

# BANGARRA DANCE THEATRE

## Copyright Law and Indigenous Culture

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This article considers the artistic and legal practices of Bangarra Dance Theatre in a case study of copyright law management in relation to Indigenous culture.

### Introduction

Bangarra Dance Theatre seeks 'to maintain the link, with respect and integrity, between the traditional Indigenous cultures of Australia and new forms of contemporary artistic expression, giving voice to social and political issues which speak to all people'.<sup>1</sup> It has developed an innovative and distinctive combination of traditional and contemporary dance, music and storytelling. Bangarra Dance Theatre has toured across Australia and overseas with its repertoire of original productions such as *Fish* and *Ochres*, and collaborations such as *Rites*. It has also adapted its performances for television, film and multimedia. Bangarra Dance Theatre has also been invited to present its unique dance style to large national and international gatherings. In particular, it featured in the Opening Ceremony of the Sydney Olympic Games in the year 2000, and the accompanying cultural festival.

Bangarra Dance Theatre is exceptional in its level of legal literacy and competence. It has sought to reform and modify the operation of copyright law through its own local practices and agreements. Bangarra Dance Theatre faces particular difficulties in relation to copyright law because of its use of traditional Indigenous culture and heritage.<sup>2</sup> It has developed special arrangements to recognise the communal ownership of the traditional Indigenous culture and heritage. Bangarra Dance Theatre also deals with similar problems with copyright law to those faced by other performing arts companies and collaborative enterprises.<sup>3</sup> It must deal with the economic and moral rights of choreographers, composers, designers, and performers. Bangarra Dance Theatre must also oversee collaborations with other

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<sup>1</sup> Australia Dance Council, <http://sunsite.anu.edu.au/ausdance/artists/companies/bangarra/bangarra.html>

<sup>2</sup> T Janke (1998) *Our Culture, Our Future Report On Australian Indigenous Cultural And Intellectual Property Rights*, M Frankel and Co.

<sup>3</sup> V Pellicano, 'Dance and Copyright: Pas de Deux or Pas de Disaster?' (1997) 2 *Media And Arts Law Review* 116.

organisations — such as the Australian Ballet and the Sydney Organising Committee for the Olympic Games. It must take care to protect and guard the performances of the company from the threat of misappropriation.

This article is primarily based upon an interview with the former general manager of Bangarra Dance Theatre, Jo Dyer, conducted in September 1998.<sup>4</sup> It took place at the headquarters of the company at Pier 4/5, the Wharf, Walsh Bay. Jo Dyer first completed a law degree in Adelaide, and became interested in Aboriginal social justice issues when working at the Human Rights Commission. In her role as the general manager of the Bangarra Dance Theatre, Dyer crossed between a number of social arenas, talking to Indigenous communities, dealing with the legal system, and liaising with the media. Dyer left Bangarra Dance Theatre in October 1999 and joined the Adelaide youth festival, *Come Out*.<sup>5</sup> She left the company in the hands of a caretaker general manager, Meryl Rogers. The position of general manager has since been filled by Andrew Booth.<sup>6</sup>

The interview with Jo Dyer is supplemented with public statements by the creative principals of Bangarra Dance Theatre. The founder, Carole Johnson, articulated her views about appropriation at the Green Mill Dance Conference.<sup>7</sup> The director, Stephen Page, has conducted an oral history with Michelle Potter for the National Library.<sup>8</sup> The composer, David Page, appeared at a conference on Indigenous music.<sup>9</sup> The designer, Fiona Foley, has given an interview with the magazine *RealTime*.<sup>10</sup> The festival director, Rhoda Roberts, has given a lecture at Belvoir Street Theatre.<sup>11</sup> The dancer, Djakapurra Munyarrun, and the general manager also spoke at a special panel discussion hosted by Bangarra Dance Theatre.<sup>12</sup>

This article is interested in dialogue over authorship, appropriation and collaboration in relation to Indigenous culture. It is grounded in the particular local experience, knowledge and understanding of copyright law displayed by

<sup>4</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998

<sup>5</sup> C Taylor, 'New Role For Dyer', *The Australian*, 4 October 1999.

<sup>6</sup> J Sexton, K Strickland, and A Lim, 'Funding Devil Now In The Detail', *The Australian*, 12 May 2000, p 11.

<sup>7</sup> C Johnson (1998) 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in C Hillis (ed), *Heritage And Heresy Green Mill Papers 1997*, Australian Dance Council, p 47.

<sup>8</sup> M Potter (1997) 'Feet to the Earth: Interview with Stephen Page', in *A Passion For Dance*, National Library of Australia, p 93.

<sup>9</sup> D Page, S Page and C Beall (1999) 'Bridging Three Worlds', in G Bloustein (ed), *Musical Visions: Selected Conference Proceedings From The 6<sup>th</sup> National Australian/ New Zealand IAPSM Conference And The Inaugural Arnhem Land Performance Conference*, Wakefield Press, p 104.

<sup>10</sup> J Millner, 'Living The Red Desert: Fiona Foley Interview' (2000) 35 *RealTime* 34.

<sup>11</sup> R Roberts, 'A Passion for Ideas: Black Stage' (1998) 32 *Australasian Drama Studies* 3.

<sup>12</sup> Australian Broadcasting Corporation, 'Collaborations: Using Indigenous Cultural Material In Contemporary Performance', *Awake*, Radio National, 14 May 1999.

the performing arts company. The first part considers the special relationship between Bangarra Dance Theatre and the Munyarrun Clan. It examines the contractual arrangements developed to recognise communal ownership. The next section examines the role of the artistic director and choreographer. It looks at the founder, Carole Johnson, and her successor, Stephen Page. The third part of the article focuses on the role of the composer, David Page. It examines his ambition to set up a Indigenous recording company, Nikinali. Part 4 focuses upon the role of the artistic designers. It looks at the contributions of artistic designers such as Fiona Foley. Part 5 deals with broadcasts of performances on television, film, and multi-media. Part 6 considers the collaborations of Bangarra Dance Theatre with the Australian Ballet, and the Sydney Organising Committee for the Olympic Games. The conclusion considers how Bangarra Dance Theatre has played a part in a general campaign to increase protection of Indigenous copyright law.

### The Munyarrun Clan

Bangarra Dance Theatre helps to foster links between Aboriginal communities in urban and rural areas. The company derives its cultural identity from the peoples of Yirrkala in northeast Arnhem Land. The choreographer, Stephen Page, and the composer, David Page, formed a strong relationship with Djakapurra Munyarrun quite early on in their careers. Stephen Page first went to visit Yirrkala as a student at the National Aboriginal and Islander Dance School. He forged a friendship and a kinship with Djakapurra Munyarrun on the basis of similar dance styles at the Stompem Ground in the community. This creative partnership developed into a relationship between the Page Brothers and the entire Munyarrun Clan.<sup>13</sup> To clarify this association, Bangarra Dance Theatre has sought to clarify this partnership through contract law and copyright law. It has provided recognition of the communal ownership of the dances and songs by the Munyarrun Clan.

### *Communal Ownership*

First, Bangarra Dance Theatre was concerned that copyright law did not recognise the collective ownership of artistic expression and cultural heritage, because of a perception that it valorised Romantic ideas of individual authorship and creative genius.

Bangarra Dance Theatre recognises that the right to use and reproduce the dances, songs and stories of the Munyarrun Clan resides in the traditional owners of those artistic works. Jo Dyer observed that there are complex hierarchies of knowledge at play:

The dances and songs are owned by the community. Not everybody in the community will know all of the songs. One of the interesting things to come out of the Hindmarsh Island case<sup>14</sup> I think was the complete inability to recognise hierarchies of knowledge that exist. Certain elders

<sup>13</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>14</sup> *Katnyeri v The Commonwealth* (1998) 152 ALR 540.

will know of the sacred and spiritual significance of certain areas and others will not because they are not of that group and they are not elders or trusted custodians. That exists as classified information that only certain sections of the community know. That exists in white Australia and no one has any problems with that. The failure to extrapolate from one structure to another I find quite bewildering really.<sup>15</sup>

The traditional owners act as custodians and trustees in relation to particular items of cultural heritage. They have the authority to determine whether a dance, song or story may be used, by whom it may be published, and the terms on which it may be reproduced. Such power derives from their status within the clan, and factors such as their place of conception, birth, residence, gender, age, and clan membership.<sup>16</sup> The traditional owners are responsible for any unauthorised use and reproduction of a dance, song, or story. They are required to punish those responsible for the breach of Aboriginal customary law.

Bangarra Dance Theatre was concerned that copyright law did not recognise the communal ownership of the Munyarrun Clan in its traditional dances and songs. Jo Dyer articulated the passionate conviction that: 'There needs to be a recognition that copyright resides within a community or a clan, and they need to be able to access justice and the legal system to ensure that their intellectual property rights are protected.'<sup>17</sup> She was worried about the implications of a number of legal decisions in the realm of the visual arts dealing with the ownership of Indigenous culture.

