MINDING CULTURE

CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS

prepared by
Ms. Terri Janke
for the World Intellectual Property Organization

Study nº 1

This is one of a series of Studies dealing with intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

MINDING CULTURE

CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS

prepared by Ms. Terri Janke
for the World Intellectual Property Organization

Geneva,
2003

WORLD
INTELLECTUAL
PROPERTY
ORGANIZATION

FOREWORD

The relationship between intellectual property protection and the rights and interests of Indigenous and local communities in expressions of their traditional cultures (or 'folklore') has been the subject of international discussion for several decades.

Discussion of policy and legal options for the improved protection of expressions of traditional cultures should be guided as far as possible by the real needs articulated by Indigenous and local communities and, most importantly, their actual experiences with the intellectual property system. This was one of the key findings of extensive fact-finding and consultations conducted by the World Intellectual Property Organization (WIPO) since 1998.

More recently, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is making significant progress in identifying and clarifying the relevant issues and in developing policy and practical responses to them. The Committee, comprising States and non-governmental organizations and representatives of Indigenous and local communities, has also expressed the need for practical and empirical information on the usefulness of the intellectual property system in this area as a basis for its policy and practical work.

This publication, 'Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions', written for WIPO by Ms. Terri Janke of Australia, responds directly to this need. The Case Studies provide factual and practical information, based on specific cases, on actual and attempted use of the existing intellectual property system by Indigenous Australians and legal and practical lessons learned therefrom. They contain examples of how designs, copyright and trade marks have been used by Indigenous communities to protect and promote their arts, cultures and identities, as well as, where so desired, their economic interests. They also indicate, in a practical context, in which respects existing systems were not seen by communities as meeting their interests, and that non-intellectual property measures also have a role to play in securing comprehensive and effective protection. These Studies will be a useful resource for policy makers at the international, regional and national levels, private legal practitioners, Indigenous and local communities and other stakeholders.

I wish to thank Ms. Janke and all the communities, individuals and organizations whom she consulted, as well as the artists and communities who consented to the use of their artworks, designs and other creations in the publication, for this most valuable contribution to the development of practical and policy responses to the challenges posed by the protection of expressions of traditional cultures and folklore.

Kamil Idris,
Director General,
WIPO

CONTENTS

OVERVIEW

The work of Mr. John Bulun Bulun ("Mr. Bulun Bulun") incorporates imagery which is sacred and important to his clan group, the ***Ganalbingu*** people and their cultural heritage. His bark painting ***Magpie Geese and Water Lilies at the Waterhole*** was created in accordance with the traditional laws and customs of the ***Ganalbingu*** people. It was created with the necessary consent of the appropriate ***Ganalbingu*** elders. The art of painting and the act of creating artistic works is a continuing responsibility handed down through the generations.

Mr. Bulun Bulun's painting was altered and copied onto fabric, imported into Australia and sold nationally, by R & T Textiles (the "Company").

Mr. Bulun Bulun and Mr. George M*[1] ("Mr. M*"), a senior representative of the ***Ganalbingu*** people, commenced action against the Company, in the Federal Court of Australia. The Company admitted copyright infringement of Mr. Bulun Bulun's work and consent orders were entered into.

Mr. M* continued in his own right, claiming that the traditional owners of ***Ganalbingu*** country had certain rights in the copyright in the artistic work, separate from the individual rights of Mr. Bulun Bulun. The court dismissed Mr. M*'s claim. However, the judgment deals with some interesting issues regarding the application of copyright to Indigenous arts and cultural expressions.

The judgment in ***Bulun Bulun v R & T Textiles***[2] was handed down in September 1998 and was given by Justice Von Doussa, the same judge who heard and gave judgment on the Carpets Case, ***M* v Indofurn.***[3] The judgment raises issues in relation to copyright and Indigenous art and it has sparked a lot of legal analysis on the protection of Indigenous art and whether the case creates a means for the protection of communal interests under intellectual property law. This study briefly looks at the case[4] and provides a bibliography of the legal commentary since the case.

BACKGROUND

Mr. Bulun Bulun is a well known artist from Arnhemland and his work ***Magpie Geese and Water Lilies at the Waterhole*** was altered and copied by the Company. In 1996, Mr. Bulun Bulun commenced action against the Company for breach of copyright in the artistic works. Mr. M*, as representative of the Indigenous owners of ***Ganalbingu*** country, also brought proceedings in his own right, claiming that the Indigenous owners were the equitable owners of the copyright in the artistic works.

Magpie Geese and Water Lilies at the Waterhole is a bark painting that was created in 1978 by Mr. Bulun Bulun with the permission of senior members of the ***Ganalbingu*** people. Mr. Bulun Bulun sold the work to Maningrida Arts and Crafts Centre where it was resold to the Northern Territory Museum of Arts and Sciences. The work was also reproduced, with Mr. Bulun Bulun's consent, in a book by Jennifer Isaacs, "***Arts of the Dreaming - Australia's Living Heritage***". Additionally, the artwork was the subject of an earlier action, ***Bulun Bulun v Nejlam*** (1989) where it was copied without Mr. Bulun Bulun's consent onto t-shirts marketed under the name "The Aboriginals" by Flash Screenprinters. Mr. Bulun Bulun had commenced action under the Copyright Act of 1968 (the "Copyright Act") and the Trade Practices Act of 1974 (the "Trade Practices Act"), however, the matter was settled prior to hearing (see Text box).

