ABORIGINAL ART: IS PROTECTION OR EDUCATION THE ISSUE?

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Let me start with an anecdote. Earlier this year our Minister received an enquiry from an Australian member of an American-based email discussion group. It was about potential actions available to address the apparent growth of trade in the United States in didgeridoos allegedly being manufactured and painted with 'Aboriginal' designs in Thailand. In researching the issue, we discovered that there is a plethora of websites with content on didgeridoos – over 500 sites identified on one links list! In advising the Minister regarding a response to the email, we not only drew attention to the potential applicability of legislation such as the Copyright Act in providing protection to creators of artistic works – including Aboriginal artists and craftpersons – and to the range of organisations which could provide specific advice - such as NIAAA, Viscopy, the Arts Law Centre, the Copyright Council and Vivien Johnson's House of Aboriginality project at Macquarie University - but we also suggested that the Minister provide the email discussion group with a statement on the issue, drawing attention to these protections and resources. The Minister was pleased to issue the statement; it was posted to discussion group members and we received some positive feedback. We also referred it to the Yothu Yindi Foundation for interest, following the release of the Garma Festival Yidaki Statement earlier this year.

I quote this anecdote not to show what an exemplary and proactive agency we are, nor to suggest that the Copyright Act is an entirely perfect and reliable tool for protecting Indigenous creative artists' rights – in this example the Trade Practices Act is possibly the more relevant legislation, as the alleged practice raises issues of misleading and deceptive conduct - but rather to illustrate the thesis of this paper – that there is a range of options available for the protection of Indigenous creative artists' rights. These range from enforcement through civil litigation – such as actions under the Copyright Act - or criminal sanctions – as illustrated by the recent case where an Adelaide man was extradited to Sydney to face charges relating to gaining a benefit by deception in distributing paintings which he allegedly knew to be forgeries – through amendments to the legislative and regulatory framework – such as the proposed moral rights amendments to the Copyright Act - to collaborative initiatives such as industry codes of ethics and practice, marketing and educative initiatives such as quality assurance and authenticity marks, and the dissemination of useful information through diverse means, such as in the example of the Ministerial statement on the Internet.

Terri Janke's recently launched report for ATSIC – *Our Culture: Our Future* – is a useful and timely discussion of Australian Indigenous cultural and intellectual property rights and amply illustrates my thesis, canvassing a broad spectrum of current legislative and non-legislative protections together with future development options and strategies. Similarly, the Australian Copyright Council's practical guide *Indigenous Arts and Copyright*, published earlier this year, is a useful reference on this topic.

The issue, I would suggest, is how all stakeholders – and Indigenous artists, communities and organisations most particularly – can best take advantage of these options. In other words, where might we apply our collective energies, talents and resources to most effect – focusing on tangible benefits rather than quixotically tilting at windmills. I don't have to tell you that the issues are complex, that there are no 'quick fixes'. Surely such complexity invites a diversity of approaches.

Let me briefly touch on several elements of the legislative framework which might be exploited in relevant circumstances for the protection of Indigenous cultural and intellectual property. The centrepiece of this legislative framework is perhaps the Copyright Act, for which the Minister for Communications, Information Technology and the Arts shares policy responsibility with the Attorney-General. It has been shown to be effective in protecting Indigenous cultural and intellectual property in specific circumstances.

A telling recent example was the decision in last year's Bulun Bulun case which found that a fiduciary relationship existed between Mr Bulun Bulun and the Ganalbingu clan of which he was a member. While the judge decided that the Ganalbingu clan did not hold copyright in the work, he did say that the fiduciary relationship between the artist and clan meant that "the artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge." The decision represents an important step towards recognising communal interests in the cultural integrity of Indigenous works; and one that has been achieved under existing legislation.

In this context it is interesting to note one possible consequence flowing from such high profile successful cases. It has been suggested that the effectiveness of Copyright Act in providing a remedy in such cases may be encouraging manufacturers to create and use derivative, generic designs rather than to reproduce (and pay for) authentic Indigenous designs. If such trends are becoming apparent, might it not be worthwhile to focus on raising consumer awareness, as illustrated in my earlier example of the didgeridoo email discussion group? Might it not be effective to encourage consumers to be more discerning when purchasing Indigenous artistic and cultural products, and to focus on assisting consumer choices through such mechanisms as authenticity and regional quality assurance marks, so as to mitigate against such practices?

As many of you will no doubt be aware, the Copyright Act is currently the subject of substantial amendment processes – from sound recordings to digital issues to moral and performers' rights. Many of these amendments will have particular relevance to the protection of Indigenous cultural and intellectual property, for example, proposed moral rights legislation will provide an author with a right not to have the work subjected to derogatory treatment. The Committee currently undertaking the Intellectual Property and Competition Review which is enquiring into the effects of intellectual property legislation, including Patents, Trademarks, Designs, Copyright and Circuit Layouts Acts, is to report next June and may well identify additional opportunities for enhancing protections in this area.

One of the particularly relevant pieces of legislation for which the Minister for Communications, Information Technology and the Arts has administrative responsibility is the *Protection of Movable Cultural Heritage Act 1986* (PMCH). Regulations under the Act specifically relate to objects of Aboriginal and Torres Strait Islander heritage. Amendments to this Act which came into effect on 1 May this year are intended to enhance protection against the inappropriate export of significant pieces of Indigenous art. The amendments reduced the threshold time period from 30 to 20 years, thereby capturing the increasingly sought-after early Papunya art from the 1970's, while increasing the monetary threshold from $5,000 to $10,000.

