

## UNAUTHORISED REPRODUCTION OF TRADITIONAL ABORIGINAL ART

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### I. INTRODUCTION

Since about 1986 Australia has seen a dramatic increase in reproductions of traditional Aboriginal art without the authority of the traditional Aboriginal owners of the art. This has occurred particularly on manufactured products (for example,

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tee-shirts) and for 'high art' purposes. Such unauthorised reproduction<sup>1</sup> has been of great concern, particularly to the Aboriginal community. There have been demands for the enactment of legislation which confers upon traditional Aboriginal owners the right to prevent other people from reproducing traditional Aboriginal art (the proposed legislative protection).<sup>2</sup>

This article identifies some difficulties with the proposed legislative protection. The problem is not that there is no justification for the proposed legislative protection; there clearly is.<sup>3</sup> Nor can it be said that the law already provides sufficient protection under the *Copyright Act* 1968 (Cth); it does not.<sup>4</sup> Rather, the difficulties associated with introducing the proposed legislative protection lie in the internal dynamics of the Aboriginal community and the interrelationship between the proposed legislative protection and the *Copyright Act*.<sup>5</sup>

## II. JUSTIFICATION FOR THE PROPOSED LEGISLATIVE PROTECTION

Justification for the proposed legislative protection lies in the need to recognise and accept the integrity of traditional Aboriginal customary laws in so far as they relate to traditional Aboriginal art.<sup>6</sup> Such customary laws provide traditional Aboriginal owners with the right of control over the reproduction of traditional Aboriginal art. Traditional Aboriginal customary laws continue to apply, to greater or lesser degrees and in modified and adapted forms, in many Aboriginal communities, particularly in the remote areas of northern and central Australia. We ought not assume that our laws and values should apply to, and be imposed upon, traditionally oriented Aborigines. Recognition of indigenous peoples' rights and interests is not a concept foreign to the common law. There is also support, in Australia and internationally, for the recognition of the rights and interests of the Aboriginal people pursuant to their own laws and customs.

Of about 240 000 Aborigines, representing about 1.4 per cent of the Australian population, there are approximately 10 000 traditionally oriented Aborigines living on 400-500 homeland centres or outstations.<sup>7</sup> There are also traditionally oriented

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1 In this article, 'unauthorised reproduction' refers to reproduction without the authority of the traditional Aboriginal owners.

2 This article considers one possible legislative form of protection of traditional Aboriginal art. Other forms of protection of traditional Aboriginal art which may be sought to be conferred by legislation are beyond the scope of this article.

3 See Part II below.

4 See Part III below.

5 See Part IV below.

6 There are other justifications but they are subsidiary to the strongest one which is stated in the text.

7 The estimated number of Aborigines in Australia and their percentage of the Australian population is taken from the 1991 census. The estimated number of traditionally oriented Aborigines living on homeland centres or outstations is based on the Report of the House of Representatives Standing Committee on Aboriginal Affairs, *Return to Country, The Aboriginal Homelands Movement in Australia*, 1987 at [2.13] (the Blanchard Report). This statistic should be used only as a guide as it is not accurate: *ibid* at [2.14-2.15].

Aborigines living in larger communities. Aboriginal customary laws and traditions continue as a real, controlling and guiding force in these traditionally oriented communities.<sup>8</sup> The traditional life and customary laws today are not the same as in pre-contact society, or even as existed two decades ago. However, there is a continuity, as well as a flexibility, of Aboriginal traditions and patterns of living, including the capacity to adapt to changing circumstances.<sup>9</sup>

The common law has recognised indigenous rights and interests in respect of those territories classified as 'conquered' or 'ceded' territories. Whilst Australia was not classified as a 'conquered' or 'ceded' territory, the High Court has nevertheless recently cleared the way for the common law recognition of indigenous rights and interests in Australia (at least where the basic doctrines of the common law are consistent with the recognition of indigenous rights and interests).<sup>10</sup> The High Court in *Mabo & Ors v State of Queensland*<sup>11</sup> found that the common law has the capacity to recognise indigenous rights and interests in land (ie native title). If, as the High Court has determined, the common law recognises traditional Aboriginal land law, there is a strengthened argument for recognition by statutory or other means of other aspects of traditional Aboriginal law.<sup>12</sup>

There has been an increasing recognition in the Australian community of the traditional Aboriginal customary system. The early and mid 1970s saw two major government policy shifts. The first was a change from a policy of assimilation to one of self-determination. The second major policy shift was towards land rights, the results of which included statutory land rights legislation in the Northern Territory and South Australia. In addition, the Australian Law Reform Commission's Report on *The Recognition of Aboriginal Customary Laws*,<sup>13</sup> is a significant manifestation of the increasing support for recognition of traditional Aboriginal customary laws. It recommends Commonwealth legislation to recognise traditional Aboriginal customary laws in areas such as: marriage, children and family property; criminal law and sentencing; evidence and procedure; and hunting, fishing and gathering rights. Further, Commonwealth legislation was passed in 1991 establishing the Council for Aboriginal Reconciliation. One of the Council's main tasks is to promote a deeper understanding by all Australians of the history and culture of Aborigines. More recently, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) which, inter alia, confirms the decision in *Mabo* recognising native title rights based on the traditions of Aborigines.

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It is acknowledged that the term 'traditionally oriented' is an imprecise one. It has been described as an indeterminate zone of a continuum: K Maddock, "How to do Legal Definitions of Traditional Rights" (1984-5) *V Anthropological Forum* 295.

