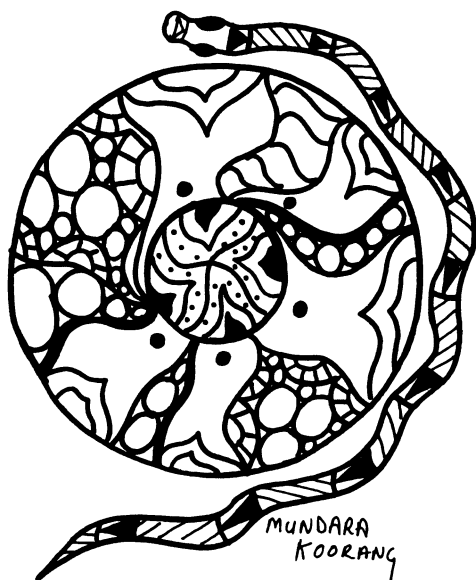


# Stopping the rip-offs

Catherine Hawkins

## *Protecting Aboriginal and Torres Strait Islander cultural expression.*



An Issues Paper, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, was jointly released by the Minister for Justice, the Hon. Duncan Kerr, the Minister for Communications and the Arts, the Hon. Michael Lee, and the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon. Robert Tickner, on 27 October 1994.

The purpose of the Issues Paper is to provide the community, and particularly Aboriginal and Torres Strait Islander peoples, with an opportunity to comment on how the Government can improve the legal protection for Aboriginal and Torres Strait Islander arts and cultural expression. Responses received will assist the development of options for reform.

As discussed below, the Issues Paper outlines the current copyright protection, notes some limitations in this protection, and suggests several options for improving the protection available for Aboriginal and Torres Strait Islander arts and cultural expression.<sup>1</sup>

### **Stopping the rip-offs: Government commitment**

In the Government's *Creative Nation* statement, the Prime Minister acknowledged that reconciliation with Australia's indigenous peoples demands recognition of the shortcomings in the current protection for Aboriginal and Torres Strait Islander arts and cultural expression.<sup>2</sup>

The release of the Issues Paper demonstrates the Government's commitment to overcome deficiencies in the law and provide strong protection for Aboriginal and Torres Strait Islander arts and cultural expression.

Many Government reports and projects have previously discussed, and are continuing to examine, the issue of legal protection for Aboriginal and Torres Strait Islander arts and cultural expression.<sup>3</sup> However, the *Stopping the Rip-Offs* Issues Paper is the first paper since the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore* to look closely at the limits of copyright protection for Aboriginal and Torres Strait Islander arts and cultural expression and to flag some possible options for reform.

### **Terminology**

#### ***Arts and cultural expression***

The Issues Paper uses the term 'arts and cultural expression' to describe the particular kinds of Aboriginal and Torres Strait Islander culture and heritage under discussion. The term is intended to encompass all forms of artistic expression which are based on custom and tradition derived from communities which are continually evolving. The Issues Paper welcomes suggestions for other terms that may be appropriate.

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### Intellectual property rights

Intellectual property rights play an important role in the promotion and maintenance of aspects of Aboriginal and Torres Strait Islander arts and cultural expression.

'Intellectual property' is a generic term that encompasses several areas of statute law including patents, trade marks, designs and copyright as well as common law areas of confidential information and passing off. The Issues Paper is principally concerned with the role of copyright law, and, where relevant, designs law, in protecting the ownership and integrity of Aboriginal and Torres Strait Islander arts and cultural expression.

Other areas such as biodiversity and indigenous knowledge are sometimes considered to be protected by intellectual property laws. However, unless such categories fit under one of the categories of intellectual property law they are not protected. The Issues Paper discusses those aspects of the existing protection for arts and cultural expression that have a close connection with copyright law.

### Present law

#### Copyright law

The *Copyright Act 1968* (Cth) ('the *Copyright Act*') provides substantial protection for forms of Aboriginal and Torres Strait Islander arts and cultural expression that satisfy the requirements for copyright protection. The protection applies in the same way as it does for the works of other Australian creators. The basic principles of the *Copyright Act* derive from Australia's obligations under the Berne Convention for the Protection of Literary and Artistic Works.

The basic principles of the *Copyright Act* are:

- to attract copyright protection, literary, dramatic, musical or artistic works must be expressed 'in material form', and be original (that is the author's own work, not copied);
- copyright subsists upon the creation of an original work — there is no registration or other formality required;
- the author of a work, not made in the course of employment, is usually the first copyright owner;
- the copyright owner usually has the exclusive rights to reproduce, publish, publicly perform, broadcast and adapt the work; and
- the term of protection for copyright works is generally the author's life plus 50 years.