Bulun Bulun v Nejlam Pty Ltd[5]

In 1989, Johnny Bulun Bulun commenced legal proceedings against a t-shirt manufacturer who had reproduced his work without his knowledge or permission. Mr. Bulun Bulun claimed infringement of his rights under the ***Copyright Act 1968 (Cth)*** and ***Trade Practices Act 1974 (Cth).***

Flash Screenprinters had reproduced Mr. Bulun Bulun's 1980 painting ***Magpie Geese and Waterlilies at the Waterhole*** without consent or proper acknowledgement. Calling the t-shirt design "At the Waterhole", a swing ticket attached to the t-shirts referred to the design as "At the Waterhole - a design originated from Central Arnhemland". Later, the company produced another 'At the Waterhole' t-shirt, this time altering Mr. Bulun Bulun's painting, ***Sacred Waterholes Surrounded by Totemic Animals of the Artist's Clan***. The new t-shirt design also included elements believed to have been drawn from the works of other artists.

In his affidavit, Mr. Bulun Bulun explained the significance of the imagery in his paintings:

> ***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 Garmedi, 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.***

The nature of this suffering was captured by Johnny Bulun Bulun in his affidavit:

> ***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, and attribute my inactivity as an artist directly to my annoyance and frustration with the actions of the respondents in this matter.***

Prior to the Flash T-Shirts Case, it was generally assumed that many Indigenous artworks were not protected by copyright. This assumption considered that Indigenous artworks were not "original" because:

- they are based on traditional creation designs;
- they are passed on through the generations; and,
- are not the independent creative effort of the individual artist.

Evidence collected in the preparation of the case challenged this assumption. According to Arts Curator, Margie West, from the Northern Territory Museum of Arts and Sciences:

> ***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 art form, just as one might rate a particular Western artist as a leading exponent in his particular art form of, say, sculpture or watercolour painting***.[6]

As it happened, investigations in support of Mr. Bulun Bulun's case revealed that 13 other Indigenous artists had grounds for legal action against Flash Screenprinters, and proceedings were also commenced on their behalf.

On the day before trial, the parties entered into a settlement arrangement which required Flash Screenprinters to withdraw all infringing t-shirts from sale, and pay damages to the amount of A$150 000.

Although each Indigenous artist's works were infringed to varying degrees, the artists determined that they would share equally the sum, since each felt they had suffered equally.[7]

When proceedings were served, the Company admitted infringement of copyright in the artistic work pleading that they were unaware of copyright ownership by Mr. Bulun Bulun. Immediately afterwards the Company withdrew the infringing fabric from sale and consented to final declarations that they, the Company, had infringed Mr. Bulun Bulun's legal title to the copyright in the artistic work, and comprehensive permanent injunctions against future infringement. Approximately 7,600 metres of the fabric had been imported into Australia and approximately 4,231 metres had already been sold. The Company then went into administration and receivership. An amended statement continued to plead a claim by Mr. M* on his own behalf and as representative of the ***Ganalbingu*** people. His claim sought a declaration that:

- As a native title holder to a certain area of ***Ganalbingu*** country, he had rights of "traditional ownership" of that country. Such rights were inexorably linked with ownership of artistic works.
- Equitable ownership of copyright in the artistic works entitled him to bring action against the Company in his own right.

The Company was no longer part of the proceedings and the Minister of Aboriginal and Torres Strait Islander Affairs and the Attorney General of the Northern Territory intervened and made submissions on legal issues relating to the Native Title Act of 1993 (the "Native Title Act") and the Aboriginal Land Rights (NT) Act of 1978.

HOW WAS THE FABRIC DISCOVERED?

The fabric was brought to the attention of the artist by Mr. Martin Hardie, a solicitor,[8] who had noticed the fabric in Darwin around 1996. The fabric was used by the Northern Territory's Chief Minister's Department as uniforms for the Department's protocol staff to wear on special occasions. Mr. Hardie bought some of the fabric and showed it to Mr. Bulun Bulun who had not consented to the use of his work in such a way and instructed Mr. Hardie to commence action.

According to Mr. Hardie, the Company had found the artwork in the Jennifer Isaacs book. The Company reproduced part of the artwork in a design for fabric which it had printed in Indonesia. The Company then imported the fabric into Australia through Brisbane where it was distributed nationally for sale.[9] The fabric was then sold in fabric shops where it could be purchased and made into dresses, shirts and fabric items.

In 1996, an anonymous person brought the fabric to the attention of National Indigenous Arts Advocacy Association (NIAAA) requesting information about the artist. As there were no supply details of where the material was purchased, NIAAA was unable to follow up on the matter.[10]

THE TRADITIONAL CULTURAL EXPRESSION

The Ganalbingu People

The ***Ganalbingu*** people are the traditional Indigenous owners of ***Ganalbingu*** country. They have the right to permit and control the production and reproduction of the artistic work under the law and custom of the ***Ganalbingu*** people.

It was pleaded in the case that the traditional owners of ***Ganalbingu*** country comprise:

- the ***Yolngu*** people[11] who are the children of the women of the ***Ganalbingu*** people;
- the ***Yolngu*** people who stand in a relationship of mother's-mother to the members of the ***Ganalbingu*** people under ***Ganalbingu*** law and custom;
- such other ***Yolngu*** people who are recognised by the applicants according to ***Ganalbingu*** law and custom as being traditional Aboriginal owners of ***Ganalbingu*** country.[12]

The applicants pleaded that the ***Ganalbingu*** people "are the traditional owners of the body of ritual knowledge from which the artistic work is derived, including the subject matter of the artistic work and the artistic work itself."[13]

As evidenced in the court, the structure of ***Ganalbingu*** society has two levels. These levels are classified in the oral and anthropological evidence as "top" and "bottom" people. Mr. M* was the most senior person in the "top" people, and Mr. Bulun Bulun the most senior person of the "bottom" people.[14]

