and trademarked – are in the public domain.

Students are rightly encouraged to draw inspiration from the existing body of art forms and ideas. They may derive great value from activities in which they simulate the techniques and processes associated with particular Aboriginal communities. For example, the preparation and painting of fallen tree bark might lead to a deeper appreciation of the skill of bark artists, and the tools and techniques involved.

It might be possible for students to experiment with x-ray or cross-hatching techniques; however, this should occur in circumstances where it is clear that no particular style is being imitated, and where there is no chance that the work created will be displayed or distributed in a way that misleadingly gives the impression that it is ‘Indigenous’. As much as anything, it is this potential for misrepresentation that underlies Aboriginal artists’ concerns about style.

Before students draw in any way from the ideas and works of Aboriginal artists, they might discuss or debate whether it is possible to ‘own’ visual art styles. As a background to this, it would be valuable for students to consider the position of contemporary artists. Students could jointly view unfamiliar artworks and speculate about the cultural and/or gender backgrounds of the artists: Is it possible to make accurate predictions? Is it reasonable to expect that artists will adopt styles that appear to match their cultural and/or gender identity?

To consider the position of consumers/viewers, students could collect examples of souvenir art that appear to be traditional Indigenous works, and investigate their origins. Were they produced in Australia? By Indigenous artists? Is it reasonable to expect that they would be?

Before discussion or debate, students should be made aware of the perspectives of Aboriginal artists and communities as represented in this text and elsewhere. How could their sense of ‘ownership’ over style be affected by:

- being part of a marginalised social group
- belonging to a culture having tens of thousands of years of continuity
- the authority of individuals in the community who are the receivers of stories and techniques
- belonging to a community that uses art as one of the ways it identifies itself and distinguishes itself from others?

2.3 Before you make use of Aboriginal art: a checklist

Consider your purpose. If you are planning any kind of reproduction that may be published or displayed beyond your classroom, follow the procedure below.

- Identify the owner(s) of the copyright – the artist(s) and (if relevant) the community.
- Contact the copyright owner(s) in writing, explaining your purpose and requesting permission (refer to 2.1.3).
- If you receive permission, you must use the image, or part of the image, only within the terms that have been agreed. Any other use will require further written approval.
- Do not display or publish any reproduction until you have received written permission to do so, even if you have received an indication, by telephone, that permission will be given.

If you are planning to adapt an existing image, or element from that image, follow the procedure below.

- Consider your planned adaptation. If there is any chance that after you make your changes, the image/element will still be recognisable as having come from another artwork, you must seek the copyright owner's permission for use. Follow the steps outlined above.
- If you have not adapted in a way that is recognisable, consider the elements of your planned adaptation. Are there elements that might belong to a community, even if the law does not regard them as an individual's legal property? Such elements might include significant figures/totems from Dreaming stories (eg those represented in rock art, or designs associated with body painting, sand drawing, clothing, craft, decoration). If you believe that an element may be the cultural property of a group of people, you should seek to identify those people and obtain their permission to display or publish your adaptation. If you are in any doubt as to whether you have free rights to a design element, you should try to identify the source of the design and make contact with the relevant people.
- Consider the stylistic quality of your planned adaptation. Is it possible that you are misrepresenting yourself (eg as an Indigenous Australian; as a person from a particular region or language group)? Make a judgement as to whether your persona as an artist might be hurtful to others, or be seen to be culturally arrogant.

Advice on copyright, legal issues and payment can be obtained from the following sources:

- **Arts Law Centre of Australia**, The Gunnery, 43-51 Cowper Wharf Rd, Woolloomooloo NSW 2011
phone 1800 221 457, 9356 2566, fax (02) 9358 6475, email artslaw@artslaw.com.au
- **Australian Copyright Council**, 245 Chalmers St, Redfern NSW 2016
phone (02) 9318 1788, website <http://www.copyright.org.au>
- **Copyright Agency Limited**, Level 15, 233 Castlereagh Street Sydney NSW 2000
phone (02) 9394 7600, fax (02) 9394 7601, website <http://www.copyright.com.au>
- **VISCOPY**
phone (02) 9368 0933, fax (02) 9368 0899, website www.viscopy.com, email info@viscopy.com

3 Case studies of copying and appropriation

There are eight case studies in this section. The first five are of key copyright infringement actions that have been commenced in the Australian court system. It should be noted that most disputes of this kind are not pursued to the point of litigation because there are a number of impediments to commencing this type of action, including the time and expense involved.