Bangarra Dance Theatre has reservations that the courts recognise the joint authorship of copyright works, but not the communal ownership of Indigenous art and culture. In *Yumulul v Reserve Bank of Australia*, Justice French acknowledged that 'it may be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and the use of works which are essentially communal in origin'.<sup>18</sup> His Honour found 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'.<sup>19</sup>

However, the courts have become frustrated with the refusal of federal parliament to implement recommendations to reform copyright law in relation to Indigenous culture.<sup>20</sup> They have sought to circumvent the formal rules of copyright law through informal measures such as damages and equity. In

<sup>15</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>16</sup> A Barron (1998) 'No Other Law? Authority, Property and Aboriginal Art', in L Bently and S Maniatis (eds), *Intellectual Property And Ethics*, Sweet and Maxwell, p 39.

<sup>17</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>18</sup> *Yumulul v Reserve Bank of Australia* (1991) 21 IPR 481 at 490.

<sup>19</sup> *ibid.*, p 492.

<sup>20</sup> Attorney General's Department (1994) *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Australian Government Publishers; see also Janke (1998) *Our Culture, Our Future*.

*Milpururru v Indofurn Pty Ltd*, Justice von Doussa made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom.<sup>21</sup> His Honour was willing to give informal recognition of communal ownership of Indigenous art and cultural expression, although he was not prepared to offer formal acknowledgment. In *Bulun Bulun v R & T Textiles Pty Ltd*, Justice von Doussa found that the relationship between Bulun Bulun and the Ganalbingu people gave rise to fiduciary obligations.<sup>22</sup> He concluded that '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'.<sup>23</sup> The decision is essentially a symbolic one because an Indigenous community could only rely upon the judgment in an exceptional set of circumstances.

In the absence of copyright law reform, Bangarra Dance Theatre was forced to develop its own legal model as best as it could. The performing arts company has entered into a private letter of agreement with the Munyarrun, through their representatives, Djakapurra and Janet Munyarrun. In the agreement, Bangarra Dance Theatre recognises that the entire copyright in the dances and songs is vested in the Munyarrun Clan. It pays a fee to the community for permission to use the themes of traditional songs and dances. Jo Dyer reflected:

We entered into an arrangement with the Munyarruns not so much because the courts had failed to recognise communal ownership but because, regardless of the courts' position, we clearly were using their dances and songs, and the Clan should be paid for that use. There was no one individual who owned or had choreographed the dances: they belong to the Clan, and they have done for thousands of years.<sup>24</sup>

The letter of agreement goes beyond the legal decisions about Indigenous culture and copyright. It recognises the communal ownership of the Munyarrun Clan at first instance, not as a last resort. However, the status of this private agreement is uncertain. It is debatable whether the letter of agreement would be enforceable, given that the *Copyright Act 1968* (Cth) makes no provision for communal ownership. The matter would depend upon whether the courts would allow the parties to expand copyright law through contract law.<sup>25</sup> The problem is that the federal parliament has not explicitly

<sup>21</sup> *Milpururru v Indofurn Pty Ltd* (1994) 30 IPR 209.

<sup>22</sup> *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513

<sup>23</sup> *ibid*, p 532.

<sup>24</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>25</sup> The debate over whether private contracts can circumvent the limitations of copyright law has largely taken place in relation to digital works: N Netanel 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283, pp 305-6, 382-85.

addressed the interaction between copyright law and contract law, even though it is essential to the operation of copyright law in social practice.<sup>26</sup>

### *Economic Rights*

Second, Bangarra Dance Theatre was concerned that copyright law would not sufficiently protect the economic interests of the Munyarrun Clan in relation to the cultural designs that were used in their performances.

The problem is that copyright law protects the form of expression of ideas, rather than the ideas themselves. Thus it would be an infringement of copyright to copy the whole, or a substantial part, of a particular dance, song or art work of the Munyarrun Clan. However, it would not be an infringement of copyright to copy a design style of the Munyarrun Clan.

Bangarra Dance Theatre entrusted the creative artists, Stephen Page and David Page, with the responsibility of paying a share of their royalties to the Munyarrun Clan. They included a clause in the commissioning arrangements with the key choreographer and composer that royalties should be paid to the Munyarrun Clan for the creation of any new works in a particular style. Jo Dyer explained that the arrangement was almost like a 'sub-contract in the commissioning'.<sup>27</sup> However, the manner in which royalties have been paid to the Munyarrun Clan has evolved. After consideration, Bangarra Dance Theatre assumed responsibility for paying the royalties to the Munyarrun Clan directly rather than 'subcontract' the commissioning. This removed an unnecessary level of complexity in the contractual arrangements.

This arrangement seems rather revolutionary in the context of copyright law, because it provides recognition for the sources and inspirations of copyright work. It acknowledges that the new works of choreography and music are infused by the culture of the Munyarrun Clan.

### *Moral Rights*

Third, Bangarra Dance Theatre was concerned that copyright law did not provide any comprehensive protection of moral rights.

At the time of drafting their agreement, the *Copyright Act 1968* (Cth) provides individual creators with exclusive economic rights of reproduction and dissemination of their work. However, there is no allowance for the moral rights of attribution and integrity, which are important for Indigenous artists and their communities. The federal government seeks to rectify this gap with the introduction of moral rights legislation.<sup>28</sup> However, the legislation proposes that moral rights should subsist in individual creators, not communities.

The private letter of agreement recognises the moral concerns of the traditional custodians of the songs and dances. The permission for Bangarra to

<sup>26</sup> Attorney-General's Department and The Department Of Communications, Information Technology and the Arts (1999) 'Joint Supplementary Submission To The House Of Representatives Standing Committee On Legal And Constitutional Affairs Inquiry into the Copyright Amendment (Digital Agenda) Bill 1999'.

<sup>27</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>28</sup> *Copyright Amendment (Moral Rights) Act 2000* (Cth).

perform and adapt the songs and dances is granted upon a couple of conditions. The first condition is that Bangarra Dance Theatre liaises with representatives of the Munyarrun Clan as to the context in which the songs and dances are presented. This provides a role for a representative of the Munyarrun Clan, Djakapurra Munyarrun, in participating in and supervising the use of traditional dances and music. The second condition is that Bangarra Dance Theatre undertakes to preserve the integrity of the songs and dances used, as required by the Munyarrun Clan. It entrusts the artistic director, Stephen Page, with ensuring that the use of the traditional dances and songs is done with respect and sensitivity.

Bangarra Dance Theatre has sought authorisation and informed consent from the traditional custodians to approve the use and adaptation of Munyarrun cultural materials. The former general manager, Jo Dyer, emphasises that there is a continuing process of consultation. Both Djakapurra Munyarrun and his sister Janet participate in the creative process. They divide their time between home in Yirrkala, and working with Bangarra Dance Theatre in Sydney and on tour. Stephen Page and David Page work strongly with Djakapurra Munyarrun, particularly when they are developing new works. They do not usually take particular myths, stories or dreamings from the Munyarrun Clan. Rather, Stephen Page and David Page take inspiration from the feelings of sacredness and spirituality engendered by visiting the Yirrkala region. For instance, the production *Fish* was inspired by the mangrove areas in Arnhem Land and other bodies of water. Bangarra Dance Theatre hopes to develop further reciprocity with the Munyarrun Clan. It is seeking to establish cultural residences, which involve Bangarra dancers going back up with Djakapurra and his family, and spending time with him over one- or two-week periods.<sup>29</sup> It hopes that this project will give the artists a greater idea of the context of the dances and songs that are performed.

The private letter of agreement contains a clause similar to a moral right of integrity. Bangarra Dance Theatre illustrates what practical measures are necessary to respect the moral right of integrity. It engages in a consultation and feedback process with the Munyarrun Clan because only the traditional custodians know what is appropriate. For example, it would be inappropriate in some cases for women to perform in particular dances. However, it is well in advance of copyright law because, even if a moral rights regime is introduced, there is no guarantee that it will go beyond protection of individual authors and recognise communal ownership.

The federal government has since introduced the Copyright Amendment (Moral Rights) Act 2000 (Cth). The Democrat Senator, and the erstwhile chairman of Bangarra Dance Theatre, Aden Ridgeway, was concerned that the legislation provided that moral rights should subsist in individual creators, not communities.<sup>30</sup> He proposed an amendment, which provided that: 'Moral

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<sup>29</sup> Australian Broadcasting Corporation, 'Collaborations: Using Indigenous Cultural Material In Contemporary Performance', *Awape*, Radio National, 14 May 1999.

<sup>30</sup> Ridgeway, A (2000) 'Second Reading of the Copyright Amendment (Moral Rights) Bill 1999', Senate, Hansard, 7 December, p. 21062.

rights in relation to an Australian Indigenous cultural work created by an Indigenous author, under the direction of an Indigenous cultural group, may be held and asserted by a custodian nominated by the relevant Indigenous cultural group as its representative for this part.<sup>31</sup> The Australian Labor Party refused to support this amendment, protesting that there was insufficient consultation. The federal government deferred the consideration of Indigenous culture and intellectual property to a later date.