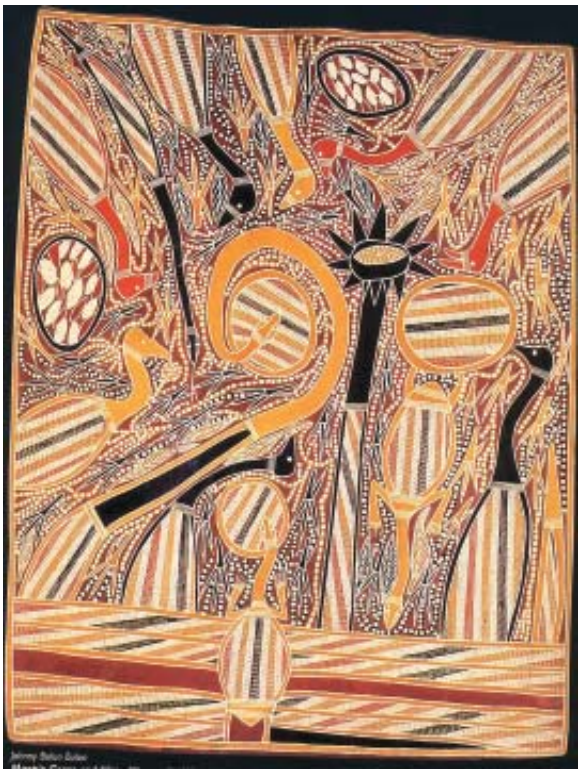
The Artistic Work

The artwork ***Magpie Geese and Water Lilies at the Waterhole*** depicts knowledge concerning ***Djulibinyamurr***. ***Djulibinyamurr*** is the site of a waterhole complex situated in the Arafura Swamp. ***Djulibinyamurr***, along with another waterhole site, ***Ngalyindi***, are the two most important cultural sites in ***Ganalbingu*** country for the ***Ganalbingu*** people. Mr. Bulun Bulun describes ***Djulibinyamurr*** as the "***ral'kal***" for the lineage of the bottom ***Ganalbingu*** people. It is the place where ***Barnda***, the turtle,[15] the creator ancestor, emerged and began ancestral travels. Mr. Bulun Bulun explains:

> ***"Barnda gave us our language and law. Barnda gave to my ancestors the country and the ceremony and paintings associated with the country. My ancestors had a responsibility given to them by Barnda to perform the ceremony and to do the paintings which were granted to them. This is a part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation."[16]***

Mr. Bulun Bulun noted that, under ***Ganalbingu*** law, ownership of land has a corresponding obligation to create artworks, designs, songs and other aspect of ritual and ceremony that go with the land. He stated:

Figure 1. Mr. Bulun Bulun, ***Magpie Geese and Water Lilies at the Waterhole***



Author: Mr. Johnny Bulun Bulun, Maningrida. Ganalbingu Clan.

Figure 2. Fabric produced by R&T Textiles reproducing Bulun Bulun's work

> ***"If the rituals and ceremonies attached to land ownership are not fulfilled, that is if the responsibilities in respect of the Madayin are not maintained then traditional Aboriginal ownership rights lapse."***[17]

Furthermore, Mr. Bulun Bulun stated that the unauthorized reproduction of the artwork threatened the whole system in ways that underpin the stability and continuance of the ***Yolngu*** society. Unauthorized reproduction interferes with the relationship between the people, their creator ancestors and the land given to the people by ***Barnda.***

Another witness, Mr. Djardie Ashley, gave evidence that according to Indigenous law, his role in the community was that of "***Djungayi***"[18] (manager or policeman) to Mr. Bulun Bulun. It was Mr. Ashley's obligation as ***Djungayi*** to ensure that the owners of certain land and ***Madayin***[19] associated with that land were dealt with in accordance with Indigenous customs and traditions. In this way, their role is important in maintaining the integrity of the land and the ***Madayin***. At trial this evidence was supported by anthropologists' affidavits. The importance of the artwork has been well documented by Howard Morphy in his book ***Ancestral Connections: Art and an Aboriginal System of Knowledge***.[20]

Rights to Apply Traditional Cultural Expressions Commercially

Evidence led in court stated that the right to paint was restricted to certain consent procedures which differed depending on the mode and purpose of reproduction. Djardie Ashley noted:

> ***"If Bulun Bulun wanted to licence At the Waterhole so that somebody could mass produce it in the way that the Respondents have he would need to consult widely. If he wanted to licence At the Waterhole to a publisher to reproduce the painting in an art book he probably would not need to consult the other traditional Aboriginal owners at all."***[21]

COPYRIGHT

Copyright vests in an artistic work that is original[22] and in material form. It is the expression that is protected and not the underlying idea. Copyright continues to subsist until 50 years after death of the author.[23] Copyright subsists in the painting ***Magpie Geese and Water Lilies at the Waterhole***, notwithstanding its traditional character***.*** By virtue of section 35(2) of the Copyright Act, the author of an artistic work is the owner of the copyright. Mr. Bulun Bulun as the creator of the artwork is recognized as the owner of the copyright in the painting under copyright law***.***

Rights of Copyright Owner

The copyright owner of an artistic work has the exclusive right to do all or any of the following acts:

- to reproduce the work in a material form;
- to publish the work;
- to include the work in a television broadcast;
- to cause a television programme that includes the work to be transmitted to subscribers to a diffusion service.[24]

Infringement

It is an infringement of copyright to directly copy a substantial part of an artistic work. A substantial part of an artistic work does not necessarily refer to a large part of the work. A range of issues, which includes the quality of the part copied, are relevant.