The final three case studies are of other actions that have been brought against people who have been accused of exploiting Indigenous art, culture and people. In case study 6 the defendant was charged under the *Crimes Act 1900* (NSW). In case studies 7 and 8, the Australian Competition and Consumer Commission brought actions against companies on the basis that they infringed the *Trade Practices Act 1974* (Cth).

3.1 Case study 1: The ownership of knowledge

Late in 1976, a matter came before the Supreme Court in Alice Springs that, in the words of the presiding judge, ‘may be unique’.

The Pitjantjatjara Council brought the proceedings on behalf of the Pitjantjatjara peoples, seeking injunctions to prevent Charles Mountford, an anthropologist, from publishing his book, *Nomads of the Australian Desert*. The book contained information about Pitjantjatjara sacred sites, which had been revealed to Mountford in confidence.

In essence, the Pitjantjatjara Council claimed that publication of the book would do damage to Pitjantjatjara-speaking communities. The judge, Muirhead J, agreed and found in their favour, ordering that the book be restrained from sale, distribution and display within the Northern Territory (the area over which the court had jurisdiction).

Background

Around 1940, anthropologist Charles Mountford made a field trip through Pitjantjatjara country. In the process, he was taken into the confidence of the local people, who privileged him with viewings and explanations of many sacred sites, objects, paintings and rock engravings. Mountford recorded these experiences through photographs, sketches and notes.

Thirty-five years later, Mountford’s research and experiences were prepared and produced as *Nomads of the Australian Desert* – a book that the judge recognised as being ‘a magnificent publication’. Mountford was aware of the potential consequences. The book carried a caution that, where its use might involve Aboriginal communities, local male religious leaders should first be consulted.

Mountford’s caution was well founded. Some of the material in the book communicated knowledge that was never intended to be shared beyond a restricted group of initiated men. The judge recognised that the book was likely to find its way into Territory schools and libraries, where it would be easily accessible to young Aboriginal people.

In support of his injunction order, the judge observed the following:

... These secrets may, by continuing publication in the Northern Territory, be revealed to those to whom it was understood they would not be revealed ... continuance of such publication ... may cause damage of a serious nature, damage of a type to which monetary damages are irrelevant, and which are not, in fact, claimed in this action.¹⁹

¹⁹ Muirhead, J, 'Foster v Mountford', in *Australian Law Reports*, Vol 14, Butterworths, Sydney, NSW, 1977.

Issues raised

In considering the Pitjantjatjara Council's application, the judge sought to satisfy himself that the book had opened 'new ground'. This suggests that the matter might have been viewed differently if the knowledge had already been communicated in some other way.

Two other key issues also arise. Firstly, there is a question as to the changing lifestyle, practices and customary beliefs of particular communities: to what extent do contemporary groups retain a practical attachment to their 'traditions', and how might this affect attitudes to protection? In this case, the judge observed:

Despite Dr Mountford's prognosis that their life and beliefs are 'quickly vanishing', there is still an urgent desire in these people to preserve those things, their lands and their identity, and the existence of the [Pitjantjatjara] Council itself illustrates these objectives.²⁰

Secondly, the judge recognised that there were matters of public policy involved, in particular, 'one's right to disseminate the results of scientific or anthropological research under such conditions'. Should authors be able to publish and disseminate information of a secret/sacred nature and information that is imparted to them in a relationship of confidence?

This case raises the issue of whether chroniclers of Indigenous culture should be able to publish and disseminate information of a secret/sacred nature and information that is imparted to them in a relationship of confidence. Under the present copyright law, authors are clearly able to do so because information that was previously unpublished (eg oral traditions) and is recorded by a non-Aboriginal anthropologist becomes the property of the recorder. (This is one of the many law reform issues currently being pursued by Aboriginal people.) However, this case shows that the courts may give equitable relief, in certain circumstances, for breach of confidence.

Discussion points

- Compare this case to the 'Flash T-shirts' and 'carpet art' cases, where materials could be attributed to individual artists owning copyright over their work.
- What individual rights and collective rights are involved in this case? In what ways do these rights compete?
- The Pitjantjatjara people took this action because they believed that publication of the book was a 'breach of confidence'. Why are there laws that protect secret or privileged information? How is the Aboriginal concept of knowledge different from Western concepts of knowledge?
- List and discuss the Aboriginal law reform issues involved in this case (refer specifically to protection of culture and heritage issues).

