



Milpurrurru and Ors vs. Indofurn Pty Ltd and Ors

Protecting Expressions Of Aboriginal Folklore Under Copyright Law

Michael Blakeney BA, LLB, LL.M., Hons (Syd), MA, Hons (UNSW)

Source: Murdoch University Electronic Journal of Law. Volume 2, Number 1 (April 1995)
<http://www.murdoch.edu.au/elaw/issues/v2n1/blakeney21.html>

The recognition by the High Court in **Mabo & Ors v. State of Queensland**¹ of the capacity of the common law to recognise traditional Aboriginal land law, has precipitated demands for legislation to acknowledge the validity of other aspects of traditional Aboriginal law². A matter of increasing concern to Aboriginal peoples has been the utilisation of reproductions of traditional Aboriginal designs as a means of decorating a host of mundane products primarily developed for the tourist trade such as tea-towels, pencil cases, key rings, tee shirts and drink coasters. At the higher end of the market, the current vogue for folkloric ornamentation has resulted in the use of Aboriginal designs on wall hangings, carpets and posters.

Concern had been expressed that the unauthorised reproduction of designs which are of significance to Aboriginal culture could be extremely damaging. Obviously, where the designs reproduced were in the nature of tribal secrets and for example, not to be seen by uninitiated tribe members the potential damage to be caused by unauthorised reproduction would be self evident and there would seem to be no legal obstacle to seeking redress. As early as 1976, the Supreme Court of the Northern Territory had in **Foster v. Mountford**³ suppressed the publication of an anthropology text which related matters of deep religious and cultural significance to the Pitjantjara People. Muirhead J. had in that case called in aid the equitable jurisdiction in confidence to prevent the dissemination of tribal secrets through this text in the Northern Territory where uninitiated members of the Pitjantjara might have been exposed to it. This equitable jurisdiction could not, however, be called in aid to prevent the unauthorised dissemination of Aboriginal designs already in the public domain. This article examines the extent to which copyright law may assist in preventing the unauthorised reproduction of Aboriginal designs.

This issue was first canvassed by the Federal Court of Australia in **Yumbulul v. Reserve Bank of Australia**⁴. That case had concerned the issue by the Reserve Bank of Australia of a

¹ (1992) 175 CLR 1.

² Eg see F. Brennan, '**Mabo** and its Implications for Aborigines and Torres Strait Islanders' in M. Stephenson and S. Ratnapala (eds) **Mabo: A Judicial Revolution** (Brisbane:1993), pp.24-25.

³ (1976-1978) 29 FLR 233

⁴ (1991) 21 IPR 481.

commemorative banknote which reproduced the design of a Morning Star Pole created by Terry Yumbulul, an Aboriginal artist. Evidence was tendered which established that Morning Star Poles had a central role in Aboriginal ceremonies commemorating the deaths of important persons and in inter-clan relationships. The particular pole created by Mr Yumbulul was carved from cotton wood and surmounted with a crown of lorikeet and white cockatoo feathers, representing the rays of the Morning Star. Painted on the pole was a yam leaf design representing the yam spirit man who would climb up the pole carrying the spirit of a deceased person to the Morning Star. The Court found the pole to be an original artistic work of Mr Yumbulul, within the meaning of the Copyright Act⁵ Furthermore, the Court found the artist's copyright in the artefact to have been validly assigned.

This was sufficient to dispose of the artists claim for breach of copyright. A particular problem thrown up by this pre-*Mabo* case was that Galpu Clan, of which Terry Yumbulul was a member, jealously guarded the right of a person to make a Morning Star Pole Mr Yumbulul had passed through various levels of initiation and revelatory ceremonies in which he learnt the Clan's sacred designs and their meanings. During the last initiation rite in which he participated, Mr Yumbulul was presented with sacred objects, conferring his authority to paint the sacred objects of his people. Following the depiction of Mr Yumbulul's Morning Star Pole upon the commemorative banknote Mr Yumbulul was subject to much criticism by his people who submitted that the maker of such poles had a cultural obligation to his clan to ensure that a pole was not used or reproduced in any way which offended against their perceptions of its significance⁶ Mr Yumbulul's attempt to set aside the assignment of his copyright in the pole on the ground of unconscionability was unsuccessful. In any event, the assignee could have relied upon a special statutory defence to a copyright infringement action. French J., the trial judge, did acknowledge that it may be the case 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."⁷ He concluded by suggesting that 'the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.'⁸