The fabric was not an exact reproduction but parts of the original work were manipulated to form the pattern on the fabric. Had the Company not admitted infringement at the outset the court would have had to decide on the issue of whether the fabric design was a substantial reproduction of the original work. Justice Von Doussa commented that, in his opinion, the fabric was a substantial reproduction.[25]

Was it a Work of "Joint Ownership"?

Another issue was whether the artistic work was a work of joint ownership. In other words, whether the work was owned jointly by Mr. Bulun Bulun and the Indigenous community. Justice Von Doussa held that the joint ownership provisions of the Copyright Act effectively precluded any notion of group ownership in an artistic work, unless the artistic work is a "work of joint ownership" within the meaning of section 10 (1) of Copyright Act. A "work of joint authorship" is a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors.

In this case, Justice Von Doussa considered that there was no evidence to suggest that any person other than Mr. Bulun Bulun was the creative author of the artistic work. He noted:

> ***"A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist.[26] Joint authorship envisages the contribution of skill and labour to the production of the work itself."[27]***

NATIVE TITLE

Mr. M* claimed that the ***Ganalbingu*** people were the traditional Aboriginal owners of ***Djilibinyamurr*** for the purposes of the Aboriginal Land Rights (NT) Act of 1976. Furthermore, it was claimed that the ***Ganalbingu*** people were also "native title holders" of that land pursuant to section 224 of the Native Title Act. At the time of acquisition of sovereignty over the Northern Territory of Australia by the Crown, the applicant's ancestors were the traditional Aboriginal owners. The applicant claimed that the rights to paint and permit the reproduction of the artistic work are subject to the conditions and obligations and an incident of native title. This claim failed for two reasons.

Firstly, certain procedural requirements under the Native Title Act were not met. The Minister for Aboriginal and Torres Strait Islander Affairs intervened to the effect that the Native Title Act contained procedural provisions for applications for determination of native title and in the absence of such an application, the Federal Court had no jurisdiction to make a determination of native title in land.[28]

Justice Von Doussa noted that neither the applicant nor the ***Ganalbingu*** people had made an application for determination of native title pursuant to section 74 of the Native Title Act. Hence, the Court was without jurisdiction to make a determination of native title in these

proceedings. There were similar procedural concerns regarding the Aboriginal Land Rights (NT) Act of 1976.

Secondly, the judge raised a further objection to the claim that the common law should recognise a connection between an interest in land and interest in a related artwork. Justice Von Doussa cited Justice Brennan in Mabo v Queensland (No 2):[29]

> ***"However, recognition by our common law of the rights and interests in land of indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system."[30]***

According to Justice Von Doussa:

> ***"The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be well characterized as "skeletal" and stands in the road of acceptance of the foreshadowed argument."[31]***

COMMON LAW RIGHTS TO COMMUNAL TITLE

On the issue of whether common law can recognise communal title directly in an artistic work, Justice Von Doussa said,[32]

> ***"Whilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so. There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal peoples did not cease to observe their sui generis system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown. The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem."[33]***

Justice Von Doussa noted that in 1788, when Australia was colonized, the common law of England gave a property interest to the author of an artistic work in unpublished compositions. This right lasted in perpetuity. However, his Honour further note that the common law right of first publication was abolished by the United Kingdom's Copyright Act of 1911. That Act was adopted with amendments in Australia in the form of the Copyright Act of 1912. Copyright in Australia does not subsist otherwise than by virtue of the subsequent Act - the Copyright Act of 1968.[34]

Justice Von Doussa noted that to "conclude that the Ganalbingu people were communal owners of the copyright in the existing work would ignore the provisions of section 8 of the Copyright Act, and involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia."[35]

EQUITABLE RIGHTS

Equitable rights are rights created and enforced by the court where it would be unconscionable to permit the legal owner of property to keep the benefit of property to herself. The Applicant argued that equitable rights were created in the artistic work given the nature of the artwork. Mr. M* represented those who have the power under customary law to regulate and control the production and reproduction of the corpus of ritual knowledge of the ***Ganalbingu*** people. It was argued that Mr. Bulun Bulun held the copyright subsisting in the artistic work on trust or alternatively as a fiduciary for Mr. M* and the ***Ganalbingu*** people.

Was there an Express Trust?

Justice Von Doussa considered that there was no express trust created in respect of the artistic work or the copyright subsisting in it. The existence of an express trust depended on the intention of the creator. To express an intention to create trust, it is not necessary that there be any formal or technical words. Any apt expression of intention will suffice.[36] The intention to create a trust must be manifested in some form or another.

Based on the evidence presented before him, Justice Von Doussa held that Mr. Bulun Bulun did not hold either the artwork or the copyright in it in trust for the ***Ganalbingu*** people. The fact that Mr. Bulun Bulun was entitled in customary law to sell his work and retain the profits himself was seen by the judge to be inconsistent with there being an intention to create an express trust. Also the fact that the artwork had been reproduced and sold commercially in a book ***Art of Dreaming - Australian Living Heritage*** was seen as being contrary to the argument that the sacred nature of the ritual knowledge embodied in the work was such as to infer an intention on the part of Mr. Bulun Bulun to hold the artwork in trust.[37]

Further, there was no evidence as to any form of express agreement of a contractual nature which vested an equitable interest in the ownership of the copyright in Mr. M* or the ***Ganalbingu*** people.

Was there a Fiduciary Duty?

