Aboriginal Artwork, Copyright Law and The Protection of Ritual Knowledge

Martin Hardie, counsel in *Bulun Bulun v R & T Textiles*, looks at the evolving relationship between the Federal Court and Aboriginal leaders in recent copyright cases concerning Aboriginal artworks.

Many people have asked me over the years to explain the seemingly zealous attitude of many Aboriginal people to the question of copyright protection and secondly whether the existing law adequately caters for the protection sought. Often, especially in the case of someone who has only had cursory contact with Aboriginal people, I ask them if they have seen the film based upon Umberto Eco's novel "The Name of the Rose". In that story religious and therefore political power is contained in closely guarded 'secret' books held in monasteries. Only the monks of highest degree are able to view these books, and persons dealing with them, without the correct authority, face catastrophic consequences. Similarly, in Aboriginal society religious texts, in the case of Bulun Bulun[1] and his compatriots manifested by bark paintings, contain the essence of religious and therefore political power. It is not surprising then that Aboriginal people of high degree guard this knowledge and power in a manner similar to the Catholic Church of old.

The analogy is further borne out by reference to the history of copyright law. Ricketson[2] notes that with the advent of the printing press and the introduction of copyright law in the 15th Century "the Crown's interest in printing was shifting from the encouragement of trade to the issue of censorship, as the greater unavailability of the written word meant the wider circulation of undesirable ideas, particularly in matters of religion ... it became a pressing matter as the security of the state came increasingly under attack and religious struggle intensified". The advent of the printing press had taken the control of religious and political power out of the hands of monks and the church's scribes and therefore introduced a new threat to the old order.

Similarly, the meeting of modern technology with the ancient processes of Aboriginal art have created a new tension in the age old Aboriginal religious and political order. As far back as 1974 Wandjuk Marika[3] remarked that it "is not that we object to people reproducing our work, but it is essential that we be consulted first, for only we know if a particular painting is of special sacred significance, to be seen only by certain members of a tribe, and only we can give permission for our own work of art to be reproduced."

JUDICIAL RECOGNITION OF ABORIGINAL LAW AND CUSTOM

For the best part of the last ten years members of the Ganalbingu clan of north central Arnhem Land have been involved in a relationship of legal reciprocity with the Federal Court of Australia. The Ganalbingu have consciously taken part in an ongoing process to find common ground between the law they administer and the law administered by the judges of the Federal Court. As His Honour Justice John Von Doussa noted in his judgment "(t)hese proceedings represent another step by Aboriginal people to have communal title in their traditional ritual knowledge, and in particular in their artwork, recognised and protected by the Australian legal system."[4]

There is a discernible theme present in the Aboriginal copyright cases over the last ten years whereby the senior members of the Ganalbingu clan have, on a case by case basis, introduced the Court progressively to further aspects of their custom, law and tradition. In the T Shirts case[5] the objective was to establish that an artistic work of John Bulun Bulun could be capable of being seen as 'original' within the meaning of the *Copyright Act* and whether it was therefore worthy of copyright protection. In the Carpets case[6] the court took into account Aboriginal law and tradition in assessing damages for a breach of copyright by taking into account the fact of Aboriginal communal relationships and spiritual harm. In the Bulun Bulun case, notions of 'collective' ownership of the material encoded in the artistic work were put to the Court.

Each case has seen the senior Ganalbingu disclose to the Court deeper insights into the basis for their law and custom. With each catastrophic invasion into the things held by them most dearly, the Ganalbingu have responded by entrusting the Federal Court with the understanding of the importance of their corpus of ritual knowledge. In the writer's opinion this series of cases represents a real jurisprudential dialogue between men of high degree.

The Bulun Bulun case concerns the unauthorised reproduction of a bark painting entitled "At the Waterhole" and whether certain Aboriginal people, other than the artist Bulun Bulun, had an interest in the copyright subsisting in that artistic work.