3.2 Case study 2: Flash T-shirts

In March 1989, bark painter Johnny Bulun Bulun took an action that was believed to be the first of its kind in Australia: he began proceedings against a T-shirt manufacturer who had reproduced his work without his permission. He based his action on the provisions of the *Copyright Act* and the *Trade Practices Act*.

²⁰ *ibid.*

Two years earlier, the Queensland-based Flash Screenprinters had reproduced Bulun Bulun's 1980 painting *Magpie Geese and Waterlilies at the Waterhole*. Calling the T-shirt design 'At the Waterhole', Flash included a swing ticket indicating that it was 'a design originated from Central Arnhem Land'. Later, the company produced a second 'At the Waterhole' T-shirt, this time adapting another of Bulun Bulun's paintings, *Sacred Waterholes Surrounded by Totemic Animals of the Artist's Clan* (1981), and including elements believed to have been drawn from the works of other artists.

In a deposition, Bulun Bulun – who lives at the Gamerdi outstation in central Arnhem Land – gave an insight into the significance of the imagery depicted:

Many of my paintings feature waterhole settings, and these are an important part of my Dreaming, and all the animals in these paintings are part of that Dreaming...

The story is generally concerned with the travel of the long-necked turtle to Gamerdi, and by tradition I am allowed to paint [that part of the story]. According to tradition, the long-necked turtle continued its journey, and other artists paint the onward journey.

(quoted in Golvan, 1989)

Originality

Bulun Bulun's action was important because it challenged the assumption that Aboriginal artworks based on traditional Dreaming designs are not original and that therefore they are not protected by copyright. In preparing the action, counsel for Bulun Bulun obtained a deposition from Margaret West, curator of Aboriginal Art and Material Culture at the Northern Territory Museum of Arts and Sciences. She noted that:

... the works are clearly products of considerable skill, and reflect facets of the Applicant's [Bulun Bulun's] distinctive style. I note, for example, the fineness and detail of the cross-hatching, which is one of the most important features in any Aboriginal bark painting ... I am not aware of any other artist who depicts magpie geese, long-necked turtle and water snake at waterholes in the fashion of the Applicant ... I would rate the Applicant as amongst the best exponents in his artform, just as one might rate a particular Western artist as a leading exponent in his particular artform of, say, sculpture or watercolour painting.

(quoted in Golvan, 1989)

Outcomes

After hearing evidence, the Federal Court in Darwin granted an injunction preventing the manufacture and sale of the T-shirts. It was a ruling that formally established Aboriginal artists' entitlement to protection from unauthorised reproduction.

As it happened, investigations in support of Bulun Bulun's case revealed that thirteen other Aboriginal artists had grounds for legal action against Flash Screenprinters, and proceedings were also begun on their behalf. On the day before trial, the parties negotiated a minimum settlement of \$150 000, and the withdrawal from sale of all infringing T-shirts.

Although the degree of infringement varied greatly, the artists determined that they would share equally from the sum, since each felt they had suffered equally. Johnny Bulun Bulun in an affidavit captured the nature of this suffering:

This reproduction has caused me great embarrassment and shame, and I strongly feel that I have been the victim of the theft of an important birthright. I have not painted since I learned about the reproduction of my artworks ...

(quoted in Golvan, 1989)

[Information for this case study has also been sourced from 'The Case of the Flash T-shirts', in V Johnson, *Copyrites: Aboriginal art in the age of reproductive technologies*, National Indigenous Arts Advocacy Association and Macquarie University, Sydney, 1996.]

Discussion points

- Identify the different things (material and non-material) that were stolen from Johnny Bulun Bulun and others in this case.
- What assumptions do you think Flash Screenprinters made when they set about producing the T-shirts?
- The development of technology involves investigating, devising, producing and evaluating. For each stage, name something that Flash Screenprinters should have done.

3.3 Case study 3: Terry Yumbulul and the ten-dollar note

In 1991, Warimiri artist Terry Yumbulul took action against the Aboriginal Artists Agency, alleging that the Agency had used false and misleading conduct in obtaining his consent to grant it an exclusive licence to his works. His action was ultimately dismissed.

The case is of interest not only because it involves an intermediary operating on behalf of the artist, but also because of the vagaries of copyright law identified by the presiding judge in his ruling.

The circumstances

In 1987, the Reserve Bank of Australia sought the help of the Aboriginal Artists Agency in the process of designing a commemorative ten-dollar note (to be produced in recognition of the 1988 bicentenary of European occupation). The note's designer, Harry Williamson, had seen Terry Yumbulul's sculpture *Morning Star Pole* in the Australian Museum; and wanted to use it in the design. The Agency was asked if it could organise a licence for this purpose.

