Copyright and Aboriginal art—Balancing Western law and Aboriginal culture.

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Abstract The paper outlines significant developments in copyright protection of Aboriginal art. This outline reveals that protection of art is improving as understanding of Aboriginal culture grows. Also apparent are the limitations of the Copyright Act when representing the complexity inherent in the respectful treatment of the art in the range of circumstances that it becomes involved. A large proportion of Aboriginal art is culturally significant with some containing sacred imagery. Thus, the rights of more than just the artist are at stake, with communal rights coming into play. Until such time as these rights have been formalised, awareness must be raised of artist's rights and of the responsibilities of those dealing with the work.

Biography After completing the Bachelor of Arts (Hons) at James Cook University, Katrina spent the first five years of her working life as a mineral commodities trader based in Hong Kong. This position entailed extensive travel throughout China and Europe. Deciding to return home and keen to rediscover Australian culture, she worked in Indigenous art sales for three years, building a broad knowledge base on Aboriginal art and culture. Katrina completed the Graduate Diploma in Management (Arts) with the University of South Australia in 2002 and commenced life as a free-lance arts writer. To date her work has focused on exhibition catalogue essay writing and research in the areas of Aboriginal art and copyright, and the dynamic relationship between critical analysis and Aboriginal art. Katrina also works in a management capacity with contemporary Aboriginal artist Ian Waldron. This work involves coordination of exhibitions, liaising with galleries, cataloguing and photography of artwork, administration and writing of support material.

Introduction

Protection of the rights of Aboriginal artists and their communities has improved considerably in the last 30 years. These improvements have developed in tandem with the growing understanding between Western and Indigenous cultures in Australia and future development may come about in much the same way. Australian Indigenous art covers a very large area including the song, dance, writing, dramatic and visual art of Aborigines and Torres Strait Islanders. This paper discusses copyright and intellectual property rights in regard to the visual art of Aboriginal Australians and their communities. Visual art in this context encompasses painting, sculpture, printmaking, photography, craft, multimedia and new media.

Aboriginal art is protected by the statutory provision of the Copyright Act 1968. The Copyright Act provides the same basic level of protection for Aboriginal art as it does for all other original work in material form, which includes:

- Copyright rests with the artist (unless otherwise assigned) and lasts for 50
The Copyright Act was amended in December 2000 to include Moral Rights. These rights remain with the artist for the period of copyright even if the artist waives copyright. The amendments cover two very important issues for Indigenous artists:

- The Right of attribution
- The Right of integrity

The Right of attribution

This right provides that the artist's name must be shown wherever the work is displayed or reproduced.

The Right of integrity

This right protects the work from derogatory treatment such as mutilation, adaptation and display in a way or place that could harm the artist's reputation or honour.

Despite the considerable developments over the last 30 years the current situation is far from satisfactory. Perhaps this can best be put into perspective by reviewing the situation three decades ago. The Copyright Act of 1968 has not always provided protection for Indigenous artists. "An inquiry during the 1970s found that because Aboriginal art was based on a long tradition it could not be shown to be original within the realms of the Copyright Act" (Horton 1994: 230). Since that time Aboriginal artists and their representatives have had to put their case in court that Aboriginal art is original art that is protected under copyright and that it needs special consideration in light of Aboriginal laws and culture which are very much alive.

Many cases have been taken to court with some creating certain important milestones. "The decision in 1983 in favour of the Aboriginal Artists Agency set a precedent for the protection of copyright by Aboriginal artists by acknowledging that Indigenous artists works could be recognised legally as original works"(Wardrop 2002). Having Aboriginal artwork being recognised as "original" was putting Indigenous artists onto a level playing field with non-Indigenous artists in terms of copyright protection.

1988 saw an important case brought to the Federal Court in the Northern Territory. Bulun Bulun and other Northern Territory artists were awarded damages of $150,000 for the unauthorised use of their artwork printed on T-shirts. Not only had copyright been breached, but also much of the artwork reproduced was concerned with ceremony and sacred imagery. The case also illustrated the difference between the Western and Aboriginal framework for assessment of fair division. "It was suggested that there be a pro-rata allocation by reference to the number of T-shirts made of each of about eight or so artistic works of different artists caught up in the dispute. This suggestion was rejected, with the artists deciding that they should share the damages equally, even though one artists work was much more extensively used than the others, as, it was said, they had all suffered equally" (Golvan 2000). "The Carpets Case" was also very important in terms of substantial awards being granted to the applicants and recognition of the blatant disregard the defendants had shown towards both the Copyright Act and Indigenous art in general.