Fiduciary refers to a relationship of one person to another, where the former is bound to exercise rights and powers in good faith for the benefit of the other. Unless expressly entitled, a court of equity will not allow a person in a fiduciary position to make a personal profit or to put herself in a position where her duty and her interest conflict. Fiduciary relationships require a vital element, and that is "that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of this other person in a legal or practical sense."[38] A question put before the Court was whether or not Mr. Bulun Bulun owed a fiduciary duty to the ***Ganalbingu*** people in respect of his role as author and copyright owner of the artistic work

Justice Von Doussa considered that a fiduciary relationship existed between the artist and the clan group and that the artist had a fiduciary duty towards his community. The artwork contained ritual knowledge that was of great importance to members of the ***Ganalbingu*** people. Justice Von Doussa noted that while the artist was entitled to pursue the exploitation of the artwork for his own benefit, he was still required under customary obligation to refrain from taking any steps which might harm the communal interests of the clan in the artwork. Having found that a fiduciary relationship existed, Justice Von Doussa considered that equity imposed on the artist, as fiduciary, obligations:

- not to exploit the artistic work in a way that is contrary to the laws and customs of the Ganalbingu people;
- in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy the infringement of the copyright in the artistic work.[39]

The equity recognized falls short of an equitable interest in copyright. The right of the ***Ganalbingu*** clan, in the event of a breach of obligation by the fiduciary, is a right ***in personam***[40] to bring an action against the fiduciary to enforce the obligation. The court considered that Mr. Bulun Bulun had fulfilled this obligation by taking legal action against the infringers. Therefore there was no need for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship.

In addition, Justice Von Doussa said that "the occasion might exist for equity to impose a remedial constructive trust upon the copyright owner to strengthen the standing of the beneficiaries to bring proceedings to enforce the copyright. This may be necessary if the copyright owner cannot be identified or found and the beneficiaries are unable to join the legal owner of the copyright."[41]

RELEVANCE OF CUSTOMARY LAW

The Court looked at the relevance of customary law and decided that evidence of customary law may be used as a basis for the foundation of rights recognized within the Australian legal system. After finding that Mr. Bulun Bulun's customary law obligations gave rise to a fiduciary relationship between himself and the ***Ganalbingu*** people, Justice Von Doussa stated:

> ***"The conclusion that in all the circumstances Mr. Bulun Bulun owes fiduciary obligations to the Ganalbingu people does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterizes the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognizes as giving rise to the fiduciary relationship, and to the obligations that arise out of it."***[42]

OUTCOME

Mr. M*'s claim was dismissed on the basis that Mr. Bulun Bulun had met his fidicuary obligations by commencing action against the Company and stopping the unauthorized production and sale of the artwork.

As mentioned above, the Company ceased production, import and sale as soon as they received the statement of claim from the Applicants. The action continued to the court to hear the novel arguments surrounding Mr. M*'s claim.

As part of the settlement, Mr. Bulun Bulun received over 2,000 metres of fabric on delivery-up. He and his community make use of the fabric to cordon off areas for ceremonies.[43]

The judgment serves to raise an awareness of the collective interests of Indigenous artists in works that embody clan knowledge.

Yumbulul v Reserve Bank of Australia (1991)[44]

Many commentators have revisited the facts of the ***Yumbulul Case*** in order to analyze the nature of the "Bulun Bulun equity". The ***Yumbulul Case*** involved the reproduction of artist Terry Yumbulul's ***Morning Star Pole*** on the Bicentennial A$10 note. Mr. Yumbulul created a Morning Star Pole under the authority given to him as a member of the Galpu clan group. The design of the pole is a clan design of the Galpu clan.[45] Mr. Yumbulul's pole was sold to the Australian Museum for public display. As part of an agency agreement, Mr. Yumbulul licensed his reproduction rights to the Aboriginal Artists Agency. The right to reproduce the pole was subsequently licensed to the Reserve Bank of Australia to reproduce on the Bicentennial A$10 note.

Mr. Yumbulul attracted considerable criticism from his community for allowing this to happen. According to the traditional custodians, such use exceeded the authority he had been given. Mr. Yumbulul had been trained by his community in the preparation of the pole and was permitted to sell the work where it would be permanently displayed to educate the wider community about Aboriginal culture. However, he had not been given authority to allow such a sacred item to be reproduced on money.

Mr. Yumbulul took action in the Federal Court against the Aboriginal Artists Agency and the Reserve Bank, alleging he would not have authorized the license to the Reserve Bank had he fully understood the nature of it. But he was unable to prove this in court.

The Court found that Mr. Yumbulul had mistakenly believed that the license to the Reserve Bank would impose limitations on the use of the pole similar to those in Aboriginal customary law and that this was his belief at the time of granting the license.

The traditional custodians were not part of the proceedings, so the Court did not have to decide on the issue of communal ownership. However, the Court noted 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."[46]

CONCLUDING COMMENTS

Copyright provides intellectual property protection for artistic works against unauthorized use or reproduction.[47] Intellectual property laws aim to provide creators with certain economic rights to exploit their efforts so as to provide an incentive for the creative process itself. There is evidence that economic factors are gaining importance for Indigenous creators. However, the creation of Indigenous art primarily concerns continuing obligations to express and maintain Indigenous cultural practices. Hence, artistic integrity and attribution are important rights and the recognition of these rights as communal is important for Indigenous peoples.

Before this judgment, remedies for Indigenous applicants under copyright law focused on individual notions of ownership. It was noted in the ***Yumbulul v Reserve Bank of Australia Ltd.,***[48] that the law fails to acknowledge the claims of Indigenous communities "to regulate the reproduction and use of works which are essentially communal in origin."[49] The Carpets Case, although also concerned with individual artists' copyright, represented a step towards recognizing the communal aspect of Indigenous artistic works. This was evidenced by the global award of damages the court made to take into account the customary practice of Indigenous applicant's communities in sharing the awarded amount. Further, part of the

damages were awarded for cultural harm the individual artists may have suffered, as being accountable to the rest of the clan for protecting the integrity of the work and the underlying ritual knowledge embodied therein.

