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PRESERVATION AND CONSERVATION OF EXPRESSIONS OF FOLKLORE: THE EXPERIENCE OF THE PACIFIC REGION

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The Australasian intellectual property regime is concerned primarily with the protection of economic interests. It does not fit in well with the indigenous peoples' concept of protection of folklore. In Aboriginal culture there is not the same distinction between real property and intellectual property as understood in Australasian copyright law. Traditional visual designs, music, drama and dance are intimately connected with indigenous peoples' religion. Land and art are intertwined. Ownership of artworks is not based on individual rights as postulated by the *Copyright Act 1968* (Cth), but instead on a system of collective rights which are managed on a custodial basis according to Aboriginal customary laws. Viewed from this perspective, the recent developments, particularly the decision of the Federal Court of Australia in *Milpurrurru v. Indofurn Pty. Ltd. and Others*[1] is a formidable one.

1. INTRODUCTION

1.1 Significance of Folklore

The topic of folklore has been attracting attention lately because of the UN-led emphasis on the rights of the indigenous peoples of the world. In Australia, the impetus has been provided by the landmark judgment of the High Court in *Mabo v. State of Queensland [No. 2].*[2] Furthermore, in the fast-growing multicultural society of Australia, it is now widely believed that protection of folklore is important in creating and maintaining identity, and in promoting self-confidence and pride.

For Australia's Aboriginal and Torres Strait Islander populations, the protection of folklore is a fundamental issue. Without effective protection of the special interests indigenous peoples have in their folklore and cultural heritage, that culture is open to pillage in the same way that Aboriginal lands and resources have been for over 200 years. Survival for indigenous peoples the world over is not merely a question of physical existence, but depends upon maintaining spiritual links with the land and their communities.

The Native Title legislation[3] is a welcome step since the control of land and sacred sites is essential to protection of cultural heritage. However, land alone is not enough; further specific measures dealing with the rights of Aboriginal and Torres Strait Islander peoples to control their folklore and cultural heritage are also required.

At present, Aboriginal communities are principally governed by the same intellectual property regime as all Australians. While this is effective in some cases, it does not cater for the unique relationship which indigenous peoples have with their cultural heritage. Artistic works, traditional designs and oral folklore are not simply viewed as commodities owned by individuals, to be protected for the economic benefits they may yield, but as integral parts of the heritage and identity of the community to which they belong. Thus, current protection of intellectual property, based on the assumption that intellectual property is a transferable commodity "are not only inadequate for the

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[1](1995) A.I.P.C. ¶91-116 at 39,051-39,085. The decision was handed down on 13 December 1994.
[2](1992), 66 A.L.J.R. 408.
[3]*Native Title Act 1993* (Cth). The Act came into force on 1 January 1994. The main purpose of the Act is to provide a mechanism, through the National Native Title Tribunal, for resolving native title issues without resort to litigation.

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protection of indigenous peoples' heritage but inherently unsuitable".[4] Intellectual property protection for the Aboriginal and Torres Strait Islander peoples which recognises their close and continuing links to their cultural heritage is vital because

> Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.[5]

1.2 Issues and Objectives

The impetus for protecting Aboriginal folklore is a deep-seated but inchoate concern to Australian legal reformers, which does not translate easily into clear-cut issues.[6] However, there are five broad issues:

- **Authentication**. Aboriginal people condemn the reproduction of their folklore and traditional crafts in Australian and overseas factories, which mass-produce the items with cheap labour. This causes not only an economic but also a cultural and psychological threat to authentic practitioners of Aboriginal arts and to the Aboriginal peoples whose values those arts and crafts express.

- **Ownership**. "Copyright in Western society is attributable to each individual person, and is originated by a single person, even in those circumstances where the copyright is jointly owned."[7] The current intellectual property regimes fail to recognise that indigenous communities rather than individual members of a tribe, create and own cultural heritage and intellectual property rights relating to it.