The Statement of Claim in the proceedings alleged in part that:

> *"According to Ganalbingu custom and law, the First Applicant's (Bulun Bulun) creator ancestor caused Djilibinyamurr to be formed and settled the traditional Aboriginal ownership of that site upon the ancestors of the First Applicant to be held with the other traditional Aboriginal owners, on the condition that they and their descendants perpetuate and maintain the integrity of the corpus of ritual knowledge (madayin) of the Ganalbingu people associated with Ganalbingu country and in particular, Djilibinyamurr, for the benefit of the Ganalbingu people, including, inter alia, the songs, dances and painting associated with Djilibinyamurr, such being an obligation arising from the granting to the Applicants and their ancestors of traditional Aboriginal ownership of Ganalbingu country."*

Bulun Bulun stated[7] in his affidavit that:

> *"Djilibinyamurr is the place where not only my human ancestors were created but according to our custom and law emerged, it is also the place from which our creator ancestor emerged. Barnda, or Gumang (long neck tortoise) first emerged from inside the earth at Djilibinyamurr and came out to walk across the earth from there. It was Barnda that caused the natural features at Djilibinyamurr to be shaped into the form that they are now...*

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. Djilibinyamurr is then our life source and the source of our continuing totemic or sacred responsibility. The continuity of our traditions and ways including our traditional Aboriginal ownership depends upon us respecting and honouring the things entrusted to us by Barnda.

Djilibinyamurr is my ral'kal, it is the hole or well from which I derive my life and power. It is the place from which my people and my creator emerged. Damage to Djilibinyamurr will cause injury and death to the people who are its owners. Damage to a ral'kal is the worst thing that could happen to a Yolngu person. It is the ultimate act of destruction under our law and custom - it upsets the whole religious, political and legal balance underpinning Yolngu society...

The creation of artworks such as 'At the Waterhole' is part of my responsibility in fulfilling the obligations I have as a traditional Aboriginal owner of Djilibinyamurr. I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such words, as part of my traditional Aboriginal land ownership obligation. A painting such as this is not separate from my rights in my land. It is a part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law. Interference with the painting or another aspect of the Madayin associated with Djilibinyamurr is tantamount to interference with the land itself as it is an essential part of the legacy of the land, it is like causing harm to the spirit found in the land, and causes us sorrow and hardship...

'At the Waterhole' has inside meaning encoded in it. Only an initiate knows that meaning and how to produce the artwork. It is produced in an outside form with encoded meaning inside. It must be produced according to specific laws of the Ganalbingu people, our ritual, ceremony and our law. These things are not separate from the manner in which this painting is produced. To produce 'At the Waterhole' without strict observance of the law governing its production diminishes its importance and interferes adversely with the relationship and trust established between myself, my ancestors and Barnda. Production without observance of our law is a breach of that relationship and trust...

Unauthorised reproduction of 'at the Waterhole' threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threaten our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations."

Professor Howard Morphy, then of University College, London gave evidence[8] to the fact that:

"In eastern and central Arnhem Land inherited designs are part of the 'sacred' law or madayin of a clan ... the designs are integral to the ownership of land ... Designs are not thought of as individual property but the corporate property of social groups. All of those who own a particular area of land will have rights of ownership over the designs associated with that land ... People producing paintings are conscious that they are existing rights on behalf of other members of the clan, and will only produce them if they have the authority to do so. Under customary law the owners of the land are able and entitled to control all uses of paintings of clan land, including the right to reproduce such paintings..."

Dr Joe Reeser, then of James Cook University, stated in a report annexed to his affidavit that:

"It is both easy and difficult to cast the issue of Aboriginal bark paintings into a conventional legal determination of originality and ownership. In some ways the matter appears to be very straightforward. The work of a major and acclaimed artist has been copied and sold without permission. From an Aboriginal point of view, however, the matter is far more serious, and involves the profanation of a scared process and subject matter, the copying of individual and clan designs by those with no legitimate authority to do so ... a careless disrespectful 'playing' with forces that could lead to catastrophe."

Earlier in his report Dr Reeser had stated that:

"revealing the 'inside' meanings of the designs and/or unsanctioned use of the process or product can result in severe calamity, for which the senior individuals with rights to designs are responsible ... (t)he reproduction ... of the painting has caused serious repercussions in the local Aboriginal community, and the managers of the site have communicated to Bulun Bulun their anger over the reproduction of the painting and are holding him accountable for whatever calamities may occur because of the profanation of the place and, importantly the production process itself. Such events, it is widely believed, can bring widespread devastation and cosmic damage."