This suggestion has been taken up by the Federal Attorney General's Department which has issued a Discussion Paper which proposes the creation of a statutory custodian of Aboriginal folklore⁹ along the lines proposed by UNESCO and WIPO in their Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions. The specific problem in the *Yumbulul Case* might, it has been suggested¹⁰, be dealt with by the importation of the Continental European concept of 'moral rights' in copyrighted works. Such rights would render inalienable a creator's entitlement to prevent the adulteration of the integrity of a work. This principle would be available, for example, to prevent the use of works in culturally inappropriate contexts.

The first post-*Mabo* consideration of the availability of copyright law to assimilate Aboriginal concerns about the unauthorised reproduction of Aboriginal designs was the recent Federal Court decision in *Milpurrurru & Ors v. Indofurn Pty Ltd & Ors*.¹¹ This case concerned the importation into Australia of a number of carpets woven in Vietnam which incorporated Aboriginal designs. The applicants were three living Aboriginal artists and the

⁵ Ibid., 484.

⁶ Ibid., 483.

⁷ Ibid., 490.

⁸ Ibid., 492.

⁹ Attorney General's Department, *Stopping the Ripoffs. Intellectual Property Protection for Aborigine and Torres Strait Islander Peoples* (Canberra: 1994).

¹⁰ By Tanya Aplin, 'Aboriginal Art and Moral Rights Law' in Bur-ran-gur ANG. *Women and the Law*. Curated by Annette Pederson, pp. 22-25.

¹¹ Unreported, 13 December 1994, per von Doussa J.

Public Trustee claiming on behalf of the estates of five deceased Aboriginal artists. Each of the artists in question had works which were either reproduced in portfolios of Aboriginal art which were produced for the Australian National Gallery (ANG) or in portfolios published by the Australian Government Printer for the Australian Information Service (AIS).

The first four artists were leading exponents of bark paintings illustrating legends of peoples of Central Arnhem Land. Three artists painted legends in the Papunya style from the western desert areas of Central Australia. The final artist was Ms Marika, a lino cut artist who was the first Aboriginal person appointed to the ANG and also to the Board of the Northern Territory Museum and Art Gallery.

It was common ground that amongst the carpets which were the subject of the action seven of the eight artworks were reproduced in virtually identical form and colour. The final artwork, it was held, was substantially reproduced, albeit in a more simplified form.

Evidence was tendered that reproductions of their works were permitted by Aboriginal artists in prestigious publications like the ANG portfolio and the AIS publication, which were designed for the education of members of the white community about Aboriginal culture. In each of the ANG and AIS publications the descriptions of the works made it clear that the subject matter of the works concerned stories of spiritual and sacred significance to the artist. It was additionally submitted that painting techniques and the use of totemic and other images and symbols were in many instances and invariably in the case of important creation stories, strictly controlled by Aboriginal law and custom. Since artworks are an important means of recording these stories, it was pointed out that errors in reproduction could cause deep offence. It was explained that the right to create paintings and other artworks depicting creation and dreaming stories and to use preexisting designs and clan totems resided in the traditional custodians of the stories.¹²

In the event of unauthorised reproduction of a story or design it was pointed out that under Aboriginal law it was the responsibility of the traditional owners to take action to preserve the dreaming and to punish those responsible for the breach. These punishments had included death, but in more recent times included preclusion from the right to participate in ceremonies and removal of the right to reproduce the stories of the clan, as well as in some cases spearing or ostracism. *Yumbulul* had established that Aboriginal customary law on the right to reproduce works and the concept of communal ownership of works were not matters relevant to the validity of an assignment of the copyright in works by their creator. *Milpururru* establishes the principle that where the unauthorised reproduction of such works involves a breach of copyright, customary Aboriginal laws on the subject may be taken into account in quantifying the damage which has been suffered.