8 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, 1986 at 79 (ALRC Report).

9 *Ibid* at 28.

10 *Mabo & Ors v State of Queensland [No 2]* (1992) 175 CLR 1 (*Mabo*).

11 *Ibid*.

12 F Brennan, "Mabo and its Implications for Aborigines and Torres Strait Islanders" in M Stephenson and S Ratnapala (eds), *Mabo: A Judicial Revolution*, University of Queensland Press (1993) pp 24-5.

13 ALRC, note 8 *supra*.

Internationally, the 1991 draft Declaration being worked on by the Working Group on Indigenous Populations, which is a subsidiary committee of the United Nations Human Rights Commission, addresses protection of intangible cultural heritage in the following provision: “[i]ndigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts...”. Further, international concern regarding the rights of indigenous peoples generally is reflected in 1993 having been named as the International Year of the World’s Indigenous Peoples.

Any consideration of the proposed legislative protection and its justification requires an understanding of what spawns, inhabits and animates traditional Aboriginal art, as well as an appreciation of the relationship between traditional Aboriginal art and traditional Aboriginal customary law.

Traditional Aboriginal art is of religious significance in the sense that it is of the Ancestral Past, which is commonly referred to as the Dreamtime. Religion and traditional Aboriginal customary law are intimately bound up in Aboriginal society.

The Ancestral Past or Dreamtime is sometimes described as the beginning of the world. This was the period when the Ancestral Beings (who were spiritual beings) emerged from the ground to transform the earth and to determine the form of social life.<sup>14</sup> The Ancestral Beings did not cease to exist with the creation of human beings; rather they moved aside, often merging into the land forms that they created, removing their physical presence to beneath the surface of the earth.<sup>15</sup> The Ancestral Beings did, however, retain the power to intervene in the life of man and remain a vital force in ensuring the continuity of human existence and in maintaining the fertility of the land.<sup>16</sup>

The Ancestral Beings, their travels and experiences (known as Ancestral Events), the things they created, and the places associated with them, form the subject matter of traditional Aboriginal art. Of fundamental significance are the pre-existing designs which are the artistic manifestations of one or more of an Ancestral Being, Ancestral Event, or area of country associated with such Being or Event. The forms of the pre-existing designs are believed to have been created in the Ancestral Past by the Ancestral Beings, and they have been handed down through the generations. A pre-existing design may be made up of many design elements - various specific images, motifs or stylistic depictions - each of which may itself be said to be a pre-existing design. According to traditional Aboriginal customary law, pre-existing designs cannot, and should not, be changed. Their efficacy, in the form of activating Ancestral power, would be impaired if they deviated too widely from socially accepted norms. The pre-existing designs do not just constitute depictions or representations of the Ancestral Past. They are manifestations of the Ancestral Beings and re-creations of the events that they took

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14 C Cooper et al, *Aboriginal Australia*, Australian Gallery Directors Council (1981) p 192 (text).

15 H Morphy, “The Art of Northern Australia”, in *ibid*, p 53 at 59.

16 *Ibid*.

part in. Such manifestations provide the people with the means of tapping the sources of Ancestral power.<sup>17</sup> Thus, the pre-existing designs evoke the power of the Ancestral Beings, which can be released for the achievement of certain ends.

The power of particular Ancestral Beings can be manifested only through particular persons associated with the Ancestral Beings.<sup>18</sup> A person's descent<sup>19</sup> defines that association and conveys with it the right to reproduce particular material representations (subject also to other matters such as initiatory advancement and possession of the requisite religious knowledge). Those who have the right to reproduce pre-existing designs are members of clans or other relevant groups which are considered to be the traditional owners of the pre-existing designs.<sup>20</sup> The reproduction must be acceptable to the relevant group, and hence the group has control over the reproduction of the pre-existing designs. The clans or other groups are the same clans or groups to whom the Ancestral Beings entrusted various areas of land with which the pre-existing designs are associated.

A person's association with a particular Ancestral Being is threatened by another person, without authority, reproducing a pre-existing design and thereby claiming the right or authority to speak for the Ancestral Being represented by that pre-existing design. If such unauthorised reproduction is permitted to occur, without any action being taken, this is considered to be an abdication by the traditionally oriented Aborigines of their responsibility to maintain the Dreaming, and calls into question the very essence and purpose of their existence.

From the traditional Aboriginal customary perspective, pre-existing designs which are reproduced and form the subject matter of traditional Aboriginal art for the external market, are no less deserving of protection than pre-existing designs reproduced in ceremony. The association with the Ancestral Beings which are manifested and confirmed by the painting of pre-existing designs are equally present when the paintings are reproduced for the external market.

Given that the justification for the proposed legislative protection is found in the recognition of the traditional Aboriginal customary system, and having regard to the role played by the pre-existing designs within that system, it is clear that the pre-existing designs constitute the aspect of traditional Aboriginal art which ought to be the focus of the proposed legislative protection. Before considering further the proposed legislative protection, it is necessary to determine whether the *Copyright Act* already provides traditional Aboriginal owners with the right to control the reproduction of pre-existing designs. If so, there would be no need for the proposed legislative protection.

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17 *Ibid.*

18 RM Berndt et al, *Aboriginal Australian Art, A Visual Perspective*, Methuen Australia Pty Ltd (1988) p 29.

19 In some cases, such as with the Western Desert people of north-east South Australia, rights are not derived from descent, but from having been born at a particular place: A Hamilton, *Timeless Transformation: Women, Men and History in the Australian Western Desert* (unpublished PhD Thesis, University of Sydney, 1979) p 78.