Substantial damages were awarded to three living artists and the representatives of five deceased artists for the unauthorised reproduction of parts of and adaptations of their artwork on carpets that were produced in Vietnam and imported into Australia.
Rather than being ineligible for any protection, Aboriginal art needs special consideration in its protection, which the Copyright Act does not provide. Australian law does not take into account the traditional laws of Aboriginal Australians. The privilege to use stories and sacred imagery in artwork comes with an obligation to protect the work from inappropriate reproduction and display. The derogatory treatment of work with ceremonial and sacred significance could bring distress to the whole community and it may be felt that the traditional potency of the imagery has been reduced by such treatment.

It would be impossible and wrong to say that pre-European contact Aborigines did not paint for recreation or individual expression. However, it is evident that in traditional Aboriginal society, the primary purpose of artistic endeavour was woven into the structure of teaching, tradition and ceremony. As such, perception of "art" for Aborigines lays great emphasis on meaning, whereas Western constructs prioritise form. (There is of course a merging of these schemas to various degrees). Those elements from which contemporary Aboriginal visual art has grown are part of Aboriginal culture, functional or ceremonial. These include basketry, body decorations, body painting, weaponry and hunting tools, ground paintings, rock paintings and funereal objects such as Pukumani poles, hollow log coffins and Morning Star poles. Aboriginal art cannot be separated from Aboriginality; it is an integral part of a living tradition. The concept of secular art and its complex environment and interrelationships is something that is still foreign to many Indigenous artists (it is complex and challenging enough for those people who have been employed in it for a lifetime). This chasm between the Western idea of Aboriginal art and what it really is to its creators means that Western law and the Copyright Act are not always adequate tools for maintaining copyright and moral rights protection. Issues that need special attention include:

**Communal Rights**

Aboriginal society is traditionally communally based. The Western notion of individual property rights does not always fit with the framework of Aboriginal society, and the Copyright Act does not allow for communal ownership of designs and stories contained in Aboriginal artwork. Individuals within a clan or language group may be granted the privilege of depicting designs or telling stories (or part-of) in artwork. This privilege carries with it the responsibility of ensuring that the work will be treated with respect by any third parties handling it. Mishandling of work such as display of work in inappropriate settings or the reproduction of important clan designs may cause the artist to bring distress to his whole community. The artist would be seen to have failed in their obligation to protect the work and its contents.

An important case in terms of communal rights was John Bulun Bulun & Anor v R & T Textiles (1998). In this case the artist John Bulun Bulun successfully brought a case against a textile company for importing and selling fabric carrying unauthorised reproduction of parts of his painting *Magpie Geese and Water Lilies at the Water*. The Ganalbingu people, the traditional owners of Bulun Bulun's country, acted as the second applicants in the case. The Ganalbingu wished to assert their position as custodians of the sacred content of Bulun Bulun's work. As such they believed they were equally entitled to a remedy for the infringement alongside Bulun.

Justice von Doussa found that Bulun Bulun had taken appropriate and effective action in preserving the cultural integrity of his art and the sacred content therein and as such there was no need for remedy to the Ganalbingu people. Black and Browne have observed, "The decision in this case represents a pragmatic solution to a complex problem involving Aboriginal customary law, native title and intellectual property rights. The court has provided a measure of protection for communal owners against unauthorised use of communal ritual knowledge in artistic works and..."
their tribal community. If the legal copyright owner fails to take action against an infringer, the court may allow the community to do so” (1998).

This case and its implications may form the basis of future remedies to the problem of the expiration of copyright for work 50 years after the artist's death. Works containing ritual knowledge do not cease to be important to the clan after the death of the artist but currently do not have formalised protection under the Copyright Act or its 2000 amendment on Moral Rights. Derogatory treatment can only be claimed for works under copyright.