### Summary

The legal model developed by Bangarra Dance Theatre has a synchronicity with the judicial responses to the treatment of Indigenous culture under copyright law. They both seek to circumvent the formal rules of copyright law through other legal regimes — such as contract law, equity law and fiduciary relationships. The legal model developed by Bangarra Dance Theatre has proved to be a meaningful and significant arrangement. The former general manager, Jo Dyer, is confident that the company would advance this model in future situations. It could be used with guest artists who come to the company from any community, or with creative artists. The model developed by Bangarra Dance Theatre could also have a wider application. It could be used in the future to help ensure that Indigenous artists use the artistic styles and designs of traditional custodians with respect and integrity. The legal model developed by Bangarra Dance Theatre is important for symbolic and material reasons. The contract serves to symbolise the sincerity and the respect that Bangarra Dance Theatre has for the Munyarrun Clan and its culture. It also provides for a cultural design fee, and the commissioning arrangements ensure that there is a flow of royalties from any new work to the community. However, the legal model developed by Bangarra Dance Theatre does have its limitations. The contract may prove to be unenforceable in the event of a conflict between the parties because it seeks to circumvent copyright law. It will also be of little help against third parties who seek to misappropriate Indigenous culture. Thus private arrangements are no substitute for genuine copyright law reform.

### Urban Clan: Director

Carole Johnson is a dancer, teacher, arts administrator and activist. She established and directed New York City's Dancemobile. She was the founder and editor of *Feet*, the first news publication devoted to dance by African-American peoples. Johnson came to Australia in 1972 as the principal dancer with the Elco Pomare Dance Company. She stayed in the country to work with Australia's Indigenous peoples and founded the National Aboriginal and Islander Skills Development Association. She shaped a vision that enabled young Aboriginal and Islander people to study their cultural heritage while preparing for viable careers in dance. Between 1988 and 1989, Johnson established Bangarra Dance Theatre Australia, the first independent Aboriginal

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<sup>31</sup> Copyright Amendment (Moral Rights) Bill 2000 (Cth), s 190A.



and Islander modern dance company. She selected Stephen Page to take over from her as the artistic director and choreographer.

First, Carole Johnson is concerned that the wider Australian community appropriates Indigenous culture and heritage for the purposes of nation-building and commercial profit. She spoke of her distress about such artistic practices at the Green Mill Festival:

Appropriation of culture I define as the taking of distinctive cultural symbols of one people and incorporating them into another culture while at the same time devaluing the people whose culture is being used. It is a political/cultural concept that applies to Euro-settler cultures such as Australia and the United States. It implies power versus non-power. The person/group that has power appropriates and the origins of the stolen cultural icons or processes are assimilated as quickly as possible while being deemed inconsequential to the new.<sup>32</sup>

Johnson conceded that some individual Australian creative artists do respect and give recognition to Aboriginal people with whom they have a relationship and permission for exchanges. However, she recognised that the white society to which they belong suffers from an historical amnesia, which allows the value of Aboriginal people to be obliterated. There is a need to recover the aspects of Aboriginal culture that have been absorbed and assimilated into the nation state. As Milan Kundera says: 'The struggle against power is the struggle of memory against forgetting.'<sup>33</sup>

Second, it is important to consider whether Indigenous artists are in turn engaging in the appropriation of Western culture and heritage. Carole Johnson insisted that it was impossible for Indigenous people to appropriate European art and culture:

Aboriginal/Islander people cannot appropriate European culture. It belongs to Aboriginal people because Anglo/European culture was forced on them in the process of white settlement. Early government policies and actions disassociated Aboriginal people, especially those from New South Wales and Victoria, from their traditional heritages and insisted that they operate within the European cultural framework. To exist within Australia's national cultural framework, such urban Aboriginal artists have been forced to operate from the European point of view. It has meant that most urban artists have had to make a very special effort to gain specific knowledge of the traditional part of their Aboriginal heritage.<sup>34</sup>

An alternative interpretation would be that the Indigenous artists are engaging in counter-appropriation. The critic Eric Michaels argues that

<sup>32</sup> C Johnson (1998) 'Ideas on Appropriation: The Emergence of NAISA and Bangarra', in C Hillis (ed), *Heritage and Heresy Green Mill Papers 1997*, Australian Dance Council, p 48.

<sup>33</sup> M Kundera (1979) *The Book of Laughter and Forgetting*, Penguin Books, p 3.

<sup>34</sup> Johnson (1998) 'Ideas on Appropriation', p 48.

Aboriginal artists are not exempted from the postmodern condition.<sup>35</sup> He believes that Aboriginal art is a practice of bricolage in which Indigenous cultural resources are consciously remade and transformed in the encounter with the forms, materials, techniques and institutions of the modern West.

Third, it is important to the position of urban Indigenous artists. As Stephen Gray notes:

Such artists occupy a doubly marginal position within Australian political and artistic debate: on the one hand, they suffer the social and economic deprivation associated with their 'Aboriginality', while on the other they are stigmatised for not being 'real' or 'authentic' Aboriginal artists.<sup>36</sup>

Carole Johnson commented that urban Indigenous artists must consider and address the issues of authorship and ownership that are involved in the use of traditional Indigenous culture and heritage: 'There are important issues of ownership that urban Aboriginal people must work out when borrowing and fusing from an Aboriginal culture that is not their own.'<sup>37</sup> Johnson is ambivalent about urban Indigenous artists drawing upon traditional forms of Indigenous culture and heritage for inspiration. She recognises that artists are always engaged in borrowing influences and styles from one another. However, she warns that urban Aboriginal dancers must recognise their limits and not overstep what is permissible for them to do with traditional Aboriginal dance of other cultures that they have learned.<sup>38</sup> The question of what is an acceptable use of traditional Indigenous culture depends upon ethical practices.

Bangarra Dance Theatre is sensitive to the ethical issues involved in the use of traditional Indigenous cultural material. Carole Johnson outlines some important considerations in relation to the appropriation of Indigenous art and culture:

Since appropriation is a fact of existence in a settler society that is also racist and an exchange of cultures is inevitable, the questions to ask are:

- How or what can I individually do in my small way to make sure that the people, whose culture I'm borrowing and incorporating and making my own, are valued and counted and will be perceived as such by the dominant culture?
- How can I make sure they are acknowledged, included, and a part of development and financially compensated?

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<sup>35</sup> E Michaels (1994) *Bad Aboriginal Art: Tradition, Media and Technological Horizons*, Allen & Unwin.

<sup>36</sup> S Gray, 'Black Enough? Urban And Non-Traditional Aboriginal Art And Proposed Legislative Protection For Aboriginal Art' (1996) 7 *Culture and Policy* 29.

<sup>37</sup> Johnson (1998) 'Ideas on Appropriation', p 49

<sup>38</sup> *ibid*, p 53

- What do I have to give up?<sup>39</sup>

The company seeks to ensure that there is respect, informed consent, negotiation, full and proper attribution, and the sharing of economic benefits in collaboration.

Bangarra Dance Theatre hired Stephen Page as Carole Johnson's successor. He was employed full-time as the artistic director, and was commissioned to choreograph new works for the company. This arrangement was quite progressive because the director retained the ownership of the copyright in the dramatic work under an exclusive licence. Stephen Page is a member of the Munaldjali Clan of the Yugambah tribe, whose traditional land is in southeast Queensland. He studied dance at the college of the National Aboriginal and Islander Skills Development Association. After graduating, Stephen Page performed with the Sydney Dance Company. He returned after some time with the company to teach and direct at the National Aboriginal and Islander Skills Development Association. Page joined Bangarra Dance Theatre as its principal choreographer in September 1991, and was appointed artistic director at the end of 1991. He has achieved major national and international recognition for his dance, choreography and direction of the works *Ochres*, *Fish* and *Rites*.

Stephen Page speaks about the use and adaptation of Indigenous culture in a different register to that of Carole Johnson. He emphasises the aesthetics and ethics of negotiation and collaboration. In an interview with Michelle Potter, Page stresses the important role of collaboration and workshopping in choreography:

*Potter* When you choreograph, how do you go about making a piece?

*Page* In terms of our workshop and our process, it's very much a lot of storytelling, a lot of debating issues — contemporary issues today in our society. Before we do any form of physical movement, it's making sure everyone understands the dance language or the dance intention before we even practise it. I believe it's healthy for them and it stimulates the work every time it's performed, because you can keep pruning it and adding to it — I tend to be a bit like the acupuncturist where he actually comes in and keeps stimulating the blood to the work. I think that's one of the best methods of working. I really like to come much more from the human base. I let them have a voice before they actually start throwing their body around. So that's how we work really. By the end of the day I'll make the last decision on what it should be, but it's very collaborative.<sup>40</sup>

As is apparent in one dispute in Bangarra Dance Theatre, there may also be conflict over the level of attribution among the key creators of a collaborative work. The assistant artistic director, Bernadette Walong, left the performing arts company in 1995 after a breakdown in communications with

<sup>39</sup> *ibid*, pp 53–54.

<sup>40</sup> M Potter (1997), p 102.

the artistic director, Stephen Page.<sup>41</sup> She alleged that the company had failed to acknowledge in promotional material her contribution to *Ochres*, on which the two had collaborated. However, Bangarra Dance Theatre insisted that it had given the assistant director full and proper attribution. Bernadette Walong left Bangarra Dance Theatre after she did not appear in the company's season at the Canberra Theatre Festival. A settlement was reached on copyright and royalties after her departure. This dispute highlights the difficulties involved in attribution in a collaborative work.