20 See RM Berndt and CH Berndt, *The World of the First Australians*, Rigby (4th ed, 1985) p 34, where it is stated that "[m]ost sacred emblems...even though made...by particular persons, are owned by the local group or clan as the case may be...".

### III. COPYRIGHT LAW

Pre-existing designs may be “original”<sup>21</sup> in the dual copyright sense of not having been copied from somewhere else and of being the products of skill, labour and judgment. However, pre-existing designs founder upon the requirement of ‘authorship’ not so much in its narrower meaning as a correlative of ‘originality’ but as a prelude to ‘ownership’. The *Copyright Act* confers ownership, in the first instance, on the individual (or individuals in the case of works of “joint authorship”)<sup>22</sup> who created the work.<sup>23</sup> However, for most pre-existing designs, no individual author<sup>24</sup> or authors can be identified, and copyright law does not recognise ‘group’ ownership as such.<sup>25</sup> Moreover, in the framework of a copyright term of the life of the author plus fifty years,<sup>26</sup> a large proportion of pre-existing designs (many of which are centuries and millennia old) are clearly in the free-for-all public domain.

Having concluded that most pre-existing designs lack copyright protection, it is appropriate to consider whether traditional Aboriginal artistic works based upon, or derived from, pre-existing designs are protected by the *Copyright Act* and, to the extent that they are, whether such protection indirectly protects the underlying pre-existing designs.

There has been some doubt<sup>27</sup> as to whether a traditional Aboriginal artistic work based upon, or derived from, a pre-existing design, can satisfy the copyright requirement of ‘originality’. This doubt has been due to a lack of familiarity with the role which innovation and artistic interpretation has played, and continues to play, in traditional Aboriginal art. Certainly, religious ritual stipulates that pre-existing designs have to be produced in the way or ways in which they were originally created by the Ancestral Beings in the Ancestral Past. However, this has not ruled out innovation, and there is sufficient evidence to suggest that there has always been scope for artistic interpretation to take place.<sup>28</sup> Therefore, it is

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21 That is, when they were first created. For copyright to subsist in pre-existing designs, they must be original: *Copyright Act*, s 32(1) & (2).

22 Section 10(1) of the *Copyright Act* defines “work of joint authorship” as “a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or contributions of the other authors”.

23 *Copyright Act*, s 35(2).

24 The term ‘author’ in copyright law is used to refer to the person who creates the work; that is, the artist. In this article, the terms ‘author’ and ‘artist’ are used interchangeably.

25 That is, ownership which is conferred on a group, irrespective of whether each member of the group contributed to the expression of the work.

26 *Copyright Act*, s 33(2).

27 See, for example, Department of Home Affairs and Environment (Cth), *Report of the Working Party on the Protection of Aboriginal Folklore*, 1981 at [1402]: “[i]n the absence of any other relevant legislation, a person making copies of an artistic work by an Aboriginal artist might be able to claim that the work was not protected by copyright. This would be because the work was based on a traditional Aboriginal design and was not therefore an ‘original’ work within the meaning of the Act”. Cf [705] of the same Report.

28 See JE Stanton, *Painting the Country, Contemporary Aboriginal Art from the Kimberley Region Western Australia*, University of Western Australia Press (1989) p 5. See also the recent and much publicised case of *Johnny Bulun Bulun v Nejlam Investments Pty Ltd* (G3 of 1989, Federal Court of Australia, Northern

possible for the derivative traditional Aboriginal artistic works to evince sufficient skill, labour and judgment to make them “original” works in their own right. For such “original” works to attract copyright protection it is also necessary that: the author(s) be identified; the term of protection not have expired; and the work be in a material or tangible form.<sup>29</sup> This last stated requirement would be a particular problem for body paintings.<sup>30</sup> Nevertheless, even where the derivative traditional Aboriginal artistic works satisfy these requirements of copyright law, the protection which is thereby accorded does not succeed in indirectly protecting the underlying pre-existing designs from unauthorised reproduction. There are three reasons.

First, copyright attaches because of the presence of an ‘original result’<sup>31</sup> expressed in the derivative artistic work and not by reason of the underlying pre-existing design. Whilst copyright protection is provided in respect of the composite work, there is no protection in respect of the underlying pre-existing design itself. Thus, if a person reproduces that part of the derivative artistic work which is represented by the underlying pre-existing design, without reproducing the individual artist’s creative contribution which constitutes the ‘original result’ expressed in the derivative artistic work, there is unlikely to be any copyright infringement. For a reproduction to constitute copyright infringement, a “substantial part”<sup>32</sup> of the copyright work has to be reproduced. The originality of the part taken is a relevant consideration in determining whether a “substantial part” of the work has been reproduced. Where the part of the artistic work which is taken involves little originality on the part of the artist (which would usually be the case where it is the underlying pre-existing design which is reproduced) it may not be regarded as a substantial part of the artistic work even though quantitatively it may form quite a large part of it.<sup>33</sup> “For that which would not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the courts will not hold its reproduction to be an infringement”.<sup>34</sup> Thus, copyright protects the original result contained in the artistic work rather than the underlying pre-existing design.

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Territory Registry) which highlighted the application of artistic interpretation in traditional Aboriginal artistic works based upon, or derived from, pre-existing designs.

