
RECENT DEVELOPMENTS

COPYRIGHT AND THE PROTECTION OF INDIGENOUS ART

by Erin Mackay

A number of developments in 2007 have made it timely to revisit the ability of Anglo-Australian laws to protect Indigenous cultural and intellectual property ('ICIP'). In June 2007, the Coalition Federal Government made several changes to arrangements in the Northern Territory ('NT') as they relate to Indigenous Australians.¹ While not specifically directed at the Indigenous arts industry, changes to land rights and welfare laws in particular may negatively affect Indigenous artists. In the lead-up to and the winning of the November 2007 election, the Australian Labor Party ('ALP') also indicated its position on a number of issues likely to impact on Indigenous art in Australia, including support for the introduction of resale royalties for all artists.² These developments took place against the domestic backdrop of the Senate Environment, Communications, Information Technology and the Arts Committee (the 'Senate Committee') Inquiry into the Indigenous visual arts and crafts sector,³ and the United Nations General Assembly proclamation in September 2007 of the Declaration on the Rights of Indigenous Peoples.⁴

This article outlines the impact of two recent domestic developments in Indigenous art; those developments being significant changes to both the permit system in the NT and to the Community Development Employment Projects ('CDEP') Program. These developments provide a further reminder that meaningful legal protection and recognition of Indigenous art will not be found within Anglo-Australian laws such as copyright law; the law that appears best placed to provide legal protection for the ICIP contained in Indigenous art. More broadly, the events of 2007 indicate that it is time to move beyond existing laws to a more meaningful system of protection and recognition of ICIP – a *sui generis* rights instrument.

ICIP AND COPYRIGHT LAW

For several years, academics and practitioners have noted the difficulties in accommodating expressions of ICIP within traditional Anglo-Australian legal categories of 'real' and 'intellectual' property laws. Aspects of ICIP that sit uncomfortably with Anglo-Australian laws include that:

1. ICIP needs to be viewed holistically, but includes

both tangible things that may find partial protection in cultural heritage and native title laws (eg, ancestral remains, sacred sites and burials) and intangible things that may find partial protection in copyright and patent laws (eg, artistic works and ecological knowledge);

2. 'ownership' of ICIP may be by groups, a form of ownership that is not comfortably housed by Anglo-Australian laws grounded in the tradition of protection of individual rights;
3. ICIP rights may not be freely transferable, with transmission instead taking place in accordance with cultural laws and customs; and
4. the promotion of culture rather than reward of economic endeavour is the paramount concern in seeking protection and recognition of ICIP rights.⁵

Even though these problems have been well-documented, piecemeal reform to the *Copyright Act 1968* (Cth) (the 'Copyright Act') still appears to be seen as the panacea. For example, in February 2007, Attorney-General Philip Ruddock indicated that Indigenous communal moral rights would form part of the 2007 legislative agenda.⁶ Further, cases such as *Bulun Bulun v R & T Textiles Pty Ltd (1998) 86 FCR 244* are too frequently referenced as examples of communal ownership, obfuscating the failure of copyright case law to broaden the conceptual scope of copyright.

The Permit System

While the permit system in statutory land rights systems appears to be unrelated to copyright law, any weakening of such systems is likely to have serious effects for the Indigenous arts industry. Permit schemes are a key feature of land ownership laws and allow Indigenous groups to control access to sacred sites; an essential requirement for the preservation of the stories, laws and customs that surround these sites. Such sacred sites provide the basis of much Indigenous art. Moreover, the 2007 Senate Committee Inquiry heard extensive evidence of 'carpet baggers' exploiting Indigenous artists in the Northern Territory.⁷ It appears that an adequately enforced permit

system in the Northern Territory would provide a strong deterrent to such exploitative dealers and provide protection to vulnerable Indigenous artists.

However, in June 2007, the permit system in the Northern Territory was abolished for common areas of major communities, airstrips and access roads on lands subject to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'), to take effect in February 2008.⁸ Before these amendments, a person could not access land governed by the ALRA without a permit issued by relevant parties such as traditional owners or land councils.

Re-instituting a (properly resourced and enforceable) permit system is essential to the wellbeing and prosperity of Indigenous artists in the Northern Territory.⁹ Indeed, the national Indigenous arts industry may be strengthened if the permit system were implemented in other jurisdictions. It is essential that the ALP Government consult with Indigenous groups in the Northern Territory and states in relation to (re)introducing the permit system, and to determine the types of activities that would be allowed under such systems.

COMMUNITY DEVELOPMENT EMPLOYMENT PROJECT ('CDEP')

In mid-2007, the Coalition Government announced the replacement of CDEP arrangements.¹⁰ Subsequent to the ALP Government's indication that it will introduce a reformed CDEP scheme,¹¹ a relevant consideration is the unusual situation of copyright ownership that arose under the CDEP Program.