THE FIDUCIARY OBLIGATION TO PROTECT RITUAL KNOWLEDGE

Consequently in his judgment His Honour found that he had "no hesitation in holding that the interest of the Ganalbingu people in the protection of that ritual knowledge from exploitation, which is contrary to their law and custom, is deserving of the protection of the Australian legal system."[9] His Honour found that the "relationship between Mr Bulun Bulun as the author and legal title holder of the artistic work and the Ganalbingu people is unique."[10] Consistent with the law of equity and with the majority judgments in Mabo,[11] His Honour found that the nature of the relationship between Bulun Bulun and the Ganalbingu people was a fiduciary one which gives rise to fiduciary obligations owed by Bulun Bulun:

"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 characterises the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it...

Having regard to the evidence of the law and customs of the Ganalbingu people under which Mr Bulun Bulun was permitted to create the artistic work, I consider that equity imposes on him obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work...

Whilst the nature of the relationship between Mr Bulun Bulun and the Ganalbingu people is such that Mr Bulun Bulun falls under fiduciary obligations to protect the ritual knowledge which he has been permitted to use, the existence of those obligations does not, without more, vest an equitable interest in the ownership of the copyright in the Ganalbingu people. Their primary right, in the event of a breach of obligation by the fiduciary is a right in personam to bring action against the fiduciary to enforce the obligation."[12]

In this case Bulun Bulun had successfully taken action against the respondent to obtain remedies in respect of the infringement. He had taken all the necessary steps under Ganalbingu custom and law as well as Australian law to protect the artistic work from unauthorised reproduction. Bulun Bulun could not have done anything more. Although Bulun Bulun had obtained full relief, the representative action brought by the Second Applicant had proceeded to seek a declaration that the Ganalbingu people were the equitable owners of the copyright subsisting in the artistic work created by Bulun Bulun. In the circumstances His Honour held that there was no occasion for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship. Nevertheless his discussion of the fiduciary relationship found in this case is illuminating:

"However, had the position been otherwise equitable remedies could have been available. The extent of those remedies would depend on all the circumstances, and in an extreme case could involve the intervention of equity to impose a constructive trust on the legal owner of the copyright in the artistic work in favour of the beneficiaries.... By way of example, had Mr Bulun Bulun merely failed to take action to enforce his copyright, an adequate remedy might be extended in equity to the beneficiaries by allowing them to bring action in their own names against the infringer and the copyright owner, claiming against the former, in the first instance, interlocutory relief to restrain the infringement, and against the latter orders necessary to ensure that the copyright owner enforces the copyright ...On the other hand, were Mr Bulun Bulun to deny the existence of fiduciary obligations and the interests of the parties asserting them, and refuse to protect the copyright from infringement, then 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...

It is well recognised that interlocutory injunctive relief can be claimed by a party having an equitable interest in copyright ... if the copyright owner of an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remedial action through the courts by the clan."[13]

CONCLUSION

Aborignal artists operating in Australia today, such as Bulun Bulun, rightly are now entitled to and receive the same protection as their non-Aboriginal counterparts when their works are the subject of unauthorised reproduction. Prior to the Ganalbingu people commencing their litigious dialogue with the Federal Court, concern was expressed

in some quarters as to whether this was the case. It was believed that Aboriginal artists drawing upon a pre-existing tradition could not prove the required element of originality to establish copyright ownership.[14] That position has now been dispelled and Aboriginal artists receive the full protection of copyright law. Further, Aboriginal artists have available to them mechanisms by which Australian law will recognise and provide remedies relevant to the wider social, political and religious concepts underpinning the production of artistic works in Aboriginal communities. The courts are willing to take into account these matters in, for example, the assessment and determination of damages as was done in the Carpets case.[15] The Bulun Bulun case indicates that the courts are able to provide remedies to persons other than the artist concerned in appropriate circumstances. It appears to the writer that, at least in the case of unauthorised reproduction of Aboriginal artistic works, the law provides adequate protection for both the rights of the artist and the Aboriginal community concerned. Nevertheless, there still remains a call from some quarters for law reform to fulfil some undetermined lacuna in the law. Following the Bulun Bulun case the question has to be asked, what more is needed other than possibly legislation declaring the law as pronounced by the Federal Court?