- 29 This requirement is not expressly provided for in the *Copyright Act* but it arises by implication: see S Ricketson, *The Law of Intellectual Property*, The Law Book Company Limited (1984) at [3.29].
- 30 As body paintings last only a few days, the requirement of material form would pose a major obstacle to copyright protection. Indeed, body paintings may not be characterised as “artistic works” at all as that term is used in the *Copyright Act*. “Artistic work” is defined to include ‘painting’. There is no definition of ‘painting’ in the *Copyright Act*. In *Merchandising Corporation of America v Harbond Ltd* [1983] FSR 32, the English Court of Appeal held that facial makeup was not a painting for the purposes of the United Kingdom’s *Copyright Act* and hence was not a work protected by copyright law. Cf J Lahore, *Copyright Law Butterworths*, (1988) at [2.390] and the cases there referred to.
- 31 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor & Ors* (1937) 58 CLR 479 at 511, per Dixon J.
- 32 *Copyright Act*, s14(1)(a).
- 33 S Ricketson, note 29 *supra* at [9.10]. See also *Baumann v Fussell* [1978] RPC 485.
- 34 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 WLR 273 at 293. See also *Warwick Film Productions Ltd v Eisinger* (1969) 1 Ch 508.

Secondly, the *Copyright Act* protects only the expression of the work, not the underlying idea. Put another way, the protection of the form of expression, not the idea embodied in it, is fundamental to the law of copyright.<sup>35</sup> This idea/expression dichotomy may exclude from copyright protection the following types of pre-existing designs as they may be characterised as ideas: diamond sequences or parallel line sequences (which are associated with the clans in north-eastern Arnhem Land); painting the internal anatomy of animals using relatively naturalistic 'x-ray' details; and cross-hatching.

Thirdly, where copyright protection is accorded to derivative artistic works, then the traditional Aboriginal artists who created the artistic works will be the owners of the copyright in the artistic works. As owners of the copyright, the traditional Aboriginal artists are entitled under the *Copyright Act* to commercialise and exploit the works (including the underlying pre-existing designs in so far as they are incorporated in the artistic works) notwithstanding that to do so would be contrary to the cultural obligations which are owed to the traditional Aboriginal owners.

In summary, the fundamental concepts of copyright law are inherently inhospitable to the protection of pre-existing designs.

#### IV. DIFFICULTIES WITH THE PROPOSED LEGISLATIVE PROTECTION<sup>36</sup>

As has already been observed,<sup>37</sup> the focus of the proposed legislative protection should be on that aspect of traditional Aboriginal art which is constituted by pre-existing designs. Further, given the justification for the proposed legislative protection discussed in Part II, the nature of the legislative protection of pre-existing designs ought to recognise the rights and obligations under traditional Aboriginal customary laws. There are, however, some difficulties with the proposed legislative protection.<sup>38</sup> They are found in the internal dynamics of the Aboriginal community, and the interrelationship between the proposed legislative protection and the *Copyright Act*.<sup>39</sup>

##### A. Internal Dynamics of the Aboriginal Community

The internal dynamics of the Aboriginal community give rise to three problems with the proposed legislative protection. First, there is the traditional Aboriginal customary law concept of group ownership. This concept stands in contrast to the

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35 *Dyason v Autodesk Inc* (1989-1990) 18 IPR 109 at 111.

36 It will be recalled that references in this article to "the proposed legislative protection" are references to legislation which confers upon traditional Aboriginal owners the right to prevent other people from reproducing traditional Aboriginal art: see the first paragraph of this article.

37 See the final paragraph of Part II.

38 The difficulties apply irrespective of whether the proposed legislative protection is introduced by way of amendment to the *Copyright Act* or by enactment of *sui generis* legislation.

39 This article will not examine the constitutional law considerations other than in the one specific sense set out in note 55 *infra*.



individualistic common law concept of property. Further, according to traditional Aboriginal customary law, there may be several groups with rights and responsibilities in respect of any one pre-existing design. The resulting non-unitary nature of traditional Aboriginal 'property' ownership and the dispersal of control among different groups presents difficulties in identifying and locating the relevant traditional Aboriginal owners. Secondly, and more seriously, there is the lack of homogeneity in the traditional Aboriginal customary laws of the various traditional Aboriginal owners, and the differing attitudes of traditional Aboriginal owners regarding what can legitimately be done with their art on the one hand and impermissible desecration on the other. Thirdly, and most significantly, the proposed legislative protection would have undesirable effects upon Aboriginal communities themselves, whether traditional or urban, and upon their art.

(i) *Traditional Aboriginal ownership*

According to the traditional Aboriginal customary system, the land and the art are inextricably linked. To own land is to know its transcendental significance, and to be entitled to hold ceremonies, and perform and execute song and art connected with it.<sup>40</sup> Accordingly, land owning groups are generally also the owning groups of the art associated with the land.

Until the 1980s it had generally been thought that traditionally oriented Aborigines perceived the landscape as being divided into totemic estates each owned by a patrilineal descent group.<sup>41</sup> It now appears that patrilineality as a form of ownership does not apply universally.<sup>42</sup> However, it does operate in significant parts of traditional Aboriginal Australia;<sup>43</sup> for example, in the cases of the Yolngu of north-eastern Arnhem Land, the Ngalakan of southern Arnhem Land and the Walbiri of central Australia. The discussion which follows is in the context of the operation of the patrilineal descent group concept of ownership.