- **Expropriation**. Expropriation represents a concern about the removal of valuable artefacts and other items of cultural heritage and folklore from their place of origin. A more specific problem which this raises relates to works which have sacred and secret character under Aboriginal laws. Should the aim be to forbid reproduction or disclosure of works where this offends Aboriginal beliefs? Aboriginal people are gravely anxious that some segments of their culture are being destroyed, mutilated or debased.

- **Protection of economic interests**. Inevitably, items of folklore get into circulation. To a large extent, Aboriginal people do not mind sale and circulation of their folklore, unless the works are of a sacred or secret nature. However, there is a widespread resentment that the individuals and groups whence the items originated are not given a fair economic return for that from which others profit.

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[4]E-I Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (Sub-Commission on Prevention of Discrimination and Protection of Minorities, Economic and Social Council, United Nations, 28 July 1993) at para. 32.

[5]Ibid. at para 1.

[6]"The matter of the rights of individuals and communities in relation to their folklife has both an ethical and an economic dimension, and their intertwining has produced a Gordian knot with which the United Nations Educational, Scientific and Cultural Organisation (UNESCO) has been grappling for over a decade." Report of the Committee of Inquiry into Folklife in Australia: *Folklife - Our Living Heritage* (Australian Government Publishing Service, Canberra: 1987) at 256 [hereinafter cited as "*Report on Folklife - Our Living Heritage*"].

[7]G.C. O'Donnell, *A Short Note on Anti-Copyright* (Australian Copyright Council, 1985) at 1.

• **Appropriate protection.** This is the most slippery of the issues: what kind of legal protection may be most appropriate for Aboriginal cultural property and folklore?

Among the several branches of intellectual property, copyright law seems most relevant to deal with the protection of the creative expressions of folklore. But as we shall see later, the copyright mould is not well-suited to provide adequate protection.[8]

This paper critically reviews existing legal mechanisms for the protection of Aboriginal culture and intellectual property rights in Australia, including copyright law and heritage legislation. It then analyzes alternative proposals and developments put forward both there and internationally. Finally, it proposes solutions, drawing from the pool of research completed both in Australia and abroad, and makes suggestions as to the most appropriate measures to be adopted locally as a basis for future action.

2. FOLKLORE AND ITS IMPORTANCE IN THE LIVES OF INDIGENOUS PEOPLES

2.1 Meaning of Folklore

Links with the past strengthen and sustain individuals and communities. The desire for roots is a basic human urge. Folklore is a mode by which culture is expressed.[9] Many see folklore as, in effect, archaeology of the mind.[10] Folklore is a powerful means of bringing people together and of asserting their cultural identity. It enables the present generation to appreciate the highly creative genius of past generations and acts as a mirror that reflects their psychic make-up and explains the primeval civilization of a race.[11]

Today, although Aboriginal artefacts are visible in the Australian market place, Aboriginal customary laws and folklore continue to suffer from neglect. Aboriginal folklore, like Aboriginal artefacts, is strikingly original, particularly in its characteristic fusion of pragmatism and myth.[12]

For indigenous peoples, folklore has its source in the life of their people and, like life, it evolves continuously. One of the common ways in which folklore manifests itself is through artistic creations.

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[8]For an excellent discussion of the Canadian situation, see A. Pask, "Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture" (1993) 8 I.P.J. 57.

[9]J. Brunvand, *The Study of American Folklore* (N.Y.: 1968) at 84. See also K. and M. Clarke, *Introducing Folklore* (N.Y.: 1963) at 28; C. Carpenter, "Folklore as a Tool of Multiculturalism" in S. Hryniuk (ed.), *Twenty Years of Multiculturalism: Successes and Failures* (St. John's College Press, 1993) at 150, where the author describes folklore as the oral traditions of a people. For the purposes of this paper, "cultural heritage" and "folklore" have been used as alternative phrases, although the former is arguably a much broader term.