The way in which this will be done, it is respectfully submitted, is not completely clear. The trial judge commenced with the established principle that the measure of damages in copyright infringement cases is on a conversion basis for those items not delivered up.¹³ In the typical copyright case the measure of damages is usually related to the depreciation of the value of the copyright as a chose in action¹⁴. Where, however this approach did not provide an appropriate basis for assessing compensation for the loss suffered, *Autodesk Australia Pty Ltd v. Cheung*¹⁵ established that the damages should be treated as being "at large". In the present case the Court accepted that there was little evidence of the likelihood of the applicants suffering a monetary loss from the infringements which had occurred. The sort of exploitation which the artists had envisaged for their works had occurred, namely their use in portfolios or posters for educational purposes in connection with the promotion of Aboriginal culture. Licensing the use of their artworks for depiction on items like carpets was, for obvious reasons

¹² The Court referred to the scholarship on this subject in Ellinson, "Unauthorised Reproductions of Traditional Aboriginal Art" (1994) 17 *UNSW Law Jnl* 327.

¹³ Transcript, p.71.

¹⁴ Eg see *Sutherland Publishing Co. Ltd v. Caxton Publishing Co. Ltd* [1936] 1 Ch. 323 per Lord Wright MR at 336, cited Transcript, p.74.

¹⁵ (1990) 17 IPR 69.

not something which the artists would have countenanced. Therefore the activities of the respondents could not be said to have caused a palpable economic loss. On this basis a merely modest award of damages was made to reflect the deleterious effect of the carpets on the reputation of the artworks and their loss of "freshness", to use the language of **Prior v. Lansdowne Press Pty Ltd.**¹⁶ However, his Honour noted that in the circumstances of the instant case the damages sustained, particularly in the case of the living artists extended beyond the commercial potential for monetary return¹⁷. He acknowledged that the infringements had caused personal distress and potentially exposed the artists to embarrassment and contempt within their communities, if not to the risk of diminished earning potential and physical harm.

This analysis applied particularly to Ms Marika whose depiction of the story of Djanda and the Sacred Waterhole had been reproduced on one of the carpets. This story concerned her ancestral creator Djang'Kawu and his two sisters, the Wagilag sisters at the end of their journey from Burralku to Yelangbara. Her right to use this imagery arose as an incident arising out of her membership of the Yalgnu Clan, the land owner group in that area. She explained by affidavit that "as an artist, whilst I may own copyright 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 the other Yolngu". She submitted that the reproduction of the artwork in circumstances where the dreaming would be walked on, was totally opposed to the cultural use of the imagery in her artwork. She explained that the misuse of her artwork had caused her great concern and that if it had come to the attention of her family she could have been subject to a catalogue of sanctions ranging from being outcast to a prohibition against further artistic production. Having found an infringement in the copyright of Ms Marika's works, the potential sanctions to which she may have been subject by her people was a matter to be taken into account in the quantification of her damages. While enunciating the qualifying principle that under copyright law damages could only be awarded to compensate a loss to a copyright owner, the trial judge accepted that given the cultural environment of the artists the infringement of their copyright was likely to have far reaching effects¹⁸. Applying the English case **Williams v. Settle**¹⁹ his honour noted that "anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering."²⁰

Of possibly greater interest was the position of the deceased artists and their respective communities. The deceased artists, whose names, in accordance with Aboriginal custom, could not be spoken at the trial and who for the purposes of the proceeding were referred to by their skin names, had for the most part been unaware of the infringements. For this reason the trial judge was not prepared to make any award for personal harm suffered. The subject of damages for their estates to cover the infringement of communal rights was not directly addressed beyond his Honour's incantation of the fundamental proposition that in the event of an established infringement, the Copyright Act detailed the available remedies. He explained that "the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicants."²¹

However, as an alternative method to permit this sort of recovery, the trial Judge called in aid s.115(4) of the Copyright Act which provides for the additional grant of damages in a case of flagrant infringement. **Williams v. Settle**²² had upheld a substantial award of

¹⁶ [1977] VR 65, 70.

¹⁷ Transcript 76.

¹⁸ Ibid., 78.

¹⁹ [1960] 1 WLR 1072, 1086-1087.

²⁰ Transcript, p.78.

²¹ Transcript, p.66.

²² Op cit., n.19.