The judgment in ***Bulun Bulun v R & T Textiles*** takes this premise further and shows a willingness of the courts to recognize an interest of the ***Ganalbingu*** people in protecting clan ritual knowledge as deserving of legal protection. Many commentators speculate that the judgment shows that Aboriginal customary law rights, interests and obligations are relevant in providing for rights which will be recognized and protected by the Australian legal system.

The court's recognition of the importance of protection of the interests that Indigenous communities have in artistic works embodying ritual knowledge is a significant development in law and equity and one that will no doubt be tested in future cases.

The "Bulun Bulun Equity" and third Party Rights

Already the judgment has been the subject of much speculation by legal commentators. Michael Hall, for instance, examines to what extent a third parties' dealing with an Indigenous artist for an assignment or license is at risk of acquiring an interest subject to the "Bulun Bulun equity."[50] Hall notes that "the commercial interests of Aboriginal artists may be adversely affected if this issue remains too much in doubt."[51]

Hall notes that an assignee for value of the legal title, who takes without notice of the existence of a "Bulun Bulun equity," will take title without encumbrance.[52] However, if a purchaser of the legal title of an Aboriginal artwork is put on notice, then he or she may be bound by the equity.

The issue is what will satisfy the giving of this notice. Hall considers that one view might be that the purchaser is on notice by the very nature of the property.[53] However, he discounts this view, stating that it is not likely for courts to impute such notice by the mere fact that it is an Aboriginal artwork which has or may have religious or cultural significance.

Another significant aspect of the debate concerns the validity of copyright licenses granted in respect of Indigenous artworks. If a licensee is sued for infringement by a person in the position of Mr. M*, can the licensee argue in defense that it has a valid license from the legal copyright owner? These would have been the facts in the ***Yumbulul Case*** had the clan group taken action against the Reserve Bank. According to Hall, "(i)t seems reasonably clear that Justice Von Doussa only envisaged that Mr. M* could, in the proper circumstances, exercise the same rights as Mr. Bulun Bulun. The answer therefore seems to be that, while the third party remains licensed by the legal copyright owner, the license would be a good defense to an action brought by the holder of the equity."[54] However, a critical point is that, in appropriate circumstances, Mr. M* may be granted the ability to terminate any license granted by Mr. Bulun Bulun, if Mr. Bulun Bulun had the power to terminate. Hence, it is speculated that a custodian, on behalf of a group, could have a license set aside if it is shown to be in breach of customary laws.

Sally McCausland notes that to rely on the mere equity, Indigenous custodians must show that the infringing party was on notice of their rights to the copyright work. McCausland recommends that to be certain, Indigenous artists and custodians should give express and clear notice of their interest to third parties.[55] She provides a draft form of notice as follows:

> ***"NOTICE OF CUSTODIAL INTEREST OF THE [NAME] COMMUNITY***
>
> ***The images in this artwork embody ritual knowledge of the [name] community. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorized by the custodians is a serious breach of the customary laws of the [name] community, and may breach the Copyright Act 1968 (Cth). For enquiries regarding the permitted reproduction of these images, contact [community]."***[56]

It is a practice of art centres to refer to the rights of the clan group, as well as the individual artists. For example, Buku Larnngay Mulka puts the following copyright notice on their individual artists' works:

> ***"This work and documentation is the copyright of the artist and may not be reproduced in any form without the permission of the artists and clan concerned."***[57]

As McCausland notes, this equity can arise not just in relation to artistic works but to other types of copyright material including dramatic, musical and literary works. A custodian's interest notice such as the one above could be adapted for these other types of materials.

The suggestions put forward by Hall and McCausland are yet to be tested in the courts. However, a positive outcome of the case is that it reinforced the importance of Indigenous people asserting rights to their cultural material and making these known to the world at large. In the same way that many copyright owners adopt a "©" symbol to provide notice of copyright, there is scope for such methods to provide notice of custodians' interests in copyright works.

Limitations of Copyright Protection

Although the case represents an extension of copyright law in protecting Indigenous arts, the limitation of copyright in generally protecting Indigenous arts and cultural expressions still remain:

Material form

There is still a necessity in Australian copyright law (and in the laws of many, but not all, countries) for the artistic knowledge of Indigenous people to be represented in some material form for it to be protected. Copyright protects the actual work of Mr. Bulun Bulun and not the underlying knowledge embodied therein.

Can a person hold traditional knowledge in an oral form on trust, or as a fiduciary, for others? V. J. Vann notes the problems associated with express trusts, beginning with the requirement that the subject matter of a trust must be property. Traditional knowledge does not meet this requirement unless it is a form that attracts copyright, patent or trademark protection.[58]

Duration

Even if traditional knowledge could be constituted in material form as was done in the ***Bulun Bulun Case***, the problem of duration of protection remains. Copyright in the artistic work of Mr. Bulun Bulun will cease after fifty years from his death. For the ***Ganalbingu***, rights to protect the underlying knowledge, and to control its wider dissemination, last in perpetuity.

Moral rights

Moral rights laws address certain non-economic interests of creators. A the time of bringing action, Australia did not have moral rights laws. The new laws include the rights of attribution and integrity. The right of integrity is important for Indigenous artists. Preserving the overall integrity of the work and the underlying story or ritual knowledge is an extremely important for the proper representation of Indigenous art. However, the rights vest in individuals and not communities. The ***Bulun Bulun Case*** raised the issue of whether a clan representative could commence proceedings for moral rights infringement if the individual artist is unknown or unwilling to bring an action of moral rights infringement.