In addition to the protection of works covered by the Berne Convention, copyright also protects sound recordings, films, television and sound broadcasts, and published editions. The *Copyright Act* also grants rights to performers to prevent a range of unauthorised uses of their performances, including the unauthorised recording, broadcasting and cable diffusion of live performances.

In the Government's *Creative Nation* statement, the Prime Minister signalled the intention to amend the *Copyright Act* to introduce moral rights for creators of copyright works.<sup>4</sup> The moral rights to be introduced will be the right to be named as creator of a work ('the right of attribution') and the right to object to derogatory treatment, for example, mutilation of a work, that is prejudicial to a creator's honour or reputation ('the right of integrity'). These will be important rights for Aboriginal and Torres Strait Islander creators, especially those who create artistic works.

### Designs law

Some Aboriginal and Torres Strait Islander designs that are applicable to articles would be protected under the *Copyright Act* as artistic works as well as through registration that may be obtainable under the *Designs Act 1906* (Cth) ('the *Designs Act*'). Copyright law protects two-dimensional artistic works that are reproduced on articles in a two-dimensional way. For example, the reproduction of an artistic design on a T-shirt may have both copyright and designs protection.

The law is more complex when a work is reproduced as a three-dimensional item for commercial purposes, for example, when a drawing of the design of a didgeridoo is realised as the didgeridoo itself and marketed in quantity. It is necessary to obtain registration under the *Designs Act* to be able to prevent others making such three-dimensional reproductions of the work. Copyright law ceases to protect artistic works that are commercially reproduced in a three-dimensional form against further unauthorised reproduction of that kind. The only way they can be protected is by registration under the *Designs Act*.

### The Aboriginal carpets case

Some of the concerns outlined in the Issues Paper have been highlighted in the recent Federal Court case *Milpururru, Marika, Payunka and the Public Trustee of the Northern Territory v Indofurn Pty Ltd, Bethune, King and Rylands* ('the *Aboriginal carpets case*').<sup>5</sup> (See the Brief on this case on page 36 of this issue.)

Briefly, the case involved the importation into Australia of Vietnamese carpets with Aboriginal designs by Beechrow Pty Ltd. The designs on the carpets were in seven cases exact reproductions of the artworks of prominent Aboriginal artists and three of the designs were reproductions of parts of the artworks of Aboriginal artists. The artwork on the carpets had been reproduced without the permission of the Aboriginal artists who owned the copyright in the artworks. At the time of the litigation only three of the eight Aboriginal artists involved in the case were still living, hence the joining of the Public Trustee of the Northern Territory as an applicant in the proceedings.

It was held in the case that the copyright in each of the artworks at issue had been infringed by Beechrow Pty Ltd. The damages awarded in favour of the Aboriginal artists included conversion damages and additional damages in excess of \$180,000.

The case has been dubbed the '*Mabo* of copyright'.<sup>6</sup> This impression is misleading. The case falls far short of this claim as it was largely argued and decided within the parameters of the existing copyright law. Nevertheless, the case has several points of interest in relation to the matters discussed in the Issues Paper.

The case demonstrates that existing copyright law does protect the work of Aboriginal artists in the same way as it protects other Australian artists. The extent of the damages awarded in favour of the applicants clearly shows that Aboriginal artists can successfully pursue court actions in relation to copyright infringements of their works.

In a number of instances the case provides judicial consideration of Aboriginal customary law. The nature of communal ownership in Aboriginal art is discussed as follows:

The right to create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well recognised totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually the right

will not be with only one person, but with a group of people who together have the authority to determine whether the story and images may be used in the artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced. [at 6-7]

Testimony from the artist Banduk Marika, one of the applicants in the case, also emphasised to the court the special role of an Aboriginal artist according to Aboriginal customary law:

As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all other Yolgnu [her clan] who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolgnu with an interest in the story. [at 8]

There was also recognition in the case that statutory remedies do not recognise the rights of traditional owners in artworks, such as those at the centre of the case (at 66).

Although the judgment does not recognise customary rights in copyright, it accommodated Aboriginal customary law where the rules and procedures of the court permitted. For example, throughout the litigation the names of the deceased artists were not spoken in court, but rather they were referred to by their skin names. Only once in the judgment were the deceased artists referred to by name so as to identify with certainty who were the applicants in the case (at 2).