It is not only the children of male members of the patrilineal descent group who hold rights in the group's pre-existing designs. Children of female members of the patrilineal descent group also have rights and responsibilities in respect of their mother's group's country and pre-existing designs. In southern Arnhem Land the children of male members of the patrilineal descent group are referred to as 'mingirringgi', and the children of female members are referred to as 'djunggayi'. Thus, if Father A has two children - Son B and Daughter C - both Son B and Daughter C are mingirringgi in Father A's estate. If Son B marries and has a child, that child is mingirringgi in his/her father's (and Father A's) estate. If Daughter C marries and has a child, that child is djunggayi in his/her mother's father's (ie Father A's) estate, and mingirringgi in his/her own father's estate. Accordingly, of

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40 L.R. Hiatt, "Traditional Land Tenure and Contemporary Land Claims" in L.R. Hiatt (ed), *Aboriginal Landowners*, University of Sydney (1984) p 11 at 15.

41 *Ibid.*

42 *Ibid.*

43 F Morphy and H Morphy, "Owners, Managers and Ideology: A Comparative Analysis" in L.R. Hiatt, note 40 *supra*, p 46.

Father A's two grandchildren, one is mingerringgi and one is djunggayi in Father A's estate and associated pre-existing designs. The djunggayi and the mingerringgi have significant rights and responsibilities in relation to the land and art, and they must ensure that sacred sites and pre-existing designs are protected.<sup>44</sup>

If only the mingerringgi are to be considered as the traditional owners under the proposed legislative protection, this would give priority to one set of customary rights holders over others, and the proposed legislative protection would in essence take away the rights of other groups such as the djunggayi.<sup>45</sup> However, if both the mingerringgi and djunggayi are provided with rights, there is a problem in so far as they would all become equal as traditional owners under European law.<sup>46</sup> This would fail to recognise the differential ranking of rights in so far as those rights are ranked under traditional Aboriginal customary law.<sup>47</sup>

Further, it ought not be thought that there is only one relevant patrilineal descent group associated with any one pre-existing design. There may in fact be several different patrilineal descent groups. For example, Morning Star Poles, one of which was the subject of the 1991 case of *Yumbulul v Reserve Bank of Australia*,<sup>48</sup> are common amongst several groups, although they make them in different ways with different identifying attributes. So too, the Wandjina tradition and image dominate the art of various groups of the north-central region of the Kimberleys. The common ownership of pre-existing designs amongst several groups derives in part from the same Ancestral Beings travelling over wide areas of land associated with various groups. Thus more than one group may be spiritually linked to the same Ancestral Being. Further, various groups of particular regions would often take part in each other's ceremonies during the course of which they would learn and become acquainted with pre-existing designs which were not their own. In time, the newly acquired pre-existing designs may be considered and treated by the acquiring group as its own.

In summary, according to traditional Aboriginal customary laws there are often several groups which own and have rights and responsibilities in respect of any one pre-existing design. In that context, the nature of group rights, and the non-unitary nature of traditional Aboriginal 'property' ownership, need to be considered.

#### (a) Group rights

Group rights and responsibilities stand in contrast to the individualistic common law concept of property, of which copyright is only one instance. However, the High Court in *Mabo* has recognised the existence of a traditional proprietary community title, at least in relation to land capable of recognition by the common law. Whilst there may be difficulties in identifying a community or its membership, Brennan J stated in *Mabo* that those difficulties afford no reason for

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44 *Ibid.*

45 *Ibid* at 55.

46 *Ibid.*

47 *Ibid* at 64.

48 (1991) 21 IPR 481.

denying the existence of a proprietary community title capable of recognition by the common law.<sup>49</sup> So too, such difficulties ought not stand in the way of the proposed legislative protection.

(b) Non-unitary nature of Aboriginal 'property' ownership

With traditional Aboriginal art, as with other Aboriginal 'property', ownership is not a unitary 'bundle of rights'. Control is dispersed among different groups. This non-unitary nature of property rights would make it difficult for anyone wishing to deal with traditional Aboriginal art to identify and locate traditional Aboriginal owners for the purpose of seeking their consent to reproduction of their art. Even if it were possible to do so, it is unlikely that the views of the various groups would be uniform. Indeed, one group could refuse to grant permission, but all the others may consent. Perhaps only one group may consent.

Whilst these practical difficulties do exist, and need to be worked through, they do not constitute an insurmountable problem. After all, fragmentation of proprietary interests is not entirely unknown to Anglo-Australian law. For instance, in one piece of land one could encounter, all at the same time, present title and various legal remainders and reversions 'co-owned' by several people, leases, mortgages, easements, restrictive covenants, and profits a prendre - and all these can be multiplied many times over by their equitable versions. Further, the *Copyright Act* allows even greater fragmentation. In addition to fragmentation between legal and equitable interests and between title, security interests and all kinds of complex licensing arrangements, the *Copyright Act* allows separate assignments of the rights (and portions of those rights) comprised in copyright (for instance, reproduction, adaptation, public performance etc) for different geographical areas and for different periods. Section 196(2) of the *Copyright Act* provides that:

An assignment of copyright may be limited in any way, including one or more of the following ways:

- (a) so as to apply to one or more of the classes of acts that, by virtue of this Act, the owner of the copyright has the exclusive right to do (including a class of act that is not separately specified in this Act as being comprised in the copyright but falls within a class of acts that is so specified);
- (b) so as to apply to a place in or a part of Australia;
- (c) so as to apply to a part of the period for which copyright is to subsist.