Effect on Customary Practices

A potential problem identified by commentators is the risk of this process of recognition hampering the dynamics at which traditional customary law is aimed.
V. J. Vann gives the following example: "In some art works there may be a fine line between what part of the work is referable to a tribe's dreaming and what is attributable to a separate expression or interpretation by an individual artist. Attempts might be made by a cultural group to restrain the use of knowledge absorbed during the artist's upbringing or experiences in that culture. Salman Rushdie and Mozart provide hypothetical examples."[59] In these instances, alternative forms of dispute resolution rather than litigation, could provide the balance between protection of traditional content and creative expression.

Native Title

The case does exclude the argument that native title rights include rights to protect Indigenous arts and cultural expression. However, Blackmore argues that such rights, if they existed, would have been extinguished by the Copyright Act. He states:

> ***"The very last point at which one can say that the existence of copyright is not inconsistent with native title is at the point when the individual first exploits their copyright, by say, selling or licensing the work. Obviously, automatic extinguishment at such an early stage in a work's existence would render native title of little use to native title holders."[60]***

But Blackmore fails to observe the complexities of Indigenous knowledge systems. Art is a continuum of cultural expression, and a painting or recording embodying traditional knowledge is just a snapshot at any given time. Copyright vests in the expressed material form but continuing cultural rights remain as in the underlying traditional knowledge. The legal point not yet tested is whether a copyright interest in the western legal sense is a sufficient title to usurp the underlying rights to cultural traditional knowledge.

Endnotes

1 The senior representative, Mr. M, is now deceased.

2 ***Bulun Bulun v R & T Textiles Pty Ltd.*** (1998) 41 IPR 513.

3 George M*, Payunka, Marika & Others v Indofurn Pty Ltd, (1994) 54 FCR 240. A study on this case is available at <http://www.wipo.int/globalissues/studies/cultural/minding-culture/carpetscase/index.html>.

4 ***Bulun Bulun v R & T Textiles Pty Ltd.*** (1998) 41 IPR 513.

5 Additional information on Bulun Bulun v Nejlam. Colin Golvan, "Aboriginal Art and Protection of Indigenous Cultural Rights", Aboriginal Law Bulletin, Vol 2, No 56, June 1992, pp. 5 – 8; Martin Hardie, "Copywrong", All Asia Review of Books, Vol 1, No 2 July 1989.

6 Reproduced in Colin Golvan, 'Aboriginal art and copyright: The case for Johnny Bulun Bulun', in European Intellectual Property Review, Vol 10, 1989, pp. 347–354.

7 ***Ibid.***

8 Martin Hardie, Interview with Susannah Lobez, The Law Report, Radio National, Tuesday, 15 September 1998.

9 Martin Hardie, Interview with Susannah Lobez, The Law Report, Radio National, Tuesday, 15 September 1998.

10 See National Indigenous Arts Advocacy Association, Submission to the Stopping the Ripoffs, May 1995.

11 Aboriginal people of Arnhem Land.

12 41 IPR 513 at 517.

13 41 IPR 513 at 517.

14 41 IPR 513 at 517.

15 Long necked turtle.

16 Affidavit of Mr Bulun Bulun cited at 41 IPR 513 at 518.

17 Affidavit of Mr John Bulun Bulun cited at 41 IPR 513 at 518.

18 or "***Waku***" 41 IPR 513 at 519.

19 Corpus of ritual knowledge 4 IPR 513 at 518.

20 Howard Morphy, Ancestral Connections: Art and An Aboriginal System of Knowledge, The University of Chicago Press, Chicago, 1991, 41 IPR 513 at 520.

21 41 IPR 513 at 520.

22 Section 22, Copyright Act 1968 (Cth).

23 Section 32(2) Copyright Act 1968 (Cth); copyright in a literary, dramatic, musical or artistic work continues to subsist until 50 years after the end of the calendar year in which the author dies.

24 Section 31, Copyright Act 1968 (note 2000 changes to Act introduced the communication right to the public).

25 41 IPR 513 at 520.

26 ***Kenrick & Co v Lawrence & Co*** (1890) 25 QBD 99 in 41 IPR 513 at 525.

27 ***Fylde Microsystems Limited v Kay Radio Systems Limited*** (1998) IPR 481 at 486. in 41 IPR 513 at 525.

28 Section 213(1), Native Title Act 1993 (Cth).

29 (1992)175 CLR 1.

30 (1992)175 CLR 1 at 43 in 41 IPR 513 at 524.

31 41 IPR 513 at 524.

32 41 IPR 513 at 525.

33 An act, proceeding or right available against the world at large as opposed to a right in personam which is a right against or with reference to a specific person.

34 Section 8, Copyright Act 1968 in 41 IPR 513 at 525.

35 41 IPR 513 at 525.

36 ***Registrar, Accident Compensation Tribunal v Commissioner of Taxation*** (1993) 178 CLR 145 at 166.in 41 IPR 513 at 526.

37 41 IPR 513 at 527.

38 ***Hospital Products Ltd v United States Surgical Corp*** (1984) 156 CLR 41 at 96 - 97 per Mason J. in 41 IPR 513 at 527.

39 41 IPR 513 at 531.

40 An act, proceeding or right available against the world at large as opposed to a right in personam which is a right against or with reference to a specific person.

41 41 IPR 513 at 531-32.

42 41 IPR 513 at 530.

43 Telephone interview with Ron Levy, Senior Legal Officer, Northern Land Council.

44 (1991) IPR 481.

45 Morning Star Poles are commonly used in funeral ceremonies of important people. They are made from feathers, wood and string and are painted with designs. The right to create the poles is governed by Indigenous customary law and the method of creating them must comply with religious rules.