The willingness to accommodate Aboriginal customary law is also reflected in the nature of the order for damages. The usual practice in the case of joint applicants is for the court to order separate judgments in favour of each of the people joined as applicants. However, in this case the applicants successfully requested that the judgment should be expressed as an aggregate liability. It was successfully argued by the applicants that an aggregate judgment would enable the division of damages to accommodate cultural practices (at 67-9).

Finally, and perhaps most significantly, to compensate for the flagrancy of the infringement in the case, additional damages were awarded in favour of the applicants under s.115(4) of the *Copyright Act*. The assessment of the additional damages awarded took into account the notion of 'culturally based harm' that was suffered by the three living artists in the action (at 83).

This judgment will be closely considered in the development of options for the reform of the protection of Aboriginal and Torres Strait Islander arts and cultural expression, particularly in regard to the issue of the assessment of damages and the cultural and customary considerations in the case.

## Limitations in protection

As the *Aboriginal carpets* case demonstrates, copyright law does protect Aboriginal arts and cultural expression in the same way as it protects the other forms of arts and cultural expression in Australia. However, the Issues Paper recognises that the *Copyright Act* has its limitations in protecting certain aspects of Aboriginal and Torres Strait Islander arts and cultural expression.

The major limitations of the *Copyright Act* to protect the full range of Aboriginal and Torres Strait Islander arts and cultural expression that have been identified are:

- while joint authorship of a work by one or more authors is recognised by the *Copyright Act*, collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest

certain other members of the community with rights in certain creations of its members, is not recognised;

- the requirement of expression of a work in a material form prevents copyright from subsisting in oral story-telling, dance and song;
- sacred-secret material is not specially protected as such by the *Copyright Act*;
- the term of protection, which is usually the author's life plus 50 years, prevents copyright subsisting in rock art and cave paintings of traditional Aboriginal and Torres Strait Islander designs; and
- an author must be identifiable to satisfy the originality requirement.

Even when the *Copyright Act* does afford protection to Aboriginal and Torres Strait Islander arts and cultural expression, there may be practical limitations inherent in the broader Australian legal system which prevent Aboriginal and Torres Strait Islander people benefiting from this protection. Such practical limitations include a lack of knowledge about the legal rights that copyright may afford creators, lack of understanding of who is a copyright owner, unequal bargaining power and the limited funding available to bring copyright infringement actions.

## Options for addressing the limitations in present protection

The Issues Paper notes that widespread consultation with Aboriginal and Torres Strait Islander people is vital to determine the most appropriate way to address the limitations in the present protection of their arts and cultural expression.

In that context, the Issues Paper outlines several suggestions as to how the limitations in the protection may be addressed. These options include:

- amendments to the *Copyright Act*;
- amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('the *Heritage Protection Act*');;
- special legislation;
- an authentication mark; and
- a possible administrative response.

### Amendments to the Copyright Act

Consideration could be given to whether the *Copyright Act* could be amended to address the limitations of the protection afforded to Aboriginal and Torres Strait Islander arts and cultural expression by introducing separate provisions to protect aspects of it. For example, such provisions could provide for copyright-related protection and include an unlimited term of protection, no material form requirement, and provisions that address the communal ownership issue.

There would be considerable practical difficulties to be overcome in framing any such legislative scheme. If there was no requirement of material form, proof of the existence and nature of the work would be one difficulty. Identification of the membership of a group claiming communal ownership of a work would be another. The determination of the ownership of copyright in works with a perpetual copyright, particularly when claimed by a community, would be increasingly difficult as time goes by.

Australia's international copyright obligations under the Berne Convention generally require that any copyright protection afforded to Australian nationals must also be afforded

to the nationals of Convention countries. Depending on how generally the legislation was framed, amendment of the *Copyright Act* to afford special protection to Aboriginal and Torres Strait Islander arts and cultural expression may oblige Australia to extend protection to nationals of other countries without any guarantee of reciprocal protection. Any proposal for new provisions would need to be carefully considered bearing in mind these international copyright obligations.