**Attribution**

The Copyright Act and the 2000 amendments concerning moral rights provide basic provisions for attribution. However there are issues concerned with attribution in a broader sense, which are not covered by the Copyright Act. Two such issues are: -

- **Expiration of copyright and attribution**
  
  Copyright and moral rights provide for attribution for only 50 years after the artist's death. It is of particular importance that works of ceremonial and sacred importance carry some mark of attribution in perpetuity, either of the artist or the clan to which they belong in order that the work is treated respectfully. Correct attribution provides the opportunity for anyone viewing the work to seek authorisation for any use of the work and to learn more about it, in turn further encouraging respectful treatment and adherence to protocol.

**Broader attribution**

Ambiguity exists in the use of artwork, which may appear to be Aboriginal artwork but has been created in that style for purely commercial purposes. In 1999 the National Indigenous Arts Advocacy Association (NIAAA) launched the 'Authenticity Label' to protect the Indigenous art and craft product market, allowing the buying public to distinguish between what is "authentic" Indigenous product and what has been produced in that "style". It has been suggested that if all Aboriginal artists made full use of the Label of Authenticity this problem would be largely solved. The development of the label is to be commended but there are a number of reasons why the adoption and effectiveness of the label may be limited. The first is that while the label has its best application to merchandise and smaller works of art and craft, it has very limited application in the area of fine art. In this realm, security of purchase is developed through personal research and the use of dealers who have an established background and good reputation in their specialised field. Certificates of Provenance/Authenticity (which when issued by reputable dealers may be a guarantee of the stated provenance) are one thing, but a mass produced sticker or tag being pinned to a work of fine art is quite another.

Another concern is with the concept that Aboriginal art needs to carry with it an identity tag to validate itself. In an article title "Labelled – buyer be aware" Aboriginal artist Brenda Croft comments, "As it currently stands, NIAAA's position on the label is that the entire Indigenous visual arts/cultural industry requires a singular blanket approach. This position overlooks the fact that a mass-produced item in a shop is not the same thing as a one-off, or limited-edition handmade work hung in a gallery". Croft asserts that buyers "need to be encouraged to educate themselves on the complexities of the contemporary Indigenous visual cultural expression. Instead of Caveat Emptor (Buyer Beware), it should be Buyer Be Aware" (Croft 2000: 85).

**Work created under contracts of employment**

Under SECT 35 of the Copyright Act, the copyright of artistic work created under the terms of employment belongs to the employer rather than the artist. Artists should be made aware of the implications for them and copyright of their works in general
and especially when the work contains sacred and ceremonial material, the copyright
for which should never leave the clan/group to which it belongs.

In cases where English is the second language, or not spoken by the artist, this is of
particular concern. The same applies where it is unlikely that the artist would be
aware of their rights in regards to copyright and moral rights.

Another instance where the issue could become a grey area is in circumstances
where galleries or dealers pay artists on a regular basis to produce paintings. In
such cases artists should be encouraged to assert their moral rights and rights to
copyright formally to avoid misunderstanding. Paintings can change hands many
times in the process of art dealership and it would be unlikely for an artist to be
aware of the many and varied circumstances in which their artwork is exhibited and
produced. By retaining copyright it is more likely that the artist will fully utilise their
rights to appropriate control over the distribution of images.

Observing protocol when dealing with culturally significant work

It is important that there exists a consciousness of the need to consult with the
creators or custodian of work concerned with ceremony and sacred or secret subject
matter. Such consultation is the only way to ensure that cultural protocol is being
used. Using the Copyright Act as the sole term of reference for dealing with
culturally significant Aboriginal visual art is inadequate. There are certain sections of
the Copyright Act that create provisions for reproduction of work in "generalised"
circumstances that may lead to inappropriate reproduction and dissemination of
images of some Aboriginal artwork. These sections of the Copyright Act include;
SECT 43 Reproduction for purpose of judicial proceedings or professional advice
SECT 65 Sculptures and certain other works in public places
SECT 67 Incidental filming or televising of artistic works
SECT 68 Publication of artistic works

Effectively utilising safeguards

Development, distribution and utilisation of protocol for interactions with Aboriginal art
and Aboriginal communities are essential elements of improving protection of
copyright.