The nature of the negotiations that followed are a matter of contention. Ultimately, however, Yumbulul signed a licence agreement that had the effect of giving the Agency permission 'to reproduce my work by mechanical reproduction throughout the world and to license others to do so', under terms that would direct 85% of royalties back to him. This was the Aboriginal Artists Agency's standard form of licence agreement. The banknote was accordingly printed, after the Reserve Bank obtained a sub-licence from the Agency.

In evidence, Yumbulul indicated his belief that, by signing the licence, he had merely given the Aboriginal Artists Agency authority to allow an important government body to look at his work. The court did not accept this. Later, he indicated the licence permitted his expectation that any use made would be *limited* – in particular, limited by the sacred character of the work in question.

Significance of the work

Morning star poles have an important place in the lives of numerous Aboriginal communities. Their significance attaches to their function: the poles have a central role in ceremonies that commemorate the deaths of particular individuals, and link the spirits of the dead to their ancestral home. They also reinforce bonds of respect between peoples, as different groups are brought together for the commemorative ceremony at which the pole is presented to the family of the deceased person.

Decorated with feathers and string, these wooden poles are painted with sacred designs – designs that Yumbulul had gained authority to paint after a gradual process of teaching and revelation within his community. Since these deeper meanings are unknown to outsiders, he had permission to create and display such poles for educational purposes, and to receive any

associated income. The pole in this case was commissioned by an art dealer and sold to the Australian Museum.

Gaps in the law?

As it happened, this matter hinged essentially on the conduct of the Aboriginal Artists Agency, not on the legality of the licence which was consistent with Australian copyright law. Even so, French J, the presiding judge, noted the limits and pitfalls of the *Copyright Act* in providing protection to Yumbulul and, more significantly, his community.

As the original author, Yumbulul was regarded as the sole owner of copyright in the work. French J stated:

There was evidence that Mr. Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank. It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations ...

And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.²¹

Discussion points

- Terry Yumbulul had signed a licence permitting someone else to market his work and authorise others to reproduce it. Suggest things that could be written into such a license to better protect Aboriginal artists.
- Yumbulul was clearly surprised and dismayed by what happened to his work. What things occurred that he had not foreseen?
- Whose responsibility do you think it was to ensure that Yumbulul's work was treated with the respect that he expected?

3.4 Case study 4: 'The carpets case'

A landmark in the legal protection of Aboriginal art occurred in 1994. After a 14-day trial, three Aboriginal artists and the estates of five other deceased Aboriginal artists were awarded damages totalling \$188 640 for infringements of their copyright.

The action was taken in response to the activities of the Perth-based Indofurn (known as Beechrow at the time of the infringement), which imported carpets from Vietnam and sold them in Australia for as much as \$4 000.

The works of prominent Aboriginal artists, living and dead, were reproduced on the carpets. The works were copied from an educational portfolio of Aboriginal artworks produced by the Australian National Gallery and a calendar produced by the Australian Information Service. Through text accompanying each artwork, both of these source publications made it clear that the depictions related to creation stories of spiritual significance to the artists. According to evidence given in court, the portfolio and the calendar were at the Vietnamese carpet factory when one of the directors of the company visited it.

Permission to reproduce the artworks was not sought from any source prior to the production

²¹ French J, 'Yumbulul v Reserve Bank of Australia and Others', in *Intellectual Property Review*, Vol 21, Butterworths, NSW, 1991.

of the carpets. Once the carpets were produced, Beechrow did write to the Aboriginal Arts Management Association (AAMA, later known as the now defunct NIAAA) to seek the artists' permission. The letter was misdirected. When there was no response, Beechrow released the carpets for sale in Australia. All artists represented were unaware of this activity.

The offence to the artists was magnified by the medium of reproduction. Reproduction on carpets, where the images were to be walked upon, would never have been considered by a number of the artists, for whom the works had particular and sensitive purposes. To varying degrees, the artists also had responsibility to their respective communities. They were therefore accountable to other people for the ways in which the images were used. This meant that the effects of the infringement went far deeper than they might have done if the issue had been restricted to a question of individual ownership.

Legal issues considered

In their response, the carpet importers raised the issue of the originality of the works represented (artworks must be original in order to attract copyright). However, this issue was ruled to be irrelevant, the trial judge concluding that the works – even those based on often-represented Dreaming themes – exhibited 'intricate detail and complexity reflecting great skill and originality'.