While I don't pretend to be an authority on the administration of this legislation, I gather that this amendment has already created some controversy in relation to items in a collection of Indigenous art which went under the hammer at a renowned auction house earlier this year. Indeed, the amendments may affect the statistics on items refused certification – I am told that only 11 items have been refused an export certificate in the 13 years that the Act has been in existence – none of those being an Indigenous item. (And in fact only one such uncertified item has been smuggled out – if extradited, the perpetrator will face forfeiture, a maximum $100,000 penalty and/or 5 years' jail.) Of course, the PMCH Act only relates to the <u>export</u> of significant objects and has no bearing on domestic transfer of ownership. My point in this context is to illustrate the preparedness of the Government to amend legislation to enhance a protection affecting Indigenous art where such a case has been effectively advocated.

In addition to legislative protections, there is any number of non-legislative options. A topical example is the recently launched authenticity label. The need for such a label has been advocated for many years and the current project has had a long and sometimes difficult gestation. The Government has supported an authenticity label both in principle and with substantial financial investments to the NIAAA project through both ATSIC and the Australia Council. However, it is clear that industry has ongoing concerns about the project. Some of the concerns identified relate to the level of awareness of, support for and commitment to the proposed model from Indigenous artists and art centres; the financial assumptions on which the model is predicated and therefore its viability; the apparent lack of certification infrastructure especially in the remote regions where much original 'product', either as unique creations or replicated designs, is sourced; the focus on the certification of authentic artists rather than on authentic, quality assured product; and the lack of priority given to the second proposed trademark, for licenced manufactured product, given that the Olympics tourist market is commonly identified as being the biggest threat of 'rip-offs' of Indigenous intellectual property, from T-shirts to didgeridoos.

By contrast, it would seem that the fine art market is relatively easier to police, given the role of art centres and commercial galleries in provenancing works and in indemnifying purchasers against fraud, and the increasing focus on codes of ethical practice as espoused for example by Art.Trade and quoted in advertisements by major dealers. Is it likely that adding a swing tag to a major work by an established artist would be acceptable to the artist or their galleries? Would the use of such a label have prevented recent highly publicised frauds? If the artist perpetrated or condoned the fraud, would that same artist have any compunction about applying a label of authenticity? I quote this 'case study' to illustrate the risk of putting too much faith in one solution, be it an authenticity label, specific legislation or enforcement resources. The point remains that satisfactory resolution of these concerns will allow the NIAAA Label, and other quality assurance initiatives, to take their place in the range of responses to the complex task of improving protections for Indigenous cultural and intellectual property. I suggest that what is required is the use of a range of mechanisms, developed in consultation and collaboration with all stakeholders and founded on respect for the legitimate interests and values of all parties.

Finally, it is worth considering the scope and extent of consistent and appropriate protocols and practices for the management and use of Indigenous cultural and intellectual property. For its part, the Government has a range of tools available to manage those aspects of Indigenous cultural and intellectual property for which it has responsibility. These include not only the identification of opportunities and priorities with a community-wide impact, for example through legislative change or the more effective targetting of specific programs and projects, but also 'getting its own house in order' for example through ensuring that there are consistent and appropriate protocols and practices for the management and use of Indigenous cultural and intellectual property across Departments and agencies. I'm not suggesting that the Government would intentionally misuse anyone's intellectual property, but rather that there is always scope for reviewing practice and avoiding inadvertent breaches – after all, the Government and its agencies collectively produce and use a vast quantity of creative material, from glossy publications and websites to postage stamps!

Similarly, the Government and its agencies have responsibility for significant archival material acquired under various historical circumstances.. There is always the potential to build on existing policies, protocols and guidelines in this area – in some cases exemplary models already exist - to ensure that these collections are managed and accessed in an

informed, consistent and appropriate manner. Museums, libraries and archives are leaders in this area as illustrated for example by the Council of Australian Museums' 1993 publication *Previous Possessions, New Obligations*.

I suggest that the whole community's interests – whether Indigenous artists, art centres, commercial galleries and dealers, tourism enterprises, the creative, cultural and copyright industries, and consumers in general – might be better served and protected if we placed more emphasis on education and awareness strategies. Opportunities could be identified across the spectrum of current legislative and non-legislative protections together with carefully targetted, high profile initiatives such as the proposed Olympics blitz aimed at identifying copyright infringements and bringing litigation against fraudulent operators. We have suggested such an emphasis in our submission to the current House of Representatives Standing Committee on Legal and Constitutional Affairs' Inquiry into the Enforcement of Copyright in Australia, for example through the establishment of a Copyright Task Force. While there is ample evidence of instances of deliberate art fraud – and much media focus on the issue - this is not necessarily exclusively a problem related only to the so-called Aboriginal art industry. There is also evidence of substantially effective enforcement processes, though no doubt there is always a case to be made that more resources in this area would produce even better results.

I guess my theme throughout this paper is one of empowerment – that there is scope for individual action and collective action to enhance the protections for Indigenous cultural and intellectual property including arts and crafts, and that such action depends on education and awareness. Might we not usefully pay more attention to the inadvertant breaches or ignorant misuse of Indigenous cultural and intellectual property? All parties - creators, communities, art centres and agents, dealers, retailers, buyers and users - might care more if they knew more - about what constitutes intellectual property and copyright, about other legal protections like Trade Practices, about where to get information and advice when they want to 'do the right thing', about culturally appropriate protocols, model contracts and other practical, 'self-help' options, about the role of collecting societies and their distributions to rightsholders. As illustrated in my opening anecdote about the didgeridoo websites, the Internet is emerging rapidly as a powerful tool for the efficient and effective dissemination of and access to information. May I recommend the Intellectual Property Branch's website for further information and links: www.dcita.gov.au/ip!