One publication of great value is Valuing Art, Respecting Culture – Protocols for
working with the Australian Indigenous visual arts and craft sector (2001) written by
Doreen Mellor and Terri Janke. Providing concise information for artists on how to
protect their copyright, this book also contains protocols for anyone dealing with
Indigenous art. Another valuable resource is Visual Cultures: Protocols for
Producing Indigenous Australian Visual Arts (2002), an initiative of the Aboriginal and
Torres Strait Islander Arts Board of the Australia Council for the Arts written by Terri
Janke. These comprehensive guidelines are useful for both artists and
organisations working to protect the cultural rights of Indigenous Australians. It is the
combination of a raising of consciousness of rights of artists, and the responsibilities
and sensitivities of art workers and the public, that will provide the most effective
copyright protection in the long run.

Attention should also be given to the maintenance of existing safeguards contributing
to the protection of Aboriginal art such as the Protection of Moveable Cultural
Heritage Act 1986. This act restricts the export of items of significance to Australia’s
Cultural Heritage. In 1999 the minimum age of items of heritage value to be
exported without permit was reduced from 30 to 20 years and the value of art was
increased from $5,000 to $10,000.
Many Indigenous communities applaud this act and its ability to assess the circumstances under which important artworks are exported from the country. Not surprisingly, galleries and auction houses have been known to express frustration at the restrictions the Act imposes to possible lucrative overseas sales. Tim Klingender, Aboriginal art expert for Sotheby’s auction house, expressed such frustration in a radio interview conducted on the eve of their largest ever auction of Aboriginal art, estimated to fetch over five million dollars. The offerings included a number of important works by the late Clifford Possum Tjapaltjarri who had died the previous week. Mr Klingender said that the situation with Australian heritage laws was “a disaster in its present state” and that it “stymies interest in Aboriginal art internationally”, using the following as an example; “Works that may have sold for a quarter of a million dollars may not sell or sell for $100,000 because there has been an export ban or we haven’t been able to get a permit prior to auction” (Fonseca 2002).

The Protection of Moveable Cultural Heritage Act assists in the monitoring of important Aboriginal art leaving the country. This has a real impact on the ability to monitor copyright by the works not “disappearing”. It is not unreasonable to expect that works of cultural heritage importance, if they have been released into the public domain, deserve some degree of monitoring. The other great advantage of encouraging measures that see more works being purchased by Australian buyers is that a growing number of collectors are bequeathing their collections to public galleries. Collections bequeathed in this way can potentially be appreciated by the greatest number of people and can be accessible to the Indigenous communities with which they are associated. Breaches of copyright and moral rights are made more difficult in such circumstances.

Conclusion

It is imperative efforts are made to disseminate information to artists directly to ensure that they are fully aware of their rights. Appropriate training for art workers in protocol and Aboriginal law and traditions may facilitate more sensitive treatment of artworks within public and private institutions. Aboriginal artists will have the most control over the use of their artwork when there is an acceptance of the validity of Aboriginal law and custom. Reliance purely on Western law for copyright protection would be a validation of its presumed omnipotence.

As Aboriginal artists become more aware of their rights and non-Indigenous Australians more aware of the consequences of breaching them, both for themselves and the Aboriginal communities concerned, greater respect in the treatment of Aboriginal art will result. The heading of Aboriginal art is extremely broad, gaining complexity from the extreme diversity within both Aboriginal regional culture and the myriad of styles emerging from them. Regardless of this complexity, ignorance should be no defence. Australia has benefited hugely from the emergence of Aboriginal visual art onto the international market. Among these benefits are an enrichment of the nation’s cultural identity, financial rewards for art dealers, and economic and social benefits to artists and communities. Everybody involved in the Aboriginal art industry from individual artists, art dealers, sales consultants and curators (to name but a few), carries the responsibility of being well informed and ethical. Working towards fully utilising existing protection and improving copyright protection for Aboriginal artists and their communities will help to ensure the considerable rewards flowing from Aboriginal art are not at the expense of its rich cultural origins.
References


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