[10]W.P. Murphy, "Oral Literature" (1978) VII Annual Review of Anthropology 115. See generally, R. Dorson, *American Folklore* (Chicago: 1959) 1; B. Toelken, *The Dynamics of Folklore* (Boston: 1979) 4; J. Rogerson, *Anthropology of the Old Testament* (Oxford: 1978) at 23.

[11]B. Ndoye, "Protection of Expressions of Folklore in Senegal" [1989] Copyright 374 at 375.

[12]M.P. Ellinghaus, A.J. Bradbrook and A.J. Duggan (eds.), *The Emergence of Australian Law* (Butterworths, 1989) at x (citing Burnum Burnum, *Aboriginal Australia* , (Angus & Robertson, 1988) 8). An artefact may broadly be defined as something man-made, such as a tool or work or art, whereas folklore refers to unwritten literature of a people as expressed in stories and songs.

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The fact that works of folklore draw upon custom and tradition for their basis means that the works produced by later Aboriginal artists represent a unique continuation of their time-honoured myths and legends.[13]

2.2 Folklore is Living Heritage

In spite of folklore's antiquity, ageing has not made it extinct. Folklore is a testimony of the past without which the present would have no future. Aboriginal peoples have deep spiritual and emotional attachment to folklore and regard it as their communal "property". Folklore is constantly evolving and there are many works of folklore that are new, either because of their recent origin or because they are directly or indirectly derived from the older works.[14]

Traditional visual designs, music, drama, and dance are closely linked to Aboriginal religion. A dance or drama may form part of a sacred ceremony; a rock painting may depict an ancient myth at a sacred site. Certain works of folklore are therefore either regarded as sacred in their own right or are so closely associated with sacred places that they cannot be shown, nor can the themes in them be disclosed, except to those few who have been admitted to knowledge of ritual secrets and mysteries by undergoing initiation or other special ceremonies.

2.3 Aboriginal Art

Aboriginal art is the world's oldest continuous living art tradition. In central Australia, much traditional art takes the form of ground designs, produced for particular ceremonies and created with natural materials used to make spectacular patterns in the desert sand, e.g., clumps of dried spinifex grass are matted together into a papier-mâché type consistency and moulded into shapes such as circles and curved lines. This form of art is not meant to be permanent and is destroyed partly by being danced upon during a ceremony and completely at the end of the ritual, because its sacred significance carries an obligation that it be kept secret from the uninitiated.

Dance and music are integral parts of tribal existence and are performed together in the form of a *corroboree*. Song is a most important component of Aboriginal music, although to Western ears its form is more accurately described as a mixture of chanting, cries or shouts, humming and other vocalisations, invoking the names of spirits and clans or imitating the sounds of birds and other animals. Dancers typically decorate their bodies with red and yellow ochres, white clay and charcoal applied to the greased face, torso and limbs. A feature of Aboriginal compositions is that many are "message" songs, addressing social issues affecting Aborigines and so helping reinforce traditional cultural values. Aboriginal art differs from Western art in that, within a particular group, the designs and motifs are homogeneous and there is a firm relationship between the pattern and its symbolism. This implies that personal interpretation is not possible, but the work represents a traditional imagery. Because Aboriginal art communicates ideas and beliefs, or can be "read", it has been described as a kind of "visual literacy".

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[13] See *Report of the Working Party on the Protection of Aboriginal Folklore* (Department of Home Affairs and the Environment, Canberra: 1981) at para. 1003 (hereinafter referred to as the *Report of the Working Party on the Protection of Aboriginal Folklore*).

[14] See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (Kluwer, London: 1987) at 313.