Therefore, the problem of discovering from whom to get permission to do certain things with a copyright work in our present system, which does not provide for registration of what can be a bewildering profusion of interests, is already daunting. In practice, the existence of copyright owners' associations, such as the Australasian Performing Rights Association (APRA), alleviates this difficulty. If traditional Aboriginal owners are given legislative rights to their art, they may be

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49 Note 10 *supra* at 61, per Brennan J.

able to form similar bodies. The experience of the land-owning and land-management structures established by land rights legislation would be instructive.

(ii) *Lack of homogeneity*

(a) *Reproduction to be prohibited*

Traditional Aboriginal owners have always been and remain culturally diverse; traditional Aboriginal customary law is not homogeneous in strength or content between them. Further, customary law is constantly in a state of change, not least because of external influences, but the degree and nature of change are not uniform amongst traditional Aboriginal owners. New situations, which have no analogy in customary law, may be dealt with differently, and customary law may be revised accordingly. This lack of homogeneity in customary law makes it difficult to formulate the nature and extent of the reproduction to be prohibited under the proposed legislative protection.

It may be difficult to determine whether customary law is itself being revised by external factors or whether such factors are themselves, and without incorporation into customary law, influencing the decisions of the traditional Aboriginal owners. So, for example, where reproduction of pre-existing designs on manufactured products, such as tee-shirts, is objected to, what part is played by Western European notions of debasement? Are there similar and independent concepts in customary law? Are such notions operating independently of customary law? Have they been incorporated into customary law? Another example relates to economic considerations. When traditional Aboriginal owners wish to permit a particular reproduction provided that they receive economic benefit, is it because this is provided for in customary law or is it because the traditional Aboriginal owners are, on balance, prepared to breach their customary law in order to improve their desperate economic position? To the extent that the answers to these questions can be determined at all, they are likely to vary as between traditional Aboriginal owners.

Whilst it may be that traditionally oriented Aborigines generally object to reproduction of pre-existing designs without alteration, there may be no such consensus in respect of transformation of a pre-existing design, or use of a pre-existing design in a 'new' artwork. Some may regard it as objectionable to alter or add to a pre-existing design. Others may be prepared to accept transformation of a pre-existing design. It may depend upon whether the pre-existing design can be seen in the transformed work. Some may be more accepting of western notions of drawing inspiration from, and being influenced by, the art of others, provided that the result is not capable of being mistaken for a traditional Aboriginal artwork; to others that proviso may not be necessary.

The relevance of the context of the reproduction is also important. Some traditional Aboriginal owners may not want to see pre-existing designs reproduced without authority no matter whether the context of the reproduction is applied art, 'high art', in the academic or any other context. Others may be prepared to accept reproduction for purposes of dissemination of knowledge or for 'high art' purposes

if the subject matter is not categorised as 'secret-sacred'. To some traditional Aboriginal owners it may depend upon whether the reproducer gains financial benefit from the reproduction.

(b) Pre-existing designs to be protected

There may be traditional Aboriginal owners whose customary beliefs are such that they wish to protect the subjects which are expressed in the pre-existing designs - the Ancestral Beings, Events, and the areas of country associated with such Beings and Events - from being artistically represented by others, even in forms which are unlike any that can be considered to be traditional Aboriginal. These traditional Aboriginal owners may wish to protect European style art prepared by themselves on the basis that the art depicts Ancestral Beings, Events, and associated areas of country; the reason being that the spiritual linkage and close association which the traditional Aboriginal owners have with the Ancestral Beings, Events and country may be viewed as not being protected if the art, which is an expression of that spiritual linkage and association, is able to be reproduced without authority. Albert Namatjira's water-colour landscape paintings, the copyright in which is not held by his descendants, may be sought to be protected on this basis.

Another difficulty associated with providing protection for pre-existing designs is that there is no physical template of such designs. The pre-existing designs are in the minds of their traditional owners, and as they are handed down through the generations, changes, which are not made consciously,<sup>50</sup> are incorporated into the pre-existing designs themselves. External influences, including introduction of new media and materials, result in changed forms of pre-existing designs. As a result of the abstract nature of the pre-existing designs, it is possible to have several different versions of the same pre-existing design. Some versions of a pre-existing design may be accepted by some traditional owners, but not by others. Certainly, the proposed legislative protection would need to ensure that there is no requirement that the protectable subject matter be in material form. However, there could be uncertainty in identifying the subject matter to be protected.

Further, having regard to the way pre-existing designs develop over time, it would be necessary for the proposed legislative protection to allow for changes and flexibility in the forms of the pre-existing designs. If protection is only to be provided in respect of pre-contact forms, this would result in a fossilisation of the art and would fail to recognise its changing nature. Changes to pre-existing designs, even if they arise from external influences, do not constitute an undesirable result. We ought not regard the Papunya acrylic on canvas dot paintings which began and have developed as a result of external influences, as an unfortunate incident. Indeed, there is clear evidence that, for example, access to adequate external markets and external market participation have assisted in the

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<sup>50</sup> Changes or innovations which are made consciously are not generally regarded as part of the pre-existing designs.

transmission of the culture and its associated skills amongst traditionally oriented Aborigines.<sup>51</sup> If, however, there is no limitation on the form of the pre-existing designs to be protected, it is possible that over time the pre-existing designs could, for example, increasingly incorporate elements of western European art, and conceivably the point could be reached where protection is being provided in respect of such elements. Further, there could be a stage where the pre-existing designs being protected no longer have a distinctive traditional Aboriginal style or quality about them.