Stephen Page went through a crisis in 1998 and resigned. He hinted at problems with the board of management. Such tensions are common in the performing arts. The relationship between the artistic director, the general manager and the board of management can be a fraught one in the performing arts, especially where funding is precarious. This is evident in a dispute involving the Australian Dance Theatre, in which the artistic director Meryl Tankard resigned under pressure from the South Australian Minister for the Arts.<sup>42</sup> Page also articulated his own worries about 'the complexities and diversity of what we were presenting. We were too much into the mainstream — too much energy was spent protecting this theatrical Indigenous experience we were putting on for the rest of the world.'<sup>43</sup> However, Page committed himself to staying with Bangarra Dance Theatre until the end of 2001. He said: 'We didn't have a strong board then and now we do.'<sup>44</sup> Bangarra Dance Theatre's chairman is Senator Aden Ridgeway, and the deputy is Danny Gilbert of law firm Gilbert and Tobin.<sup>45</sup> Recently appointed board members include businessmen Richard Longes and Graeme Galt. Given that the company has been expected to do so much with so little funding, Bangarra Dance Theatre has done well to survive and prosper.

### **Blackfella, Whitefella: Composer**

Sydney-based composer and performer David Page is a descendant of the Munaldjali Clan of the Yugambah tribe of southeast Queensland. His musical career began with the release of two singles at the age of thirteen. Page continued with music studies at the Centre for Aboriginal Studies in Music at Adelaide University.<sup>46</sup> This institution has established a reputation for encouraging its students to learn about traditional and contemporary forms of Aboriginal music. David Page describes the tensions at play in his work:

<sup>41</sup> Staff Reporter. 'Walong Leaves Bangarra' (1996) 82 *Dance Australia* 9; and B Turner, 'Bangarra Breakdown', *Sydney Morning Herald*, 6 February 1996, p 17.

<sup>42</sup> A Brissenden and K Van Ulzen, 'The Tankard Affair' (1998) 98 *Dance Australia* 26.

<sup>43</sup> V Lawson, 'Page's Long Rite of Passage', *Sydney Morning Herald*, 29 November 1999, p 16.

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> For a history of The Centre For Aboriginal Studies in Music, see C Ellis (1985) *Aboriginal Music: Education for Living*, University of Queensland Press.

But then I am more than an artist, I am an Aboriginal artist. And this is where the biggest challenge lies. On the one hand, I want to project Indigenous peoples in a positive light, providing an all-important role model for young Aboriginal and Torres Strait Islander people. On the other hand, I want all Australians to understand the pain, the difficulties, the realities of being an Indigenous Australian. For this reason, I think my work is rather bittersweet. I hope it is full of contrasts — optimistic, depressing, joyful, sad, shocking and light-hearted.<sup>47</sup>

As a composer for dance, Page has collaborated with his brother, choreographer Stephen Page, to create works for the National Aboriginal and Islander Skills Development Association, Sydney Dance Company, the Australian Ballet, and Bangarra Dance Theatre. He has also composed for, and acted in, musicals, television and film.

Bangarra Dance Theatre was inspired by the example of the Warumpi Band, the predominantly Aboriginal rock band famous for such songs as 'Blackfella, Whitefella' and 'My Island Home'.<sup>48</sup> Following the lead of the Warumpi Band, who were fusing traditional Aboriginal music with rock and roll, Stephen Page did the same with traditional and contemporary dance styles. He first engaged in this kind of choreographic fusion in a piece of work called *Warumpi Warumpi* for an end-of-term workshop at the National Aboriginal and Islander Dance School. After this innovative work, Stephen Page said: 'That's when I knew that I wanted to continue'.<sup>49</sup>

Bangarra Dance Theatre has also been influenced by the success of Yothu Yindi, a rock band from Yirrkala in Arnhem Land, Northern Territory.<sup>50</sup> Following the example of the band, David Page has sought to bring together traditional Aboriginal music with the rhythms of contemporary dance and pop music. Bangarra Dance Theatre has also learnt the importance of legal arrangements from Yothu Yindi. After negotiation with their elders, the band agreed to enter into a contract with Mushroom Records on the condition that the company waived copyright in the sound recording for the tribally owned music comprising half of their debut album *Homeland Movement*.<sup>51</sup> The group and the recording company have shared authorship of musical works and sound recordings on later albums. Bangarra Dance has also learnt lessons from

<sup>47</sup> D Page et al. (1999) 'Bridging Three Worlds', in G Bloustein (ed), *Musical Visions: Selected Conference Proceedings From The 6<sup>th</sup> National Australian/ New Zealand IAPSM Conference and the Inaugural Arnhem Land Performance Conference*, Wakefield Press, p 105.

<sup>48</sup> A McMillan (1988) *Strict Rules*, Hodder and Stoughton; and N Murray (1993) *Sing For Me, Countryman*, Sceptre.

<sup>49</sup> M Potter (1997) 'Feet to the Earth: Interview with Stephen Page', in *A Passion for Dance*, National Library of Australia, p 102.

<sup>50</sup> P Hayward (ed) (1998) *Sound Alliances: Indigenous Peoples, Cultural Politics, and Popular Music in the Pacific*, Cassell, pp 175–209.

<sup>51</sup> J Castles (1992) 'Tjungaringanyi: Aboriginal Rock', in P Hayward (ed), *From Pop to Punk to Post-modernism*, Allen & Unwin, p 25.

Yothu Yindi about managing the difficulties of mainstream commercial success. In 1991, Yothu Yindi released a dance — or ‘filthy lucre’ — remix of its single *Treaty*. The single spent 30 weeks in the Australian top 100, promoted the album *Tribal Voice* and won a string of awards. Yothu Yindi was acclaimed for transmitting a political message to a wide audience, but it was also criticised for selling out and cheapening its intended message.<sup>52</sup> The episode highlights the difficulties involved in reconciling commercial success with political integrity.

Bangarra Dance Theatre is based upon an artistic collaboration between the Page Brothers and the Munyarrun Clan. David Page discusses the strengths and tensions at work in this partnership:

Our experience is urban, theirs is traditional. Having this closeness is not always easy, but for us it is a great honour and it is enduring. Together we have shared our stories, our dreaming, our dance and song.<sup>53</sup>

David Page observes that the dance theatre company hopes to reach a universal audience through stories about belonging, identity, and connection that touch members’ own communities:

It is our experience to perform one day in the city of Sydney, the next in the homelands of Arnhem Land and then to reach the international audience through CDs and radio airplay. To mean something to such a diversity of people is a big responsibility. We must be more than an artefact, a tourist attraction, a smoke screen covering the truth of people’s existence. We need to give people a sense of how human nature and experience is fundamentally the same for all people the world over. We need to cross barriers of language, technology, time and place. Dance and music are the best possible conveyors of these experiences and these messages.<sup>54</sup>

Bangarra Dance Theatre must be faithful to the particular experiences of Indigenous peoples, and yet at the same time reach a universal audience. It seeks to avoid the twin traps of being trapped in the ghetto, and being totally absorbed into an international commodity culture. Bangarra Dance Theatre has a prodigious task in educating people about Indigenous heritage, about retaining the languages, the stories, the lands. There is still a lack of understanding of the many cultures that form Indigenous Australia.

Bangarra Dance Theatre has acted as an umbrella organisation, and lent its support to a number of musical collaborations. It has provided a platform for a number of Indigenous musicians and performers in the Black Vine and the Dance Clan series. Bangarra has featured such guests as Christine Anu, Leah Purcell, Archie Roach, Ruby Hunter, Jimmy Little, Tiddas and the Stiff

<sup>52</sup> P Hayward (ed) (1998), *Sound Alliances*.

<sup>53</sup> D Page et al (1999) ‘Bridging Three Worlds’, p 106.

<sup>54</sup> *ibid.*

Gins. Such arrangements have been mutually beneficial. Bangarra Dance Theatre has lifted its profile and reputation by associating with such stars. In return, it has fostered and supported the careers of Indigenous musicians and performers. As David Page observes: 'Emerging artists need to collaborate and network with each other to reinforce their existence and motivate the practice of our natural sharing abilities.'<sup>55</sup> It is also striking that such Indigenous musicians and performers have achieved their success with the help of non-Indigenous collaborators. They have been assisted by songwriters such as Neil Murray, scriptwriters like Scott Rankin and producers like David Bridie, Brendan Gallagher and Joe Camilleri.

Bangarra Dance Theatre has policed the musical work that has been performed under its auspices. Jo Dyer discovered on a number of occasions that its works have been used without authorisation by television and radio broadcasters.<sup>56</sup> The Aboriginal performer Leah Purcell started out as a singer in the musical *Bran Nue Dae*,<sup>57</sup> and subsequently starred in an autobiographical play, *Box the Pony*.<sup>58</sup> She appeared as a guest of Bangarra Dance Theatre at the Black Vine series in 1997. The Australian Broadcasting Corporation taped the concert to play on the Aboriginal cultural program *Awave*. Leah Purcell was upset that various pieces of the songs were being played in other contexts on radio programs broadcast by the Australian Broadcasting Corporation. She did not want to have her work fixed in a recorded form at this stage of her career. In response, Bangarra Dance Theatre negotiated with the Australian Broadcasting Corporation to stop the practice of playing such music out of context in order to protect the Indigenous performers and musicians it works with.