The *Copyright Act* provides that for works created in the course of employment, the employer will own the copyright in that work.¹² While under the more common employer/employee relationship, subject-matter produced is generally commercial rather than cultural in nature, under the CDEP scheme, an Indigenous person has been required to 'work' for a registered organisation for stipulated hours and in return for set payment. While the scheme was characterised as a 'stepping stone' to mainstream employment, the scarcity of ready employment in rural Australia saw many Indigenous artists remain on CDEP for an extended period. It is unclear whether a CDEP art centre or gallery would be considered an 'employer' for the purposes of the *Copyright Act* and, as such, hold copyright ownership over artworks produced either partly or entirely as part of the CDEP scheme. This is worthy of further examination by the ALP Government before instituting 'reformed' CDEP arrangements.

CONCLUSION

The issues raised here are not unique to copyright law, but are the result of a complex intersection of laws and regulatory arrangements with the particular social, economic, linguistic and geographical situation of Indigenous peoples in Australia. Recognising the complexity of the issues, the findings of the Senate Committee into Australia's Indigenous Visual Arts and Crafts Sector in June 2007 included a key recommendation that 'the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights'.¹³

The Senate Committee Inquiry may have been overshadowed by other events in Indigenous affairs in 2007, but this important recommendation cannot be ignored. Preliminary questions remain: is such protection best attained through legislation or should a negotiated instrument be pursued as a starting point? Should such legislation take place at the domestic level, or would it be better to engage in international negotiations? In 2008, it is clear that further investigation of a *sui generis* system for the protection of Indigenous cultural and intellectual property, and the form that such a system could take, needs to be the subject of informed and considered inquiry through urgent consultation with Indigenous groups and leaders.

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- 1 Mal Brough MP, 'National Emergency Response to Protect Aboriginal Children in the NT' (Press Release, 21 June 2007).
- 2 Peter Garrett MP, 'Labor Announces its Vision for the Arts' (Press Release, 14 September 2007), <<http://www.petergarrett.com.au/441.aspx>> at 18 January 2008.
- 3 Senate Environment, Communications, Information Technology and the Arts Committee, Senate, *Indigenous Art: Securing the Future—Inquiry into Australia's Indigenous Visual Arts and Crafts Sector* (2007).
- 4 *Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UN Doc A/RES/47/1 (2007).
- 5 See, eg, Senate Environment, Communications, Information Technology and the Arts Committee, above n 3, [11.8]; Terri Janke and Michael Frankel, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (1999), 11.
- 6 Attorney-General Philip Ruddock, 'Copyright: From "The Da Vinci Code" to YouTube' (Opening address to the Australian Centre for Intellectual Property in Agriculture's 12th Annual Copyright Conference, Brisbane, 16 February 2007), <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2007_Speeches_16_February_2007_-_Speech_-_Opening_address_at_the_Australian_Centre_for_Intellectual_Property_in_Agriculture&apoc> at 18 January 2008. This undertaking did not eventuate.

- 7 Senate Environment, Communications, Information Technology and the Arts Committee, above n 3, [8.15]-[8.30].
- 8 Prior to the amendments, s 70 of the *Aboriginal Lands Right (Northern Territory) Act 1976* (Cth) ('ALRA') made it an offence to enter or remain on Aboriginal land except in accordance with the ALRA or a law of the Northern Territory. Enacted under s 73(1)(b) of the ALRA, s 4 of the *Aboriginal Land Act 1978* (NT) made it an offence to enter onto or remain on Aboriginal land without having been issued a permit to do so. For an overview of the changes to the permit system under the Coalition-led Northern Territory intervention, see the Office of Indigenous Policy Coordination, 'Fact Sheet Permit System' (2007), <http://www.oipc.gov.au/permit_system/default.asp> at 18 January 2008.
- 9 The ALP has given a commitment to reinstating the permit system with exemptions for journalists and contractors. Most recently, Indigenous Affairs Minister Jenny Macklin has sought departmental advice in relation to reinstating the permit system in the NT: Patricia Karvelas, 'Fast track on return of permit system', *The Australian* (Sydney), 18 January 2008.
- 10 Mal Brough MP and Joe Hockey MP, 'Jobs and training for Indigenous people in the NT' (Press Release, 23 July 2007), <http://www.facsia.gov.au/internet/minister3.nsf/content/cdep_23jul07.htm> at 18 January 2008.
- 11 Trish Crossin and Warren Snowdon, 'Reform And Improve CDEP, Not Scrap It' (Press Release, 27 July 2007), <<http://www.alp.org.au/media/0707/msNA270.php>> at 18 January 2008.
- 12 In relation to works, see *Copyright Act 1968* (Cth) s 35(6).
- 13 Senate Environment, Communications, Information Technology and the Arts Committee, above n 3, Recommendation 25.

Bushfire on the Moyle
Madeline Anderson

Mixed media on canvas
1200mm x 1500mm