*(iii) Impact Upon Aborigines*

(a) Traditional Aboriginal owners

Consideration of the proposed legislative protection raises questions as to how such protection would impact upon traditional Aboriginal owners themselves. If traditional Aboriginal owners are permitted to reproduce pre-existing designs contrary to their customary law, the basis of, and the justification for, the proposed legislative protection is threatened; such basis being the continued connection which traditional Aboriginal owners have with their customary law. Further, it would be difficult to justify restricting urban Aborigines in their reproduction of pre-existing designs<sup>52</sup> in circumstances where the distinguishing feature between urban Aborigines and traditional Aboriginal owners, being the latter's attachment to the customary system, is permitted to fall away, even in part.

Consequently, it would be necessary for the proposed legislative protection to require the traditional Aboriginal owners to be subject to restrictions in their own reproduction of pre-existing designs. In particular, traditional Aboriginal owners would be required to reproduce pre-existing designs in accordance with their customary law. Traditional Aboriginal owners may find that they can no longer do with their art what they could do before the introduction of the proposed legislative protection. Requiring traditional Aboriginal owners to comply with customary law will adversely affect the interests of the traditional Aboriginal owners. This would be a paternalistic approach whereby our legal system decides for the traditional Aboriginal owners what is best for them, and would prevent them from deviating from their customary laws even if they wished to do so. Traditional Aboriginal owners would be deprived of cultural autonomy which is an essential ingredient in their struggle for self-determination. There may be circumstances where the traditional Aboriginal owners might wish to reproduce pre-existing designs in ways which are contrary to customary law. It may be that those deviations contribute to the development of customary law and its survival. Requiring traditional Aboriginal owners to comply with customary law would constitute a severe and unwarranted inhibition on traditional Aboriginal owners' development of their art. Traditional Aboriginal art will only survive in an environment in which changes

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51 See Dept of Aboriginal Affairs, *Report of the Review Committee: The Aboriginal Arts and Craft Industry*, 1989 at [14.7].

52 See (b) below for a discussion as to why it would be necessary for the proposed legislative protection to restrict urban Aborigines in their reproduction of pre-existing designs.

which the traditional Aboriginal owners themselves wish to make are permitted rather than hindered.

(b) Urban Aborigines

Since the mid-1980s there has been an explosion of urban Aboriginal art. There has also been a growing urban Aboriginal involvement in the commercial manufacture of traditional Aboriginal art including screen printing of pre-existing designs on fabrics and garments.

Urban Aborigines' search for their own identity and the identity of their art often finds its beginnings in traditional Aboriginal pre-existing designs.

Searching for images and symbols of their own, many (urban Aboriginal artists) borrowed techniques from northern and central Australia, where traditional religion is still practised. For these artists it really is almost a necessity to use some of these devices as a tool to work through to the individual self.<sup>53</sup>

To many urban Aborigines, pre-existing designs form part of their own cultural heritage. Some urban Aborigines perceive that they ought to be free to use and exploit pre-existing designs. Thus, urban Aborigines have tried to use imagery to which they had no right under traditional Aboriginal customary law; they felt that it was sufficient that they were Aborigines.<sup>54</sup>

It is recognised that urban Aborigines have a particular interest, over and above that of the wider (non-Aboriginal) community, in the use of pre-existing designs. However, from a traditional Aboriginal customary perspective there is little distinction between unauthorised reproduction by urban Aborigines and unauthorised reproduction by the wider (non-Aboriginal) community. Accordingly, the proposed legislative protection would need to prohibit unauthorised reproduction by urban Aborigines; urban Aborigines, as with the wider (non-Aboriginal) community, ought to accept the integrity of the traditional Aboriginal customary system. If urban Aborigines are exempted from the operation of the proposed legislative protection, it becomes more difficult to support the application of the legislation to the non-Aboriginal community. Consequently, urban Aborigines may find that with the introduction of the proposed legislative protection, they will face restrictions in their use of pre-existing designs. This will impact adversely upon urban Aborigines and upon the development of urban Aboriginal art.

## **B. Interrelationship Between the Proposed Legislative Protection and the Copyright Act**

The proposed legislative protection must include a mechanism for dealing with any potential overlap with the *Copyright Act*. It is possible that a reproduction which is contrary to the proposed legislative protection may be incorporated into an

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53 D Scott-Mundine, "Black on Black: An Aboriginal Perspective on Koori Art", *Art Monthly Australia* (May 1990) 7 at 8.

54 C Anderson, "The View of Copyright from the Bush" in J Altman & L Taylor (eds), *Marketing Aboriginal Art in the 1990s*, Aboriginal Studies Press (1990) p 77.

artistic work which itself attracts copyright protection. The pre-existing design may be taken without alteration but be incorporated into an artistic work the remainder of which constitutes an 'original result' sufficient to satisfy the copyright law requirement of 'originality'. Alternatively, the pre-existing design may be altered sufficiently to satisfy the requirement of 'originality' and to enable copyright protection to attach, although such reproduction of the pre-existing design may still be contrary to the proposed legislative protection. For the proposed legislative protection to be effective, a reproduction which is otherwise prohibited ought to remain so notwithstanding that it results in an artistic work which attracts copyright protection. If this were not so, it would be possible to escape the ambit of the proposed legislative protection with ease. A person could reproduce a pre-existing design if sufficient labour, skill and judgment were expended to satisfy the requirement of 'originality': the degree of labour, skill and judgment necessary to satisfy such requirement is not difficult to achieve.