1 *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* (1998) 157 ALR 193, Federal Court of Australia, Von Doussa J, 3 September 1998 ('**Bulun Bulun case**').

2 Staniforth Ricketson, The Law of Intellectual Property, Law Book Company, 1984, p.58.

3 Wandjuk Marika, "Copyright on Aboriginal Art', Aboriginal News, Vol. 3 No 1, Feb. 1975, pp. 7-8.

4 Bulun Bulun case at 195.

5 *Bulun Bulun v Nejlam Investments*, Unreported proceedings 1988, before Olney J, which were settled after interlocutory injunctions were granted. See Colin Golvan, "Aboriginal Art and Copyright: The case of Johnny Bulun Bulun" [1989] 10 European Intellectual Property Review 346.

6 *M v Indofurn* [1994] 54 FCR 240. The name of the Applicant in this case commenced with the letter M. He was also the Second Applicant in Bulun Bulun v R&T Textiles. M died in late 1998 and therefore consistent with Aboriginal tradition I have refrained from using his name.

7 Bulun Bulun case at 198-199.

8 Affidavit of Professor Howard Morphy.

9 Bulun Bulun case at 210-211.

10 ibid at 209.

11 Mabo v Qld [No 2] (1992) 175 CLR 1

12 Bulun Bulun case at 210-211.

13 ibid at 211-212.

14 See Report of the Working Party on the Protection of Aboriginal Folklore, Department of Home Affairs and the Environment, 1981.

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"If You Think Digital Watches Are a Pretty Neat Idea ...."[1]

Therese Catanzariti analyses the *Copyright (Digital Agenda) Bill.*

On 26 February 1999 the Attorney General and the Minister for Communications, Information Technology & the Arts released for public comment an exposure draft of the *Copyright Digital Agenda Bill* ("**Bill**")[2] and accompanying explanatory commentary ("**Commentary**").

The Bill is designed to amend the *Copyright Act* 1968 (Cth) ("**Act**") to ensure Australian law is consistent with international standards in international treaties.[3] It follows the Copyright Convergence Report,[4] a Discussion Paper[5] and consultation with copyright owners, users and other stakeholders.

The closing date for submissions on the Bill was 19 March 1999. The Attorney General has said he intends to introduce the Bill before the end of the current sittings, which at the time of publication was expected to run until 31 March.[6]

EXCLUSIVE RIGHT TO COMMUNICATE TO THE PUBLIC

The Bill provides that the exclusive rights of copyright in a literary, dramatic, artistic and musical work, a sound recording, a cinematograph film, a television broadcast and a sound broadcast will include the exclusive right to communicate the work or other subject matter to the public.[7] This replaces the current right to broadcast and the right to transmit by cable to subscribers to a diffusion service.[8] Published editions are not proposed to be accorded the right.

"Communicate" means to "electronically transmit or make available on-line sounds and/or visual images[9] that are not capable of being heard or seen except by the use of reception equipment".[10] The definition is deliberately not technology specific.[11]

The right to communicate to the public is distinct from the public performance right by the use of the words "reception equipment"[12] in the definition of "communicate" and a new section[13] which expressly states that communication to the public is not a performance.

The phrase "to the public" has been defined as "to the public within or outside Australia".[14] The Discussion Paper[15] stated that the phrase "to the public" has been accepted to mean "the copyright owner's public", that is, the nature of the audience is such that the copyright owner would be entitled to expect payment for the use of the copyright material by the particular audience.[16] [17]

WHO IS "COMMUNICATING TO THE PUBLIC"

The Bill provides that a communication is taken to be made by the person responsible for determining the content of the communication.[18]

This means that if a person is merely relaying a communication whose content is determined by someone else and does not take responsibility for the content of