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2.4 Popularity of Aboriginal Art

Twentieth century Australian history reveals the "discovery" of Aboriginal art. The 1930s saw the advent of true appreciation of Aboriginal art due to the efforts of anthropologists and missionaries.[15] The 1960s saw the birth of the commercial marketing of Aboriginal art[16] and the 1980s saw the increasing acceptance of Aboriginal art as fine art.[17] Over the past decade the Aboriginal arts and crafts industry has enjoyed an unprecedented boom. There are few industry statistics available but data on the arts and crafts industry in 1987-1988 revealed that Aboriginal people received just over $7 million per year from the sales of their art and craft.[18]

However, no boom comes without cost. Anthropological studies reveal that the Aboriginal art industry is unlike others: its products are a cultural embodiment of the living heritage of its producers. Visual art, song and dance represent outward manifestations of Aboriginal religious beliefs. Market growth has led to what has been termed as the "second crime" of the non-Aboriginals: "Having taken away the land, children and lives, the only thing left is identity through art and this is now being abused."[19] The "crime" is the unauthorised reproduction of Aboriginal designs.[20]

2.5 Significance of Folklore and Issues Arising out of its Abuse

For Aboriginal people, folklore performs several important social functions. It helps them to release cultural tensions and ambivalences, and it provides amusement and education.[21] It is a sort of "social cement" that exists outside the formal or official structures. It strengthens social cohesiveness, raises the quality of life and assists in the development and articulation of cultural identity. Aboriginal people use folklore to reflect the past and make improvements for their future. Folklore gives them a chance for creative self-expression through music, song, dance, speech, and many other avenues. Such cultural manifestations create an invisible bond among individuals and groups and forge social and spiritual contact.

A form of judicial recognition of Aboriginal customary laws regarding ancestral designs can be discerned from three Australian Federal Court cases.[22] In *Bulun Bulun v Nejlam Investments and*

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[15]See H. Morphy in P. Cook (ed.) *Aboriginal Art at the Top* (1982) at 6.

[16]P. Cook (ed.) *Aboriginal Art at the Top* (1982) at 26.

[17]Report of the Review Committee, *The Aboriginal Arts and Crafts Industry* (1989) at 15 [hereinafter cited as the *Altman Report*].

[18]Ibid. at 12.

[19]D. Scott-Mundine, "Cultural Sustainability" in *Marketing Aboriginal Art in 1990's* at 52.

[20]For the purposes of this study, the word "design" incorporates visual design, musical design, theatrical design (dance and ceremony) and verbal designs (myths).

[21]See *Report on Folklife - Our Living Heritage*, above, note 4 at 73 et seq.

[22]Another case that considered aspects of indigenous arts and cultural expressions is *Foster v. Mountford* (1976) 29 F.L.R. 233. It demonstrated that restrictive requirements prevent the use of copyright infringement as the basis for an action where sacred-secret materials have been published unwantedly; instead, a breach of confidence action must be relied on. In this case, the Supreme Court of Northern Territory issued an interlocutory injunction to members of the Pitjantjatjara Council on the basis of breach of confidence, restraining the publication of a book entitled, *Nomads of the Australian Desert.* The plaintiffs successfully argued that the information published in the book, divulged 35 years previously by tribal elders, had been supplied in confidence to the anthropologist, Dr Mountford. Copyright infringement could not have been relied upon by the plaintiffs because the book in question was not written by them.

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Others,[23] an Aboriginal artist, Johnny Bulun Bulun, succeeded in having a manufacturer of T-shirts withdraw the T-shirts from sale. The defendant had reproduced one of the artist's paintings, known as *At the Waterhole*. The case also involved reproductions of artworks which incorporated elements of other Aboriginal artists' paintings, from books and postcards. Although the case was settled prior to trial, its significance lies in "breaking the drought" in this area of litigation and drawing media attention to infringement of copyright in indigenous peoples' artistic works. The manufacturers and two distributors gave undertakings to the court, a substantial payment was made to the artists, and the clothing was withdrawn from sale and delivered up.[24]