The next question which arises is whether copyright owners of artistic works which incorporate an infringing reproduction of a pre-existing design ought to be entitled to exercise their rights under the *Copyright Act* to exploit the resulting copyright works. If the copyright owners are to remain so entitled, they would be able to exploit their artistic works (and the pre-existing designs incorporated in the artistic works) as they wish. To permit this conduct to occur, would significantly limit the effectiveness of the proposed legislative protection. Indeed, there would be an inconsistency between the proposed legislative protection which would prohibit the reproduction of the pre-existing design, and the *Copyright Act* which permits the copyright owner to exploit the copyright work, including any pre-existing design incorporated in the copyright work. To avoid such an inconsistency it would be necessary for the copyright owner to be deprived of his or her rights under the *Copyright Act*.<sup>55</sup> However, if copyright owners are deprived of their

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55 There is an important constitutional law issue involving the acquisition of property power which is relevant to a consideration of whether the proposed legislative protection can deprive the copyright owner of his or her copyright.

Section 51(xviii) of the Commonwealth Constitution authorises the Commonwealth Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to "Copyrights ..". Legislation depriving a person of copyright is a law which is concerned with, and operates directly upon, the subject matter of s 51(xviii). However, it is necessary to consider whether deprivation of copyright in the context of the proposed legislative protection would be unconstitutional having regard to s 51(xxxi) which authorises the Commonwealth Parliament to make laws with respect to: "[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". If depriving a copyright owner of his or her rights of copyright constitutes an "acquisition of property" and therefore requires payment on "just terms" to such copyright owner, then the requirement for such payment may render the proposed legislative protection unworkable. Those benefiting from the protection would not be in a position to make any payment. Nor would it be likely that the Commonwealth Government would be willing to enter into an inquiry in each case as to the compensation which is appropriate, let alone actually make such payments which could be substantial.

Having regard to the High Court's recent decision in *Australian Tape Manufacturers Association Limited v The Commonwealth of Australia* (1993) 112 ALR 53, the acquisition of property power does not necessarily stand in the way of the proposed legislative protection in the event that it has the effect of depriving copyright owners of their copyright. In that case, the High Court held that the statutory extinguishment of copyright



rights the effect would be that anyone could reproduce the author's 'original result' or embellishment which is what is sought to be encouraged and protected by the *Copyright Act*.

If an infringer under the proposed legislative protection is to be deprived of his or her copyright in his or her artistic work by reason of it incorporating a pre-existing design, then deprivation of copyright ought similarly apply in relation to an artistic work which incorporates a reproduction of a pre-existing design even where the reproduction is not in breach of the proposed legislative protection, for example where the artistic work is created by the traditional Aboriginal owner of the pre-existing design. Otherwise, such artistic work (incorporating the pre-existing design) could be exploited by the artist (who is also the owner of the copyright) in a way which, in so far as the pre-existing design is concerned, would be in breach of the proposed legislative protection. However, if copyright owners are to be deprived of their copyright in these circumstances, this will have an adverse effect upon traditional Aboriginal owners who are presently creating traditional Aboriginal artistic works incorporating pre-existing designs. It would be ironic if, at the time when the wider (non-Aboriginal) community is conferring individual recognition on individual traditionally oriented Aboriginal artists, one of the most significant manifestations of that recognition (ie copyright protection) is taken away by the proposed legislative protection.

## V. CONCLUSION

The proposed legislative protection considered in this article is one possible legislative form of protection of traditional Aboriginal art; namely, one which would confer upon traditional Aboriginal owners the right to prevent other people from reproducing traditional Aboriginal art. The strongest justification for the proposed legislative protection lies in the call for recognition of traditional Aboriginal customary laws which relate to the protection of traditional Aboriginal art. Such customary laws provide traditional Aboriginal owners with the right of control over the reproduction of traditional Aboriginal art. Pre-existing designs constitute the aspect of traditional Aboriginal art which is the critical focus of protection from the traditional Aboriginal customary perspective. Accordingly, pre-existing designs ought to be the focus of the proposed legislative protection.

There is a demonstrated need for the proposed legislative protection: there are widespread unauthorised reproductions of pre-existing designs, particularly on manufactured products as well as for 'high art' purposes; further, the *Copyright Act* does not provide protection of pre-existing designs from unauthorised reproduction. However, there are some difficulties with the proposed legislative

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owners' rights does not of itself constitute an acquisition of property: "the mere extinction or diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another".

protection. First, there is the traditional Aboriginal concept of group ownership, and the non-unitary nature of traditional Aboriginal 'property' ownership. Secondly, and more seriously, there is the lack of homogeneity in the traditional Aboriginal customary laws of the various traditional Aboriginal owners and the differing views of traditional Aboriginal owners regarding what can legitimately be done with the pre-existing designs on the one hand, and impermissible desecration on the other. Thirdly, and very significantly, the proposed legislative protection would have adverse effects upon Aboriginal communities, whether traditional or urban, and upon their art. Finally, there are the problems which would arise from the interrelationship between the proposed legislative protection and the *Copyright Act*. The identification of these difficulties serves only as a beginning. They ought to be reckoned with and worked through. At the same time, the Aboriginal and non-Aboriginal communities ought to join together in promoting an increased awareness, understanding and appreciation of the role of pre-existing designs within the traditional Aboriginal customary system.