In order to establish infringement, it was also necessary to satisfy the court that the carpets had reproduced substantial parts of the source artworks. This led three artworks to be examined in detail. In each case, the trial judge considered that substantial copying was evident. In all, eight works, each by a different artist, were involved in the case.

The judge was satisfied that the company knew (or ought to have known) that copyright would have been breached if the carpets that were exact reproductions had been made in Australia.

The carpet importers altered some artworks. The judge found that these alterations were made 'for the purpose of saving themselves labour'. The inaccuracy of some of the reproductions was considered by the judge to be potentially offensive to the traditional owners of a particular design, given that some of the artwork included secret parts of Dreamings that were only known and understood by those who have close knowledge of the cultural significance of the story. Part of the damages awarded against the company was assessed to compensate the artists for personal suffering and humiliation.

Breaches of the *Trade Practices Act* were also identified. Labels indicated that Aboriginal artists had designed the carpets and, further, that these artists were paid royalties out of sale proceeds. Since such labelling was false and likely to lead consumers to believe that the company had licence rights and that royalties were being paid to the Aboriginal artists, or that the carpets were made with the approval of the Aboriginal artists, the judge determined that it was misleading and deceptive. He also observed that, if the carpets were not substantial copies (as argued by the importing company), it would have been false to represent them as having been designed by Aboriginal artists.

Outcomes

In awarding the record sum, the trial judge included special punitive damages. This recognised a number of factors – in particular, the cultural hurt suffered by the artists as a result of the company's persistent denial of their copyright.

A component of the damages (\$43 222) was awarded against two silent directors who took no part in the day-to-day management of the company. This part of the judgement was

overturned on appeal on issues relating to corporations law and directors' liability.

The damages were allocated to the artists as a group. This was in line with their wishes, enabling the proceeds to be shared by the traditional owners of the designs and images. The judgement included orders that any unsold carpets be handed over to the artists. It also included the following observation by the presiding trial judge, Von Doussa J:

The reproduction of paintings, which depict Dreaming stories and designs of cultural significance has been a matter of great concern to the Aboriginal community. Pirating of Aboriginal designs and paintings for commercial use without the consent of the artist or the traditional owners was common for a long time. 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.

(quoted in Janke, 1995)

Update on the case

The determinations on the copyright issues in the case and the liability of the active director are still valid. It should be noted that no payment of damages has been made to the artists or their next of kin because Indofurn Pty Ltd has been wound up and the active director declared bankrupt.

Discussion points

- Why is the *medium* of reproduction important to so many Aboriginal artists?
- A number of factors led the court to add to the damages awarded in this case. What were they?
- Before being imported into Australia, the carpets in this case were produced in Vietnam, where there are no copyright laws. Why was the Australian marketing ruled to be illegal? What opportunities might still exist to exploit Aboriginal art without permission? Suggest ways in which this could be prevented.
- Make a list of the law reform issues to with culture and heritage that are currently being pursued by Aboriginal people. Also make a list of law reform issues currently being pursued by artists in general. Discuss, compare and contrast the resulting lists of issues.

3.5 Case study 5: John Bulun Bulun & M* v. R&T Textiles

[The source of this case summary is *Australian Indigenous Law Reporter* (1998) J 3 (4). References to M* are to an Aboriginal artist and elder who is now deceased. To write his name would be culturally inappropriate.]

In 1996, the artist Johnny Bulun Bulun's work *Magpie Geese and Water Lilies at the Waterhole* was again the subject of unauthorised copying, this time on imported fabric. Bulun Bulun commenced action against the company, R & T Textiles, for breach of copyright. A senior clan elder, M*, as representative of the Ganalbingu people, also brought proceedings in his own right, claiming an equitable right in the copyright subsisting in the artistic works.

Bulun Bulun painted the artistic work in 1978 with permission of senior members of the Ganalbingu people. Bulun Bulun sold the work to Maningrida Arts and Crafts Centre, where it was sold to the Northern Territory Museum of Arts and Sciences. The work was reproduced with Bulun Bulun's consent in a book by Jennifer Isaacs, *Arts of the Dreaming – Australia's Living Heritage*.

When proceedings were served, R & T Textiles admitted infringement of copyright in the artistic work, pleading that they were unaware of copyright ownership by Mr Bulun Bulun. The respondents immediately withdrew the infringing fabric from sale. Approximately 7600 metres of the fabric had been imported and approximately 4 231 metres had already been sold. In settlement of the infringement claims, the company consented to various orders and declarations and the case proceeded on a series of legal arguments aimed to explore issues of communal ownership in artistic works.