The second case, *Yumbulul v. Aboriginal Artists Agency Ltd.*[25] was more definitive. It demonstrated the limitations of the current law to address Aboriginal customary law and notion of communal ownership of designs. This involved a Northern Territory artist, Terry Yumbulul who commenced proceedings against the Reserve Bank of Australia for infringement of copyright arising from the reproduction of his artwork, *The Morning Star Pole*, on the Bicentennial $10 plastic currency note. He also sued the agent who negotiated the arrangements. The artist claimed that the Reserve Bank had not obtained his permission before reproducing the artwork. The Reserve Bank relied on an agreement entered into between Yumbulul and the agent under which the Bank maintained that permission to reproduce Yumbulul's works had been obtained. Nevertheless, the Reserve Bank settled the dispute with Yumbulul by agreement.[26]

The action between Yumbulul and the agent continued with Yumbulul alleging unconscionable or misleading conduct on the part of the agent. The subsequent action was dismissed by French J. in the Federal Court of Darwin. However, some important dicta can be extracted from this judgment which point to the need to recognize customary laws dealing with ancestral designs. His Honour stated that, "There was evidence that Mr Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the [design] .... And it may ... be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially commercial in origin."[27]

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[23]Unreported, Federal Court of Australia, Darwin (NTG 3 of 1989). Noted in C. Golvan, "Aboriginal Art and Copyright: The Case of Johnny Bulun Bulun" [1989] 10 E.I.P.R. 346. See also, by the same author, "Aboriginal Art and Copyright - An overview and commentary concerning recent developments" (1996) 1 Media and Arts Law Review 151.

[24]For another case with similar facts, see *Bancroft v. Dolina Fashion Group Pty Ltd.* unreported, Federal Court of Australia, 12 December 1991. There, the defendant had supplied to Grace Bros., one of Australia's largest retailers, dresses with an "Aboriginal look" from a famous Japanese fabric maker. The plaintiff alleged that the print supplied by the fabric maker was a direct copy of "External Eclipse", a painting which she had permitted to be published in a book entitled, *Aboriginality: Contemporary Aboriginal Paintings and Prints* by Jennifer Isaacs. The defendant (clothing manufacturer) and the retailer claimed that they were innocent of the infringement and argued that the Japanese fabric maker was liable. The case was settled out of court with the defendant paying the sum of $8,000 to the plaintiff and agreeing to destroy the remaining stock.

[25](1991) 21 I.P.R. 481.

[26]*The Weekend Australian* , 3-4 November 1990 at p. 11.

[27]*Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 25 at 490. French J. also made certain comments on the operation of ss. 65 and 68 of the *Copyright Act 1968*, which are referred to in the text accompanying notes 70-72, below.

The third case, *Milpurrurru v. Indofurn Pty. Ltd. and Others* [28] is most formidable. It involved the exploitation of Aboriginal artwork without the artists' permission, culminating in substantial reproductions occurring in the form of woven carpets produced in Vietnam and imported into Australia. An action for breach of copyright was filed by three living Aboriginal artists and the Public Trustee, representing five deceased Aboriginal artists. The case centred around section 37 of the *Copyright Act 1968*, which prohibits parallel importation of copyrighted works.

Apart from the outcome of this decision in awarding injunctions, delivery up, and damages, the judgment is also important in the way that Von Doussa J. awarded additional damages to the Aboriginal artists for culturally based harm following infringement of copyright in their artworks. This is perhaps the most significant aspect of the judgment because it reflects the court's willingness to acknowledge the cultural sensibilities of the Aboriginal people, and protects those sensibilities accordingly, by means of orders for exemplary damages.[29] The judgment discusses at great length the difficulty of applying the Western copyright regime to indigenous peoples.