Bangarra Dance Theatre is conscious that support from within the mainstream, profit-making music industry for Aboriginal and Torres Strait Islander music has been limited. David Page observed:

Many Indigenous performers have to work twice as hard as the average Australian in this field to fit into the mainstream music industry. And then they are often catalogued and slotted into a pigeonhole when it comes time for the country to award these people for their hard work in creating an original style of music and story-telling.<sup>59</sup>

Furthermore, Bangarra Dance Theatre is concerned about the appropriation of Indigenous music by the mainstream music industry. There is a high potential for exploitation where popular music adapts Indigenous music into hit-oriented recordings. Ade Kuyoki and Maroochy Barambah complained that a major recording organisation sought to acquire ownership of all

<sup>55</sup> *ibid*, p 104.

<sup>56</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>57</sup> J Chi and Kuckles (1991) *Bran Nue Dae*, Currency Press and Magabala Books Aboriginal Corporation.

<sup>58</sup> S Rankin and L Purcell (1999) *Box the Pony*, Hodder Headline.

<sup>59</sup> D Page et al (1999) 'Bridging Three Worlds', p 104.

copyright materials in a project about Indigenous Australian songs and stories.<sup>60</sup> They believed that the contract would breach traditional Aboriginal customary law. Such musical appropriation is also apparent overseas.<sup>61</sup> Most notoriously, the Belgian producers Michel Sauchez and Eric Mouquet produced an album called *Deep Forest* by mixing recordings of chants by Pygmy people in the Ituri Forest, Zaire, with programmed keyboards and drum machines.<sup>62</sup> The pair took credit for the project, and did not share the royalties with the Indigenous people.

Bangarra Dance Theatre supports the development of Indigenous music through bodies run by Indigenous people. They hope to complement the performing arts company with a musical recording company. David Page is working towards the establishment of a music recording studio and label called Nikinali based in Sydney. The recording company has been given government-sponsored premises at The Wharf alongside the Bangarra Dance Theatre, Sydney Dance Company and the Sydney Dance Theatre Company. The composer David Page articulates the goals of Nikinali:

- to help develop the styles of emerging Aboriginal and Torres Strait Islander artists;
- to help given them recognition;
- to increase the Australian Indigenous music market;
- to encourage role modelling for future generations; and
- to develop each performer's experience of songwriting and recording processes.<sup>63</sup>

David Page hopes that Nikinali will facilitate networking and collaborations between Indigenous performers by sharing the similarity of cultural expression through song form. It will also allow the maintenance and preservation of musical works within the urban Aboriginal music industry. It might also be an antidote to musical appropriation.

However, there are a number of difficulties for Indigenous musicians and performers working outside the mainstream musical industry. The recording companies run by Indigenous persons and groups such as Nikinali, Daki Budtcha Pty Ltd and the Central Australian Aboriginal Media Association are largely dependent upon government funding. They are thus vulnerable to changes in funding policy and distribution. The recording companies have

<sup>60</sup> A Kukoyi (1999) 'The Significance of an Indigenous-Owned Recording and Publishing Company in Australia', in G Bloustein (ed), *Musical Visions. Selected Conference Proceedings From The 6<sup>th</sup> National Australian/ New Zealand IAPSM Conference And The Inaugural Arnhem Land Performance Conference*, Wakefield Press, p 77.

<sup>61</sup> S Feld, 'Notes on the World Beat' (1988) 1 *Public Culture Bulletin* 31.

<sup>62</sup> T Mitchell (1996) *Popular Music and Local Identity: Rock, Pop, and Rap in Europe and Oceania*, Leicester University Press, p 54.

<sup>63</sup> D Page et al (1999), p 105.



limited production capabilities. They can only have a small list of albums and signed acts. The Indigenous recording companies do not have the distribution networks of the major multinational companies. They will have difficulty getting the publicity, marketing and retail support necessary for commercial success. It is a difficult dilemma for Indigenous musicians. They can either work in an unsympathetic mainstream music industry, or else join independent Indigenous recording companies.

### **Alchemy: Designer**

Bangarra Dance Theatre has collaborated with a number of artistic designers, including Fiona Foley, Lin Onus and Peter England. Fiona Foley is an internationally recognised artist based in Hervey Bay, Queensland, Australia. She was the artistic designer for the production *Alchemy*, and the Olympic Games double bill, *Skin*, for Bangarra Dance Theatre. She was also the artistic designer for the production of *Ochre and Dust*, which was choreographed by Aku Kadogo for the Adelaide and Perth festivals. Since studying art at the Sydney College of the Arts, Foley has exhibited her studio work in Australia and overseas. She helped set up and curate the Boomalli Aboriginal Arts Cooperative in 1988. Foley has worked on a variety of community-based projects, from working as an artist-in-residence to executing public commissions in collaboration with local communities. For instance, she was employed as a silkscreen printer in Maningrida and Ramingining in Central Arnhem Land in the 1990s. Fiona Foley has been involved in making public art in negotiation with local communities, such as the *Lie of the Land* for the National Reconciliation Conference in 1997, and art work for the Queen Street Mall in Brisbane in 1999. She has also been engaged in a number of overseas residences, including workshops at Modingar in India and Niigata in Japan.

Fiona Foley has worked on designing the sets for Aboriginal theatre and dance for Bangarra Dance Theatre. She emphasised that her role is to visualise the ideas of the director in a physical space:

Yes, the first work I did was for Stephen Page's *Alchemy*, by Bangarra Dance Company. And I will be working on his upcoming production for the Olympic Arts festival in Sydney. The work is to be divided into two sections — one representing women, the other men. My brief is to design the four sets for the women's dance. When working with Stephen, maybe the best way to describe my role is to say that I visualise his ideas in physical space. He knows what he wants, and gives me key clues — for example: 'I want something to do with Lily Pads'. From there, I can run with the idea. I have spent a lot of time watching Bangarra performances and know many of the dancers well — I've shared houses with some of them — and this intimacy gives me a good understanding of what is needed in a set from the perspective of the dancers themselves.<sup>64</sup>

The director and the designers collaborate to express the physical images of the dance. They seek to complement the dance and music with suitable visual designs.

Fiona Foley celebrates the renaissance in Indigenous art and culture — from the use of watercolours by Aranda artists to the use of acrylic paint by the Papunya movement and the more recent applications of Western media by Indigenous artists. However, she is concerned about the appropriation of Indigenous artistic expression and cultural heritage. Foley is an outspoken critic of the appropriation of Aboriginal artistic expression and cultural heritage:

As an executive member of the Aboriginal Artists Management Association, I witness the cultural theft of this country's Indigenous arts, in many forms, on a daily basis. We all continue to experience a status quo whereby Australian history is regarded as beginning from the year 1788; prior to that date there is no formal 'history'. As the Sydney Olympics draws nearer, the quest for a new Australian nationalism will see a plethora of copyright abuses and breaches of the rights of Aboriginal art and culture.<sup>65</sup>

Fiona Foley comes to similar conclusions as Carole Johnson about the appropriation of Aboriginal and Torres Strait Islander art and culture. She believes that the wider Australian community adopts Indigenous imagery to gain cultural credibility, but fails to acknowledge its history or context.

For instance, the artist Emily Kame Ngwarreye has been the subject of artistic appropriation by white Australian artists. In his recent series of paintings, *Nature Speaks*,<sup>66</sup> the artist Imants Tillers has been drawn to Emily Kame Ngwarreye's *Yam Dreaming* on the basis of its visual elements:

When I first saw Emily's *Yam Dreaming* work it was a real shock to me. I found it visually shocking. The linear elements, the network of meandering coils, springs and loops, the superimposed elements, all seemed to vibrate like atomic energy — yes, like atomic energy vibrating in the form of a network of strings, resonate with the theory of Superstrings [twenty-first century theory about the nature of matter]. I went to see the Emily show in three different venues. The superimposed loops reminded me a lot of Brice Marden's work. Again, it was the purely visual side of it that I am responding to in *Nature Speaks*.<sup>67</sup>

Furthermore, there has been a media controversy about whether there has been a flood of fakes and frauds of the work of the artist Emily Kame

<sup>65</sup> F Foley, 'Traditional Boundaries, New Perspectives' (1994) 18 *Periphery* 8, p 10.

<sup>66</sup> I Tillers (1999) *Nature Speaks*, Sherman Galleries; and B James, 'Tillers Goes Bush', *Sydney Morning Herald*, 5 June 1999.

<sup>67</sup> C Nicholls (2000) *From Appreciation to Appropriation: Indigenous Influences and Images in Australian Visual Art*. Flinders University Art Museum Gallery, p 8.

Kngwarreye.<sup>68</sup> It has been alleged that artistic dealers were trying to pass off works by fellow Utopian community artists under the authorship of Emily Kame Kngwarreye. Such media scandals have confused and confounded the intense individualism of Western art, and the communal nature of Indigenous art and culture.