The artwork incorporated traditional ritual knowledge belonging to the Ganalbingu people. Mr Bulun Bulun gave evidence that it is his duty to create such works as part of his traditional land ownership responsibilities in accordance with Ganalbingu custom and law. Further to this role, Mr Bulun Bulun stated that he was obliged to consult with other traditional owners on certain kinds of reproductions of the painting. Mr Bulun Bulun gave evidence that reproduction that was not subject to proper consultations threatened the framework of Ganalbingu society. On the basis of this relationship, M*, a co-applicant to the proceedings, claimed an equitable interest in the copyright of the artistic work that entitled him, on behalf of the Ganalbingu people, to claim relief for unauthorised reproduction of the artistic work.

The court dismissed M*'s claim for equitable ownership, stating that unless the artistic work is a 'work of joint ownership' (within the meaning of the *Copyright Act*) where one or more artists created the work, there is no communal ownership in an artistic work. In this case, von Doussa J considered that there was no evidence to suggest that any person other than Mr Bulun Bulun was the creative author of the artistic work.

The Court did consider, however, that Mr Bulun Bulun owed a fiduciary duty to M* and the Ganalbingu people to protect the ritual knowledge which he had been permitted to use under customary law. Further, while Mr Bulun Bulun had the right to depict the designs, he had a fiduciary obligation to the rest of the clan group to ensure that the image would only be reproduced in ways that would preserve the integrity of the culture and the knowledge. In the event of a breach of obligation by the artist, the group had a right to bring an action 'in personam' against the artist to enforce the obligation. The court considered that Mr Bulun Bulun had fulfilled his obligation by taking legal action against the company and therefore there was no reason for the Court to provide any additional remedy to the Ganalbingu people.

Discussion points

- Why did the Court decide that Bulun Bulun owed a fiduciary duty to M* and the traditional owners?
- What impact might this decision have on Aboriginal artists who depict traditional or totemic figures?

3.6 Case study 6: *R v. O'Loughlin*

In 2001 John O'Loughlin was the first Australian to be convicted and sentenced for Aboriginal art fraud in Australia. He was charged under the *Crimes Act 1900* (NSW) with several counts of obtaining a benefit by deception. The matter went to a committal hearing where O'Loughlin pleaded guilty.

John O'Loughlin had passed off certain paintings as being by Clifford Possum Tjapaltjarri, a well-known Western Desert dot painter. Now deceased, Mr Tjapaltjarri is renowned for establishing the Western Desert art movement. At a gallery viewing in 1999, he announced

that several paintings attributed to him were in fact not his. Those who had bought these paintings included the Museum of Contemporary Art, Sydney and the Art Gallery of New South Wales.

Often disputes about authenticity turn on intellectual property, trade practices or contract law rather than criminal law. Civil proceedings are usually commenced as they permit an artist to bring the action themselves, the onus of proof is not as high (unlike criminal law) and damages can be awarded. The case of *R v. O'Loughlin* is unusual in being a criminal proceeding that was brought by the State against a perpetrator of art fraud.

3.7 Case study 7: Australian Icon Products Pty Ltd (AIP)

AIP were retailers of souvenirs. They made representations to the public that certain hand-painted works that used Indigenous motifs were 'authentic', 'certified authentic' and/or 'Australian Aboriginal art'. The company's website also stated that the artists who painted these souvenirs were 'Australian Aboriginal by descent or Aboriginal'. These representations were found to have been misleading and deceptive.

In 2003, the Australian Competition and Consumer Commission (ACCC) brought an action against AIP in the Federal Court alleging that AIP had engaged in conduct likely to mislead or deceive consumers in contravention of Section 52 of the *Trade Practices Act 1974* (Cth). The ACCC obtained interim orders restraining AIP from describing or referring to any of its artworks as 'Aboriginal art' or 'authentic' unless they reasonably believed the souvenirs were painted by a person of Aboriginal descent. In May 2004, the court gave default judgment against AIP (in liquidation), declaring AIP's representations to be likely to mislead in the case of products not painted by Aboriginal artists. Even though AIP was in liquidation the court made the declarations against AIP to fairly reflect the totality of the conduct.

3.8 Case study 8: Australian Aboriginal Art Pty Ltd (AAA)

This was another case where souvenirs were being represented as Aboriginal artwork.