'vindictive' damages in a case where purely commercial compensation would have dictated only a minimal level of loss. This case had concerned the sale of photographs by a wedding photographer of a plaintiff whose father had been murdered in notorious circumstances. The damages awarded were computed to reflect the flagrancy of the infringement and the

"...total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property."²³

In the instant case the respondents had conducted themselves from the very first in flagrant disregard of the applicants' rights. Prior to the importation of the carpets the principal respondent had been informed by a Mr Horrocks, an office manager of the Aboriginal Legal Service of Western Australia Inc that the importation would constitute a copyright infringement and that advice should be sought from the Aboriginal Arts Management Association (AAMA), which had been set up under the auspices of the Aboriginal Arts Unit of the Australia Council.²⁴ For a variety of reasons, no contact was made by the respondents with the AAMA. That organisation subsequently became aware of the activities of the respondents following its receipt of an inquiry from a New South Wales Aboriginal art dealer as to whether the carpets had received copyright approval. Following its own investigation, the AAMA contacted the respondents, informing them of their infringements of copyright and breaches of ss.52 and 53 of the Trade Practices Act and demanding an immediate cessation of their activities, delivery up of the carpets and an account of profits. The consistent posture of the respondents was to deny infringement and to impugn the good faith of the AAMA. The trial judge noted that throughout the directions hearings and the trial the respondents continued to maintain that the AAMA was not serving the best interests of the Aboriginal artists in its conduct of the proceedings.²⁵ The trial judge noted that this allegation was entirely contrary to the truth and that not only were the AAMA "acting strictly in accordance with the wishes of the Aboriginal artists", but that without the AAMA's support "a very serious copyright infringement of major artistic works could have remained unremedied."²⁶ Additionally, the position taken by the respondents in refusing to admit the applicants' ownership of the copyright was observed by the trial judge to be an "extraordinary tactical stance."²⁷ These tactical positions of the respondents were relied upon by the applicants as matters relevant to the flagrancy of the infringement and to the assessment of damages required to compensate the cultural and personal hurt of the artists.

On the question of flagrancy, the trial judge ruled that the copyright infringements were "plainly deliberate and calculated,"²⁸ observing that from the outset the source of the imagery on the carpets was known and the respondents had been put on notice of some copyright concern by Mr Horrocks and later by the AAMA. Among other factors mentioned by the trial judge was the fact that the carpet manufacturing venture was commenced as a means to curry favour with a potential business associate in Vietnam "with complete disregard for the copyright issues,"²⁹ and that the carpets were promoted as Aboriginal artworks with swing labels implying endorsement or approval of prominent artists of the carpet venture.³⁰

In his computation of damages the trial judge awarded an amount of \$1500 per artwork against each of the respondents under s.115(2) of the Copyright Act, reflecting the low quantum of

²³ [1960] 1 WLR at 1082, per Sellers LJ.

²⁴ Transcript, pp.16-17.

²⁵ See Transcript at pp.16-29.

²⁶ Ibid., at 29-30.

²⁷ Ibid., at 29.

²⁸ Ibid., at 80

²⁹ Ibid., at 82.

³⁰ Ibid., at 83.

damage attributable to the commercial depreciation which had been suffered. However, to mark the seriousness of the infringements he awarded an additional sum under s.115(4) of \$70,000 to be apportioned in the amounts of \$15,000 to each of the living applicants to "reflect the harm suffered ...[by them] in their cultural environment."³¹ Each of the estates of the deceased artists received \$5,000, but this was awarded in respect of the other aspects of flagrancy.

Milpurruru represents a step forward from *Yumbulul* in the preparedness of the Court to grant some recognition to traditional Aboriginal concerns in the protection of artistic works against unauthorised use. However, at the end of the day the Copyright Act is the controlling text. It requires creators who are in a position to assert copyright ownership. This was not a particular problem in either case, but would be a problem where the designs reproduced were in the public domain, having been created more than a life plus 50 years before the act of infringement. In the case of ancient Aboriginal designs, some of which date back more than 40,000 years, identifying a copyright creator is impossible. Both *Milpurruru* and *Yumbulul* disentitle representatives of the Aboriginal group of which an artist is member from either asserting communal ownership or from claiming in respect of communal harm. Although the decision in *Milpurruru* may have achieved some measure of justice on its own facts, the decision is illustrative of the importance for comprehensive legislation *sui generis* legislation to protect expressions of aboriginal folklore.

³¹ *Ibid.*, at 86