Fiona Foley comments that the appropriation of Aboriginal and Torres Strait Islander art and culture amounts to a violation of customary law:

As Galarrwuy Yunipingu wrote: 'For Aboriginal people, it's not a simple case of stealing Aboriginal imagery or breaking Australian copyright laws. You're also stealing that person's life, ceremony and land.'<sup>69</sup>

Under customary law, traditional Indigenous artists are only allowed to paint particular stories and dreamings as prescribed by their skin name, family, knowledge and ties to the land. They will be held responsible for the unauthorised reproduction of stories and dreamings by a third party, even if the artist had no control over or knowledge of what occurred. If the art work is misused, custodians can censure the artist by stopping them from painting, excluding them from the community and seeking recompense. As Christine Nicholls notes: 'Painting a dreaming belonging to another, or rendering it in any form whatsoever, still amounts to a cultural theft as well as blasphemy and continues to be a capital offence and punishable by Indigenous law.'<sup>70</sup> However, under customary law, there are occasions when outsiders are given permission to use and adapt imagery belonging to another group.

Fiona Foley observes that the appropriation of Aboriginal and Torres Strait Islander art and culture does not only offend Indigenous customary laws, but it might also amount to an infringement of intellectual property laws:

Intellectual property encompasses copyright, patents, design and trade marks. The next seven years will prove to be a minefield of appropriation of Aboriginal and Torres Strait Islander cultural property ... Our cultural property will once again be appropriated, as it was in the national celebrations during the Bicentennial Year, 1988. Non-Aboriginal people willingly infringe the boundaries of Aboriginal and Torres Strait Islander copyright, either naïvely unaware of the implications, or knowingly prepared to steal Indigenous imagery. This certainly is a legally blurred boundary for non-Aboriginal and non-Torres Strait Islander people, but it is nevertheless a crime against the

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<sup>68</sup> S McCulloch, 'Authentic Forgery: The Faking of Aboriginal Art', *Weekend Australian: Review*, 7–8 October 1995, pp 1–2; S McCulloch, 'Too Many Dots', *Weekend Australian: Review*, 21–22 September 1996, p 5; and G Greer, 'Selling Off the Dreaming', *Sydney Morning Herald*, 6 December 1997, p 5.

<sup>69</sup> Foley (1994) 'Traditional Boundaries, New Perspectives', p 10.

<sup>70</sup> Nicholls (2000) *From Appreciation to Appropriation*, p 8.

Indigenous nations of Australia to continue blatantly to ignore issues of copyright.<sup>71</sup>

Foley observes that there is a gap between Western intellectual property laws and Indigenous customary law. Copyright law grants individual creators exclusive economic rights in respect of works and other subject matter reproduced in material form for a period of up to 50 years after the death of the author. By contrast, Indigenous customary law invests communities with cultural rights over tangible and intangible heritage in perpetuity. The misfit between the two systems may disadvantage Indigenous litigants.

There have been a number of initiatives to bridge the gap between Western copyright law and Indigenous customary law in the area of the visual arts. First, there have been a number of legal actions run by progressive lawyers and the National Indigenous Arts Advocacy Association in order to reform copyright law, and gain publicity for this cause.<sup>72</sup> In response, the courts have engaged in formal innovations to protect Indigenous art and culture from misappropriation. They have provided informal recognition of communal ownership through awards of damages, and the use of fiduciary relationships. However, the courts have been unwilling to go further and recognise that there is an inherent connection between Indigenous culture and native title in land.<sup>73</sup> Second, there has also been a campaign run by the National Indigenous Arts Advocacy Association to introduce an authenticity mark.<sup>74</sup> The use of such a trade mark designates that a product or a service was the result of the work of an Indigenous person or group. It is hoped that this campaign will inhibit the appropriation of Indigenous art. Third, there has been a push for the introduction of a right of resale.<sup>75</sup> This would mean that Indigenous artists would receive money for every new sale of their work.

Bangarra Dance Theatre has drawn inspiration from the work of Emily Kame Kngwarreye for its next production, *Shelter*. Stephen Page said: 'I've been in love with her stuff for a long time'.<sup>76</sup> Bangarra Dance Theatre will have to take care in the use and adaptation of the work of Emily Kame Kngwarreye. They will not want to be associated with the spate of appropriation of her work. Bangarra will have to seek permission from the closest family members of Emily Kame Kngwarreye — Greenie Purvis,

<sup>71</sup> Foley (1994) 'Traditional Boundaries, New Perspectives', p 10.

<sup>72</sup> *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurruru v Indofurn Pty Ltd* (1994) 30 IPR 209; and *Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

<sup>73</sup> But see the article by Stephen Gray in this issue of *GLR*.

<sup>74</sup> M Annas, 'The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin' (1997) 3 *Aboriginal Law Bulletin* 6; and National Indigenous Arts Advocacy Association, [www.niaaa.com.au/index.html](http://www.niaaa.com.au/index.html). See also the article by Leanne Wiseman in this issue of *GLR*.

<sup>75</sup> Janke (1998) *Our Culture, Our Future*, pp 209–13.

<sup>76</sup> V Lawson, 'Page's Long Rite of Passage', *Sydney Morning Herald*, 29 November 1999, p 16.

Lindsay Bird, Sammy Petyarre, Josie Petyarre and Jemma Kngwarreye.<sup>77</sup> It could employ the legal model that it used in relation to the Munyarrun Clan. This would allow for both the direct use of her work, and the indirect use of her cultural designs.

### Archiving Ephemera: Performers

While performing arts companies are careful to protect the copyright interests of key members of the creative team, consideration is not always given to the application of copyright law to the rights of performers. Jo Dyer commented: 'I don't think that performing arts organisations are necessarily that good at dealing with the nuances and complexities of copyright law.'<sup>78</sup> Bangarra Dance Theatre features a company of ten dancers, including Russell Page, the brother of choreographer Stephen Page and composer David Page. The dancers are employed on ten-month contracts with the company, from the beginning of February to the end of November each year. It is worth investigating what — if any — rights the performers have in relation to the recording and broadcast of their live performances on television, film, and multimedia.

Bangarra Dance Theatre is contemplating using film as a means to archive its performances and to increase the distribution of its work. A documentary about the Page brothers called *Urban Clan* was produced in 1997.<sup>79</sup> Stephen Page worked with the maker of the documentary to shoot excerpts of *Ochres* in the studio for camera.<sup>80</sup> Inspired by this experience, Stephen Page spent two weeks shooting a version of *Fish* directly for film.<sup>81</sup> The former general manager, Jo Dyer, anticipated: 'It will be a lasting testament to the work but it will be an entirely different kind of work from the *Ochres* style filming a performance.'<sup>82</sup> It will have the same choreographic elements and music, but it will be quite a different work than the live performance. As Michelle Potter commented:

No archived material, including film and video recordings, can ever recreate the moment of performance. That moment is truly evanescent since it involves not only a specific space and time, but a specific connection with a specific space and time.<sup>83</sup>

Bangarra Dance Theatre also hopes that film recordings will increase the audience for its work both in Australia and overseas. Jo Dyer commented: 'There is no question that film is the most universal artistic medium.'<sup>84</sup>

<sup>77</sup> J Isaacs (1998) *Emily Kngwarreye — Paintings*, Craftsman House.

<sup>78</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>79</sup> M Mahrer (1997) *Urban Clan*, Music Art Films/Ronin Films.

<sup>80</sup> S Burstow (1996) *Ochres*, Australian Broadcasting Corporation Arts.

<sup>81</sup> S Page (1998) *Fish*, Music Arts Dance Films Pty Ltd.

<sup>82</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>83</sup> M Potter, 'Archiving the Evanescent: Dance Collections and Australia' (1993) 3 *Voices* 3, p 105.

<sup>84</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

Bangarra Dance Theatre generated a strong response when the documentary about the Page Brothers was screened in Australia and Great Britain. It is anticipated that it will receive a similar positive reaction when the film version of *Fish* is screened. This television coverage creates a far greater degree of audience recognition than performance.

Bangarra Dance Theatre has also been involved to a limited extent in multimedia and new technologies. It gave permission for excerpts from three of its performances to be included on one of the 'Australia on CD' titles, *Moorditj: Australian Indigenous Cultural Expressions*.<sup>85</sup> There is some uncertainty, however, whether multimedia products can be protected as cinematographic films.<sup>86</sup> However, Bangarra Dance Theatre has no plans to create further digital work in the future. Stephen Page is more interested in the possibilities of television and film. The company, too, is devoting its energies to live performance and Indigenous issues. Bangarra Dance Theatre believes that dance companies such as Chunky Move are better suited to exploit the opportunities opened up by digital technologies.<sup>87</sup>

Of course, Bangarra Dance Theatre needs to get permission from the Munyarrun Clan to broadcast any of its dances and songs on television, film and multimedia. They also must get copyright clearances from the creative principals — the choreographer, the composer and the designer. However, the question arises of whether Bangarra Dance Theatre also needs to obtain the consent of the performers to broadcast their performances.

At present, performers have rights under Part XIA of the *Copyright Act* 1968 (Cth) to bring an action against any person who makes an unauthorised use of their live performances.<sup>88</sup> They can prevent the fixation of live performances in a sound recording or a film.<sup>89</sup> They can also stop commercial dealings in unauthorised sound recordings or films.<sup>90</sup> However, performers' rights only last for 50 years in respect of sound recordings, and 20 years in relation to films. They are furthermore exhausted once authorisation has been given for fixation.