The ACCC argued that AAA and two former directors (Henry de Jonge and Bruce Reed) allegedly engaged in misleading and deceptive conduct in representations about the authenticity of the Aboriginal-style souvenirs AAA manufactured and distributed to retailers in Australia and advertised on the internet.

The alleged conduct was that the company placed stickers on their products declaring they were 'Australian Aboriginal Art', 'Aboriginal Art' and/or 'Authentic, made by Aboriginal artists or artists of Aboriginal descent'.

Section 52 of the *Trade Practices Act* states that it is unlawful for a corporation to engage in conduct, in trade or commerce that is misleading or deceptive or likely to mislead or deceive. This includes statements made to consumers. A corporation can be found to have misled consumers unintentionally or unknowingly. Consumers are entitled to receive goods that match their description. In this case, the consumer is entitled to receive goods that are 'Australian Aboriginal art', 'Aboriginal art', and/or 'Authentic, made by Aboriginal artists or artists of Aboriginal descent'.

It was found that AAA did not employ Aboriginal artists or artists of Aboriginal descent. The ACCC claimed that the directors had knowledge of the alleged misrepresentations made by

AAA. De Jonge was the former director and Read the former general manager of Australian Icon Products. According to the ACCC, when AIP went into liquidation its assets were transferred to AAA.

The matter did not proceed to trial.

Discussion point

- Why do you think O’Loughlin, AAA and AIP traded on the reputation of Indigenous artists and artwork?

Glossary

Aboriginal	Refers to the Indigenous people of Australia except those of the Torres Strait region.
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies, a statutory body whose mission is to promote knowledge and understanding of Australian Indigenous cultures, past and present.
appropriation	Use of another’s knowledge, ideas, property and material. Artistic appropriation draws on existing styles or elements and incorporates these into new contexts. While not necessarily unlawful, the appropriation of Indigenous images, styles and themes is a concern for many Indigenous Australian artists since Dreaming figures, totems, symbols (eg waterholes, tracks) or styles (eg cross-hatching, x-ray, dotting) that are embedded with particular and sensitive cultural meaning have been taken and re-used without permission, fair payment or acknowledgement. In these circumstances, the Indigenous artists (and their communities) view appropriation as property theft. It is therefore potentially offensive; at its worst, it is a practice that undermines Indigenous cultures and trades on the cultural capital built up by others. ²²
ATSIC	Aboriginal and Torres Strait Islander Commission. ATSIC was an independent statutory authority established by the Commonwealth Government. It was responsible for Australia’s national policy making and service delivery for Indigenous people. ATSIC was abolished by the Federal Government in July 2005.
attribution	The right of an artist to be associated and identified with his or her own works.
breach of confidence	Legal action giving rise to equitable remedies where applicant can show that the information has the necessary quality of confidence about it, the information was imparted in circumstances where there was an obligation of confidence, and there was an unauthorised use of that information to the detriment of the party communicating it. ²³

²² This definition reflects the debate as observed by the Indigenous persons consulted. For further information on appropriation see Terri Janke, *Our Culture: Our Future. A Report on Australian Indigenous Cultural and Intellectual Property Rights* (see References); Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective*, Sydney, 1997 and Bruce Ziffe and Pratima V Rao, *Borrowed Power: Essays on Cultural Appropriation*, Rutgers University Press, New Brunswick, 1997.

²³ *Coco v A N Clark (Engineers) Ltd* (1969) RPC-41 (Ch)