Whilst stopping short of recognizing Aboriginal customary law in relation to intellectual property, Von Doussa J. nevertheless made a number of significant concessions to Aboriginal custom, most notably: (i) the observance of an Aboriginal custom not to use the names of deceased Aboriginal artists in the proceedings - they were referred to in the judgment by their skin names only; (ii) the award of additional damages under section 115(4) of the *Copyright Act 1968* to reflect culturally based harm; (iii) the award of damages as a lump sum to enable Aboriginal clans to take account of collective ownership of the designs in the allocation of damages amongst the members of the clan;[30] (iv) the award of additional damages for humiliation or insulting behaviour with reference to a particular cultural group rather than to the community at large.[31]

Obviously, this judgment of the Federal Court of Australia is commendable in that it recognizes Aboriginal culture and customary law within the usually inflexible boundaries of Western laws and generally illustrates a sensitive approach to Aboriginal customs and traditions. It gives a clear warning to all concerned that dealings in Aboriginal intellectual property should be handled with utmost care. Although Aboriginal artists may continue to encounter difficulties framing their claims under the *Copyright Act*, the courts in future are likely to exhibit a much more sensitive and flexible approach toward the cultural barriers confronted by Australia's indigenous peoples. It will be no exaggeration to

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[28] Above, note 1.

[29] "In the present case the infringements have caused personal distress and, potentially at least, have exposed the artists to embarrassment and contempt within their communities if not to the risk of diminished earning potential and physical harm. The losses arising from these risks are a reflection of the cultural environment in which the artists reside and conduct their daily affairs. Losses resulting from tortious wrongdoing experienced by Aborigines in their particular environments are properly to be brought to account." (Ibid. at 39,081).

[30] It is noteworthy that the court did not recognize this collective ownership overtly but accommodated the Aboriginal position to the fullest extent possible. Whilst therefore under the present law the collective ownership of intellectual property as recognized in Aboriginal law cannot be acknowledged by the court in establishing a breach of the *Copyright Act*,, it is something that the court may take into account in the award of damages.

[31] Together with an award of damages under s. 116 of the *Copyright Act 1968* for loss of commercial exploitation (conversion damages), the court also made an award of additional damages in the nature of exemplary or punitive damages under s. 115(4) of the Act to reflect the harm suffered by the Aboriginal artists "in their cultural environment." (Ibid. at 39,083).

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describe this decision as a "mini *Mabo*" since it has the potential to do for Aboriginal intellectual property rights what *Mabo*[32] has done for Aboriginal land rights.[33]

As the above cases illustrate, there has been a widespread commercial exploitation of Aboriginal designs which have been used, for example, on tea towels, T-shirts, sarongs, table mats, decorations on restaurant menus, postcards, a range of souvenirs, wall hangings, posters, fashion items, interior decorating, shorts, towels and carpets. These cases have been a vehicle for drawing public attention to the limits of the present law. It is against this background of deprivation and dislocation that any examination of legal protection of folklore should take place.

3. CURRENT LEGAL PROTECTION OF FOLKLORE

3.1 Overview of the Current Position

Copyright does not subsist in Australia otherwise than by virtue of the *Copyright Act 1968* (Cth) or the *Designs Act 1906* (Cth).[34] No mention is made of folklore or folk music or folk art of any kind in the copyright and design statutes. "Aboriginal works are not excluded from protection, but they are not given any special protection either. This means that a painting by Albert Namatjira is protected in the same way as a painting by say, Brett Whitely."[35] Such works are only covered by implication to the extent that they do not fall within the generic category of works in the "public domain."

There is an economic value in cultural heritage, apart from its cultural significance. Where a work is within the public domain there may largely be unrestricted commercial exploitation of that work. Items of cultural heritage can therefore fall an easy prey to enterprising persons who may use these works without constraints or limitations. In Australia, where the law does not yet protect moral rights,[36] exploiters of Aboriginal folklore can even distort the essence of the work and its authenticity with impunity. Like commercial goods and services, such works have therefore become consumer goods.

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[32]*Mabo v. The State of Queensland (No. 2)*, above, note 2.