#### ***Amendments to Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)***

Currently the *Heritage Protection Act* provides a discretionary regime for the protection of areas and objects, under serious and immediate threat of injury or desecration, that are of particular significance to Aboriginal and Torres Strait Islander peoples in accordance with their traditions. The *Heritage Protection Act* could be amended to afford Aboriginal and Torres Strait Islander communities a right of action to protect artistic works of traditional significance, with no limit on the term of protection for such works and no requirement of material form.<sup>7</sup>

#### ***Special legislation***

Special legislation to protect and promote Aboriginal and Torres Strait Islander arts and cultural expression was recommended in the *Report of the Working Party on the Protection of Aboriginal Folklore* in 1981 ('the Working Party Report'). The Working Party Report recommended the introduction of an Aboriginal Folklore Act to protect Aboriginal folklore against unauthorised uses, to develop a system of clearances for users and to facilitate payments. It also recommended establishment of an Aboriginal Folklore Board and the establishment of a Commissioner for Aboriginal Folklore.<sup>8</sup>

#### ***Authentication mark***

The souvenir industry produces reproductions, or purported reproductions, of Aboriginal and Torres Strait Islander designs and other objects for the tourist market. Many of them are cheap items that convey an impression, whether accurately or inaccurately, of Aboriginal influence.

To combat proliferation of articles that falsely represent Aboriginal origin or influence, the National Indigenous Arts Advocacy Association (NIAAA), formerly the Aboriginal Arts Management Association (AAMA), is currently developing a certified trademark for authentic Aboriginal and Torres Strait Islander works. This type of mark would be designed to help consumers distinguish authentic Aboriginal and Torres Strait Islander works from fake items. It would work in a similar way to the international woolmark.

Consultation on the authentication mark is being carried out by NIAAA with Aboriginal communities and business organisations.

#### ***A possible administrative response?***

The present protection for Aboriginal and Torres Strait Islander arts and cultural expression may also be improved by an administrative response. Examples include enhancing the role of NIAAA, facilitating NIAAA's relationship with VISCOPY (the collecting society for visual artists) and encouraging relevant copyright interests to educate Aboriginal and Torres Strait Islander peoples about their rights. These administrative options may make the existing law more accessible and effective.

### **Community response — stopping the rip-offs**

The main aim of the Issues Paper (as noted above) is to obtain comments from the community, and especially Aboriginal

and Torres Strait Islander communities, to assist the development of the right type of law reform in this area.

Approximately 3000 copies of the Issues Paper have been distributed to ATSIC Regional Councils, Regional Offices, Aboriginal Legal Services, Land Councils, indigenous media associations, Aboriginal art centres, copyright interests and arts interests inviting comment on the paper.

Comments in any form, including written, faxed, audio-taped or telephone comments, are welcome. Comments and ideas submitted will be considered by a working party of officers from the Attorney-General's Department, ATSIC, and the Department of Communications and the Arts.

Ministers will consider the recommendations of the working party with a view to the formulation of a joint submission to Government in early 1995, followed by draft legislation later in the year.

### **Extended consultation period**

The original date for submissions and comments on the Issues Paper has been extended by one month to 28 February 1995. Submissions received soon after this date may also be taken into account. Submissions should be addressed to:

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Copies of the Issues Paper and the leaflet 'You can help stop the rip-offs' are available from the Attorney-General's Department. Please telephone (06) 250 6704.

### **References**

1. This paper draws heavily on the Issues Paper, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* and a talk recently presented at the Queensland Indigenous Artists' Aboriginal Corporation Festival and Conference held in Woorabinda, Queensland, 8-10 December 1994.
2. Commonwealth cultural policy statement, *Creative Nation*, October 1994, p.67.
3. These Government reports and projects include the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*; the 1986 Australian Law Reform Commission Report No.31, *The Recognition of Aboriginal Customary Law*; the 1989 Report of the Review Committee (Altman Report), *The Aboriginal Arts and Crafts Industry*; the 1993 Council for Aboriginal Reconciliation Issues Paper, *Addressing the Key Issues for Reconciliation*; the 1994 Australian Law Reform Commission Discussion Paper, *Designs*; the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Culture and Heritage Inquiry; the Draft National Aboriginal and Torres Strait Islander Cultural Industry Strategy that is being developed in response to recommendations in the *Final Report of the Royal Commission into Aboriginal Deaths in Custody*; and the Social Justice Commissioner, the Aboriginal and Torres Strait Islander Affairs Commission (ATSIC) and the Council for Aboriginal Reconciliation, *Toward Social Justice? An Issues Paper and Towards Social Justice? Compilation Report of First Round Compilations*, 1994.
4. *Creative Nation*, above, p.68.
5. Unreported judgment, No.DG4 of 1993, Von Doussa J, 13 December 1994.
6. Virginia Trioli, 'Record damages for illegal Aboriginal images', *Age*, 14.12.94.
7. Golvan, C., 'Aboriginal Art and the Protection of Indigenous Cultural Rights', (1992) 2(56) *Aboriginal Law Bulletin* 5 at 8.
8. Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore, 1981*, p.4.