copyright	The legal protection provided to the creators of original works and makers of sound recordings and films, preventing unauthorised copying or exploitation by others.
cultural heritage	See ‘Indigenous cultural and intellectual property’ below.
custodian	In Indigenous communities, an individual charged with maintaining and passing on particular elements of cultural significance (eg stories, songs, language, ritual and imagery).
defamation	The act of damaging the reputation of a person or entity (such as a corporation) by the publication of false statements either by word of mouth (slander) or in a more permanent form (libel).
Dreaming	The English expression that attempts to capture the nature of traditional Aboriginal religious belief. It brings together physical sites, plants and animals and metaphysical concepts that are recognised as having life-sustaining power. Many ‘Dreaming tracks’ may crisscross landscapes, each indicating the journey of an ancestral spirit. A people’s Dreaming is celebrated and maintained through many expressions of movement, story and song.
equitable relief	A remedy granted by a court of equity, based on ethical concepts; for example, an injunction restraining a person from doing a particular action.
Indigenous cultural and intellectual property	Includes objects, sites, cultural knowledge, arts and cultural expression that have been transmitted or continue to be transmitted through generations as belonging to a particular Indigenous group or Indigenous people as a whole or their territory. ²⁴ Commonly referred to as ICIP and sometimes used interchangeably with the term ‘cultural heritage’.
integrity	Wholeness; uprightness; honesty or soundness of moral principle and character.
intellectual property	Non-material assets such as forms of cultural expression that belong to a particular individual or community. ‘Intellectual property rights’ refers to the bundle of rights that the law grants to individuals for the protection of creative, intellectual, scientific and industrial activity, such as inventions. Such rights are for the protection of economic investment in novel, inventive and/or creative effort. ²⁵
Mabo	Eddie Koiki Mabo, whose Murray Island land claim led the High Court to recognise, for the first time, that a form of land title existed prior to Australia’s occupation by Great Britain in 1788. The judgement, made in 1993, is usually referred to as Mabo.

²⁴ See Madam Erica Irene-Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and Chairperson of the Working Group of Indigenous Populations, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, E/CN.4/Sub.2/28, 28 July 1993.

²⁵ For more information see IP Australia website: www.ipaustralia.gov.au

Mimi	Spirit figures portrayed on rock walls in western Arnhem Land. Their actions may be either malevolent or benevolent. By tradition, Mimi taught the Kunwinjku people the art of painting.
moral rights	Certain non-economic personal rights of authors and creators in relation to their works, including the right of attribution, the right of integrity and the right against false attribution. The right of attribution means that any reproduction of your work should carry your name as the author of the work. The right of integrity means the right to not have your work subjected to derogatory treatment. The right against false attribution means the right to not have another person named as the creator of your work.
NIAAA	The National Indigenous Arts Advocacy Association (NIAAA) was a national organisation that advocated for greater recognition for Indigenous artists, and for the protection of their rights. It was disbanded in 2002.
Papunya Tula	An Aboriginal artists' cooperative established in 1972 at Papunya, Northern Territory, and bringing together diverse groups of Western Desert people. Often recognised by their dotting techniques, iconography, visual language, u-shapes, tracks, concentric circles etc. These artists have developed some of the most famous and distinctive works of modern Australian art.
public domain	An artwork that is 'in the public domain' is not protected by copyright. Such works are considered free for all to use without the legal requirement to seek the permission of the artist or to negotiate terms and pay royalties for use.
postmodernism	The ongoing cultural movement that followed the more optimistic and forward-looking period of modernism. The term came into popular currency in the 1970s. Postmodernism is characterised by irony, appropriation and self-reference. In particular, the movement has uncovered the presence of source ideas, information and influences. It has therefore challenged the idea of 'originality'. It has also made artworks resistant to straightforward assumptions about the place of the author and the interpreter.
Rainbow Serpent	A name that occurs through much of Aboriginal Australia for a variety of beings that take the form of a snake or a sea serpent, eg Yingarna, Ngalyod, Witiitj, Pulanj and Warnayarra.
rarrk	The fine cross-hatching used by artists of western and central Arnhem Land. Similar patterns are known as miny'tji and dhulang in the region's east. The patterns are used to identify clans in the region. They are understood to inscribe supernatural power in the objects on which they are painted.
Torres Strait Islanders	Refers to the Indigenous people of the Torres Strait region.

Wandjina	Striking figure represented by people in the Kimberley region of Western Australia, featuring a halo effect around the face. Wandjinas are recognised as having a significant role in natural and spiritual events.
WIPO	World Intellectual Property Organisation. The WIPO administers the major intellectual property conventions such as the Berne Convention for the Protection of Literary and Artistic Works.

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Other resources

Arts Law Centre of Australia, The Gunnery, 43-51 Cowper Wharf Rd, Woolloomooloo NSW 2011; phone 1800 221 457, 9356 2566, fax (02) 9358 6475, www.artslaw.com.au

Australian Copyright Council, 245 Chalmers St, Redfern NSW 2016; phone (02) 9318 1788, website www.copyright.org.au

Indigenous culture and copyright webpage: <http://www.copyright.org.au/information/specialinterest/indigenous.htm>

Australian Indigenous Art Trade Association, www.arttrade.com.au

Copyright Agency Limited, Level 15, 233 Castlereagh Street Sydney NSW 2000; phone

(02) 9394 7600, fax (02) 9394 7601, website www.copyright.com.au

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