46 Ibid at 490.

47 It also protects dramatic, musical and literary works.

48 ***Yumbulul v Reserve Bank of Australia Ltd*** (1991) 21 IPR 482, 490 French J.

49 ***Yumbulul v Reserve Bank of Australia Ltd*** (1991) 21 IPR 482, 490 French J.

50 Michael Hall, "Case Note: Bulun Bulun v R & T Textiles", Vol 16, No 3 Copyright Reporter, November 1998, pp. 124 - 135, at 130.

51 ***Ibid.***

52 Michael Hall cites National Provincial Bank v Ainsworth.

53. Michael Hall, Op cit, at 131.

54 ***Ibid***, at 132.

55 Sally McCausland, "Protecting Communal Interests in Indigenous Artworks after the Bulun Bulun Case", Indigenous Law Bulletin, July 1999, p. 5.

56 ***Ibid***, p. 4.

57 Diane Blake, Buku Larrngay Mulka Arts Centre, Yirrkala, Northern Territory, interview 1 August 2000.

58 V. J. Vann "Copyright by way of fiduciary obligation – finding a way to protect Aboriginal art works" Media & Arts Law Review (2000) March p. 13.

59 ***Ibid***, p. 22.

60 Nicholas Blackmore, "The Search for a Culturally Sensitive Approach to Legal Protection of Aboriginal Art", (October 1999) 17 (2) Copyright Reporter, pages 57-69 at p. 66.

BIBLIOGRAPHY

Case Citations

(1998) 157 ALR 193

(1998) 41 IPR 513

(1998) FCR 244

(1998) AIPC 91-447

Articles

BLACK, Hilary-May, "John Bulun Bulun & Anor v R & T Textiles" ***Art & Law*** (3) 1998, pp.8- 9.

BLACKMORE, Nicholas, "The Search for a Culturally Sensitive Approach to Legal Protection of Aboriginal Art", (October 1999) 17 (2) ***Copyright Reporter***, pp. 57-69.

BLAKENEY, "The Protection of Traditional Knowledge under Intellectual Property Law," [2000] ***European Intellectual Property Reports,*** pp.251- 262.

BURKE, Erika, "Bulun Bulun v R & T Textiles Pty Ltd: The Aboriginal Artist as a Fiduciary", (1999) ***Flinders Journal of Law Reform***, pp. 283 – 286.

GOLVAN, Colin, 'Aboriginal art and copyright: The case for Johnny Bulun Bulun', in ***European Intellectual Property Review***, Vol 10, 1989, pp. 347–354.

GOLVAN, Colin, ***Case Note: John Bulun Bulun v R & T Textiles Pty Ltd***, June 1999 4(2) Media and Arts Law Review, pp.111 – 112.

GOLVAN Colin, "Aboriginal art and copyright: an overview and commentary concerning recent developments" ***European Intellectual Property Review*** 21(11) November 1999, pp. 599-603.

GOLVAN, Colin, "Aboriginal Art and the public domain" ***Journal of Law and Information Science*** 9 (1) 1998, pp. 122 – 129.

HALL, Michael; "Case Note: Bulun Bulun v R & T Textiles", Vol 16, No 3 ***Copyright Reporter***, November 1998, pp. 124 – 135.

HARDIE, Martin, "The Bulun Bulun Case - John Bulun Bulun & Anor v R & T Textiles Pty Ltd", ***Indigenous Law Bulletin***, November 1998, vol. 4, issue 16, pp. 24 – 26.

HARDIE, Martin, "Aboriginal artwork, copyright law and the protection of ritual knowledge", ***Communications Law Bulletin*** 18(1) 1999: pp. 9 – 12.

HARDIE, Martin, "Bulun Bulun & M* v R & T Textiles" ***Art and Law*** (1) 1997, p. 8.

JANKE, Terri, "Respecting Indigenous Cultural and Intellectual Property Rights", UNSW Law Journal, pp. 631 – 639.

LOFTUS, Paul, "Colonisation Through Art: how Western intellectual property laws is failing Indigenous art" ***Balayi 1*** (1) January 2000, pp.183 – 206.

KELLY, Paul, "Equity to the Rescue: a fiduciary duty to an Aboriginal clan" ***Southern Cross University Law Review*** (3) 1999, pp. 233 – 240.

McCAUSLAND, Sally; "Protecting communal interests in indigenous artworks after the Bulun Bulun Case", ***Indigenous Law Bulletin***, July 1999, vol 4, issue 22, pp. 4 – 6.

MORRIS, Scot, "The Protection of "Folklore: the Australian Experience" ***Intellectual Property in Asia and the Pacific*** (58) September 1998, pp. 28 – 35.

NICHOLLS, Christine, "What is authorship?" Vol 25, No 4 August 2000, ***Alternative Law Journal***, pp. 187 – 189.

ROBBINS, David, "Aboriginal Custom, Copyright and the Canadian Constitution", reproduced in Conference Papers of ***Protecting Knowledge: Traditional Resource Rights in the New Millennium***, hosted by the Union of British Columbia Indian Chiefs, 23 - 26 February 2000.

RIMMER, Matthew, "Four Stories about Copyright Law and Appropriation Art"

Media and Arts Law Review Volume 3, December 1998, p. 180.

VANN, V-J, :Copyright by way of fiduciary obligation: finding a way to protect Aboriginal art works" ***Media and Arts Law Review*** (5) March 2000, pp. 13 – 23.

Books

MORPHY, Howard; ***Ancestral Connections: Art and an Aboriginal System of Knowledge***, The University of Chicago Press, Chicago, 1991.