Bangarra Dance Theatre accepts the status quo that performers should have some say about the representation of images in film, television and multimedia. Jo Dyer observed:

<sup>85</sup> Moorditj Consortium (1998) *Moorditj Australian Indigenous Cultural Expressions*, Australia On CD.

<sup>86</sup> T Aplin, 'Not in Our Galaxy: Why "Film" Won't Rescue Multimedia' (1999) 21 *European Intellectual Property Review* 633.

<sup>87</sup> Chunky Move is developing a web-supported CD-ROM allowing it to edit a choreographic work using motion capture technology. It is part of the Performing Arts Media Library pilot project, which explores the legal issues surrounding the production and distribution of performing arts products in the digital environment: H Simondson (1999) *Performing Arts Media Library: From Live Performance to the Digital Stage*, Cinemedia.

<sup>88</sup> *Copyright Act* 1968 (Cth), s 248J.

<sup>89</sup> *Copyright Act* 1968 (Cth), s 248J.

<sup>90</sup> *Copyright Act* 1968 (Cth), s 248J.

Certainly I think that there should be some kind of protection as to how their images are used. You should not be able to broadcast things around the world without having them accepted that this is going to happen.<sup>91</sup>

Bangarra Dance Theatre has been involved in a number of situations in which there needed to be clearance in respect of copyright works performed by the dancers. On one occasion, the television station SBS had to obtain the permission of performers to broadcast their performance at the Survival Concert on television.<sup>92</sup> On another occasion, the Australian Broadcasting Corporation had to acquire clearance from the performers to broadcast some of the footage from the Festival of the Dreaming in Tim Flannery's television series, *The Future Eaters*.<sup>93</sup>

A discussion paper released by the federal government proposed that performers should receive economic and moral rights over the reproduction, distribution and communication to the public of their performances.<sup>94</sup> In her report *Our Culture, Our Future*, Terri Janke supports the introduction of comprehensive performers' rights in the belief that it would help and advantage Indigenous performers.<sup>95</sup> However, there would still be problems regarding communal ownership of Indigenous performances.

Bangarra Dance Theatre is uncertain about the introduction of extensive performers' rights. Jo Dyer reflected that it is a given that there is a lot of improvisation, workshopping, and collaboration involved in the creation of a new work. However, she was uncertain whether it is possible to recognise all of the contributions involved in this creative process. She observed that performers receive a cast listing:

We obviously acknowledge the roles that people play but when it comes to the dancers it is these are the performers who you see. We do not have any original cast attribution where the work is constantly evolving all the time. So, beyond the acknowledgments to the director, the choreographer, the composer, the designers and the Munyarrun Clan's input, there is a listing of the cast, and that is as far as we go.<sup>96</sup>

Jo Dyer contends that the creative principals — the choreographer, the composer and the designer — deserve to have comprehensive economic and moral rights. By contrast, she believes that the performers should only enjoy limited rights because their contributions are dependent upon the director.

<sup>91</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*

<sup>94</sup> Attorney-General's Department and The Department of Communications and the Arts (1997) *Performers' Intellectual Property Rights*, Australian Government Publishing Service.

<sup>95</sup> Janke (1998) *Our Culture Our Future*.

<sup>96</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

Dyer stressed that a performing arts company such as Bangarra Dance Theatre had a clear hierarchy of roles and positions:

Art just does not work as a cooperative, as communism in art. You do not get art. You need to have a creative vision and where that finally is going to lie is generally with the director. That is agreed by all of those who enter into collaborative, creative endeavour. As long as the delineations are agreed to from the start, and everybody has signed up to that, that is okay ... So I think that there should be some say in how performers' images are going to be used, but there is no power of veto in these kind of situations.<sup>97</sup>

The assertion of Jo Dyer that art does not work in a cooperative could be contested. This statement may be valid in relation to the artistic practices of major performing arts companies, but it ignores the collective practices of a number of smaller, radical theatre and dance companies.<sup>98</sup> However, there are good reasons why Bangarra Dance Theatre should be cautious and circumspect about performers' rights. It is sensible to let the director and his key collaborators take responsibility for the dances and songs of the Munyarrun Clan. It would be much more difficult to control and manage the use and adaptation of traditional Indigenous culture if all the performers had economic and moral rights in the performance.

### **Festival of the Dreaming: Festival Director**

In 1997, Bangarra Dance Theatre was close to extinction because it was unable to generate through touring the sufficient revenue required to maintain professional standards, cover administrative costs and develop new programs.<sup>99</sup> It was in dire straits because of a decline in funding from the Australia Council and ATSIC and a lack of commercial sponsorship for its works.<sup>100</sup> Fortunately, Bangarra Dance Theatre overcame this shortfall by gaining increased support from the New South Wales state government. The performing arts company also obtained private sponsorship from the Internet service provider Ozemail. Bangarra Dance Theatre has lobbied the prime minister, John Howard, for greater public funding from the federal

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<sup>97</sup> *ibid.*

<sup>98</sup> For instance, Not Yet It's Difficult, one of the theatre groups involved in the Performing Arts Multimedia Library Project, operates as a collective: H Simondson (1999), *Performing Arts Media Library*.

<sup>99</sup> This is a common problem in the performing arts. See Department of Communications, Arts and the Information Economy (1995) *Securing The Future: The Major Performing Arts Discussion Paper* AGPS.

<sup>100</sup> H Pitt, 'From the World Stage to a Cultural Desert', *Sydney Morning Herald*, 15 August 1996, p 8.



government.<sup>101</sup> It stands to gain a great increase in funding in the wake of the Nugent Report into the Performing Arts.<sup>102</sup>

Bangarra Dance Theatre has supplemented such funding by commissioned work with major organisations such as the Australian Ballet and the Sydney Organising Committee for the Olympic Games. They have entered into arrangements with private organisations for commissioned work.

Bangarra Dance Theatre was engaged in an artistic collaboration with the Australian Ballet to dance to Stravinsky's *Rite of Spring*.<sup>103</sup> Jo Dyer commented that it was very much an Australian Ballet work in terms of the producing structure:

Bangarra Dance Theatre is administering the contracts and payment for the nine dancers involved in that collaboration. So it is almost as if we were acting as the dancers' agent. We have no copyright in the finished product. We have no rights to perform it.<sup>104</sup>

This agreement permitted the commissioning parties to use individual dancers in return for a commercial fee.

Bangarra Dance Theatre was commissioned as an entity by the Sydney Olympic Committee to participate in the *Festival of the Dreaming*. It charged the large organisation for employing the individual artists of the performing arts company, the company and the company name. Such arrangements reflected the fact that the Sydney Olympic Committee had much bigger margins than a performing arts group like the Australian Ballet.

The director of the Festival of the Dreaming has championed Bangarra Dance Theatre. A member of the Bundjalung Nation in northern New South Wales, Rhoda Roberts is a trained actor who has worked as a performer in theatre, film and television. She was also a presenter and a reporter on the television station SBS. Rhoda Roberts has become a producer and a festival director. She was a co-founding member of Australia's first national Aboriginal theatre company, the Aboriginal National Theatre Trust. She was artistic director of the 1997 Festival of the Dreaming, the first of four international arts festivals leading up the Sydney Olympics held in the year 2000.

Rhoda Roberts is weary of the constant and incessant appropriation of Indigenous artistic expression and culture by the mainstream white community: 'We're tired of stories being told, not from our perspective, but

<sup>101</sup> J Howard, 'Bangarra Dance Theatre, 10<sup>th</sup> Birthday Gala Fundraising Dinner', transcript of the Prime Minister, Bangarra Dance Theatre, Walsh Bay, 29 October 1999.

<sup>102</sup> J Sexton, K Strickland and A Lim, 'Funding Devil Now In The Detail', *The Australian*, 12 May 2000, p 11.

<sup>103</sup> J Sykes, 'The Night the Earth Moved', *Sydney Morning Herald*, 31 October 1997, p 17

<sup>104</sup> Author's interview with Jo Dyer, Sydney, 15 September 1998.

narrated almost.<sup>105</sup> Rhoda Roberts notes that the appropriation of Indigenous artistic expression and culture is nothing new. She recalls that the Aboriginal writer and inventor David Unaipon, labelled the 'Leonardo of Australia', was a victim of literary appropriation in the 1930s.<sup>106</sup> The anthropologist Diane Bell provides a good account of the case in her book on the Hindmarsh Island dispute.<sup>107</sup> David Unaipon wrote a manuscript based on all the stories of his language group. Ramsay Smith bought the copyright to the stories for £150 in March 1927. The book, *Myths And Legends of the Australian Aboriginals*, was published by Angus & Robertson in 1930 under the authorship of Ramsay Smith, even though the material was almost word for word a reproduction of the stories of David Unaipon. Rhoda Roberts concludes from this example that Aboriginal people have been constantly fighting to retain control over their culture.

Rhoda Roberts registered her anxiety about well-meaning white dramaturges who hijack the work that has been developed by black writers, and then proceed to take the rights to the work. A good example of such appropriation would be the play, *Aboriginal Protestors*.<sup>108</sup> Originated by Gerhard Fischer, the Mudrooroo/Muller Project involved the framing of Muller's post-Brechtian German play about a failed revolution with a script written by Mudrooroo and workshopped by an Aboriginal theatre group in Sydney in 1991. The production was fostered, nurtured and professionally produced by the Performance Space for the Sydney Festival. It was then invited to the Weimar Arts Festival as its top international billing. Noel Tovey was the director of the Mudrooroo/Muller Project, *The Aboriginal Protestors*.<sup>109</sup> He was going to take the show to Germany for five performances. However, the management claimed that it was the owner of the copyright work. Taking legal action, Noel Tovey was able to prove that he was the author of a dramatic work, because he had combined and adapted two texts by the joint authors, Mudrooroo and Muller. In the face of this evidence, the management was forced to recognise his ownership and settle the case. They were also compelled to divide the royalties equally instead of favouring the German playwright over Mudrooroo.

However, Rhoda Roberts thought that there could be situations where white directors could help improve work developed by black writers. She

<sup>105</sup> R Roberts, 'A Passion for Ideas: Black Stage' (1998) 32 *Australasian Drama Studies* 19.

<sup>106</sup> *ibid.*

<sup>107</sup> D Bell (1998) *Ngarrindjeri Wurruwarrin. A World that Is, Was, and Will Be*, Spinifex Press, pp 130–31.

<sup>108</sup> G Fischer (1993) *The Mudrooroo/Muller Project: A Theatrical Casebook*, New South Wales University Press; H Gilbert, 'Pan-Aboriginality Meets Post-Modernism?' — A Review of the Mudrooroo/Muller Project' (1993) 2 *CRNLE Reviews Journal* 135; and H Gilbert (1998) *Sightlines Race, Gender, And Nation in Contemporary Australian Theatre*, University of Michigan Press.

<sup>109</sup> N Tovey, 'Discussion', *Managing Rights — Indigenous Culture in the Digital Domain*, Arts Queensland, Brisbane, 21 September 1998.

cited, for example, the production of *Up the Road*. Rhoda Roberts acknowledged that there needed to be a lot of work done on the script by Johnny Harding. She believed that the director Neil Armfield was able to improve the level of the work. Rhoda Roberts paid tribute to his understanding: 'Neil does have that awareness and he's prepared to listen, just to listen to the language and people and so forth, and that obviously is captured on that production, but I think his level of direction showed as to the script I read initially'.<sup>110</sup> She emphasised that collaboration can be a positive experience, so long as the rights of ownership remain with the Indigenous artists.

In the Olympic Arts Festival, Rhoda Roberts implemented a policy of Authorship and Control, so Indigenous artists could retain the control of the product. She articulated her policy:

The Olympic Arts Festivals established a policy very early on; that of Authorship and Control. In fact, I think they thought I was a bit mad when I kept pushing it, but I dug my heels in because I thought this was something that has to be set up, some sort of legacy and precedent. This is to say that the authorship of the product, activity or event and the control of its development and presentation should be in Indigenous hands. This guideline was an aspiration, a goal to strive for and it did not inhibit collaborations or joint artistic ventures between Indigenous groups and non-Indigenous groups. On the contrary, it encouraged and made them celebratory and unique.<sup>111</sup>

Such ethical protocols play an important symbolic role through offering public recognition of the communal ownership of Indigenous culture. They also have a practical, material effect by providing financial incentives and rewards for creative artists who respect Indigenous culture. However, the ethical protocols are limited in their scope and range. They do not prevent outsiders who are not party to the agreement from using Indigenous art and culture without authorisation. So it must not be thought that the ethical standards are a panacea that will solve all of the problems of the appropriation of Indigenous art and culture.

Bangarra Dance Theatre was commissioned to direct the Indigenous component of the Olympic Games Opening Ceremony, *Awakening*.

Stephen Page and Rhoda Roberts battled with the organisers of the ceremony to preserve authenticity in the Indigenous performance. A ceremony staff member reported:

They really fought for what they wanted. Rhoda and Stephen walked out of meetings in tears when there was talk of flaming boomerangs and

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<sup>110</sup> Roberts (1998) 'A Passion for Ideas', p 20.

<sup>111</sup> *ibid.*, p 8

dot paintings. They wanted traditional stories, not a commercial version of Aboriginal Australia.<sup>112</sup>

Djakapurra Munyarrun, the principal dancer of Bangarra Dance Theatre, played a key role in the Opening Ceremony. He called to a new generation of spirits, which are drawn to the heartbeat of the land. The cast of dancers was drawn from a diverse range of Indigenous communities. There were 330 women from the Central Desert, 200 young people from four communities in Arnhem Land, 100 Torres Strait Islanders and 400 dancers from around New South Wales. The sequence ended with a huge 32 metre tall red and yellow Wandjina — a spirit from the Kimberley region — being raised and suspended from the overhead cables and encircled by eight stilt walkers.

Bangarra Dance Theatre was also commissioned by the Olympic Arts Festival to create a full-length new work, *Skin*.<sup>113</sup> They produced a highly political work, perhaps to make sure that the integrity of their work was not compromised by being involved in a nationalistic and commercial event such as the Olympics. Stephen Page was interested in children, family and kinship. The first part, 'Shelter', examines the strength, moral courage and traditional skills of Aboriginal women. It examines the toxic poisoning of their desert homeland through mining projects. The second part, 'Spear', explores the problems Aboriginal men face in urban and remote communities. It deals with such political issues as deaths in custody, the stolen generations, alcoholism and petrol sniffing. The production draws upon a number of influences. It is inspired by the paintings of Emily Kngwarreye, Fiona Foley and Tracey Moffatt, and the work of singer-songwriter Archie Roach and playwright Robert Merritt.

Bangarra Dance Theatre hopes to secure the financial viability of the company from its association with commercial organisations — such as the Olympics. Rhoda Roberts emphasised that one of the benefits of the Olympic Festival was that it generated employment for Indigenous artists: 'But what it's given us; we had seven hundred Indigenous artists employed in this festival and probably about 550 of those are still working.'<sup>114</sup> Bangarra Dance Theatre also hoped to use the exposure gained during the Olympic Games as a springboard for international tours across America. It has already hired IMG as an agent to facilitate this world conquest. However, Bangarra Dance Theatre is aware of the risks involved in its collaboration with the Olympics. It must guard against the danger of being co-opted by the state to give the misleading impression to the world that Australia has achieved a happy reconciliation with its Indigenous people. Stephen Page was sensitive to the possibility of an

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<sup>112</sup> Hope, D (2000) 'Bangarra Aims for the Real Thing', *The Weekend Australian*, 16–17 September, p 24.

<sup>113</sup> Bangarra Dance Theatre (2000) *Skin: Programme*, Sydney Olympic Arts Festival; Jones, D (2000) 'Skin Deep', *The Australian*, 21 September, p. 20; and Sykes, J (2000) 'Haunting images of Aboriginal Australia', *Sydney Morning Herald*, 21 September.

<sup>114</sup> Roberts (1998) 'A Passion for Ideas', p 18.

Olympic boycott by Indigenous people in response to the federal government policies on native title, cultural heritage and the Stolen Generation. He observed that 'there's been too much pain, the pain lingers, there are still people finding their mothers and fathers'.<sup>115</sup>

## Conclusion

Bangarra Dance Theatre has been on the cutting-edge of copyright law reform. In its agreements with the Munyarrun Clan, the creative principals of the company and outside collaborators, it has anticipated developments in Indigenous policy, moral rights and performers' rights.

Bangarra Dance Theatre has sought to extrapolate from its particular circumstances, and form some general conclusions about the nature of legal protection of Indigenous culture. It has supported a number of initiatives.

First, Bangarra Dance Theatre hosted a seminar convened by the Arts Law Centre of Australia on collaborations with Aboriginal communities in the area of contemporary performance on 14 May 1999.<sup>116</sup> It shared their experiences about copyright and royalties in collaborative projects with traditional Indigenous people with other companies such as the Marrugeku Company, the Woomera Aboriginal Corporation and Cudjerie Films.

Second, Bangarra Dance Theatre provided a platform for Terri Janke, an Indigenous lawyer who wrote the *Our Culture, Our Future* report about options for the reform of intellectual property.<sup>117</sup> It supported her call for new and specific legislation to protect Indigenous culture and intellectual property rights.

Finally, Bangarra Dance Theatre has endorsed the introduction of an authenticity certification mark and labelling system in Australia by the National Indigenous Arts Advocacy Association.<sup>118</sup> This form of consumer education and protection will help the performing arts company because it will be heavily involved in cultural festivals at the Sydney Olympics.

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<sup>115</sup> Lawson (1999) 'Page's Long Rite of Passage', p 16.

<sup>116</sup> Australian Broadcasting Corporation, 'Collaborations: Using Indigenous Cultural Material in Contemporary Performance', *Awaye*, Radio National, 14 May 1999.

<sup>117</sup> Janke (1998) *Our Culture, Our Future*.

<sup>118</sup> Annas (1997) 'The Label of Authenticity', and National Indigenous Arts Advocacy Association, [www.niaaa.com.au/index.html](http://www.niaaa.com.au/index.html)