[33]For two thought-provoking comments on this case, see M. Blakeney, "Protecting Expressions of Australian Aboriginal Folklore under Copyright Law" [1995] 9 E.I.P.R. 442 and D. Miller, "Collective Ownership of the Copyright in Spiritually-Sensitive Works: Milpurrurru v. Indofurn Pty Ltd" (1995) 6 A.I.P.J. 185. One commentator has hailed the decision in *Milpurrurru* as "the creative equivalent of Mabo.". See Ruth Hessey, "Designs on the future" *The Sydney Morning Herald* (15 December 1994) at 15. However, it should be noted that an appeal by two (dormant) directors against a finding of personal liability for copyright infringement against them has been successful: see *King & Another v. Milpurrurru & Others* (1996) AIPC ¶91-219 at 37,227.

[34]See s. 8(1), *Copyright Act 1968* (Cth).

[35]Australian Copyright Council, *Aboriginal Arts and Copyright*, Bulletin 75 (1991) at 4.

[36]But note that the Commonwealth government is presently considering introducing moral rights legislation, see Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators*, (Attorney-General's Legal Practice, Canberra: 1994).

3.2 Variance Between the Aboriginal Customary Law and Copyright Law

Non-exclusive rights are a peculiar feature of Aboriginal customary law and are not readily compatible with the exclusive rights of copyright. Aboriginal communities follow the custom of tribal ownership of art forms and designs, whereas the right to depict designs is determined by tribal customs and practices.[37] Between themselves, Aborigines have their own customs and practices governing copyright matters.[38] There are severe sanctions imposed on painting images not permitted by the tribe.

3.3 Aboriginal Customary Laws

There is no systematic collection available of Aboriginal customary laws nor has anyone prepared any manuals or handbooks compiling all aspects of Aboriginal law.[39] Despite this lack of written laws there is a good collection of material on Aboriginal traditions and ways of life including detailed studies of kinship, religion, and family structures.[40]

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[37]K. Maddock, "Copyright and Traditional Designs - An Aboriginal Dilemma" (1989) 2 I.P. 7. However, the following statement by the author dismisses the common misconception: "Although individual creativity is not stressed in traditional communities, it would be wrong to jump to the extreme and suppose that designs are subject to a generalised communal right. Communities are internally differentiated to quite a high degree, and their members should not be seen as interchangeable units. On any matter some people are likely to have rights of a certain kind, others rights of another kind, and yet others no rights at all." (ibid. at 8-9). See generally, R. McLaughlin, "Some problems and issues in the recognition of indigenous customary law" (1996) 3 Aboriginal Law Bulletin 4, where the author discusses the place of indigenous customary law in the wider Australian legal landscape; and M. Dodson, "From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems" (1996) 21 Alternative Law Journal 2.

[38]See M.C. Suchman, "Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Preliterate Societies" (1989) 89 Columbia L. Rev. 1264 at 1265, where the author has argued that, far from being nonexistent, intellectual property rights actually pervaded preliterate societies and figured "prominently in the complex of magical beliefs surrounding numerous aspects of daily life."

[39] According to one researcher, Aboriginal tribes had "no hereditary chieftains, no police force, no lawyers, and no judges appointed by a central government. Yet strict norms of behavior were enforced among them, and offenders could even be put to death by local councils of elders. These derived their power from their guardianship of the sacred ceremonial sites and their knowledge of the ancient traditions. The decisions of these elders were obeyed only if they rested on the traditional norms and on what may be termed legal precedents." See N.M. Williams, "Studies in Australian Aboriginal Law 1961-1986" in R.M. Berndt & R. Tonkinson, *Social Anthropology and Australian Aboriginal Studies* (Aboriginal Studies Press, Canberra: 1988) at 192 (citing T.G.H. Strehlow, *Aranda Traditions* (Melbourne University Press, 1947) at 1).

[40]The Australian Institute of Aboriginal Studies in Canberra maintains within its library the largest collection in existence of archival material relating to the Aboriginal and Torres Strait Islander peoples of Australia. According to a recent study, "Whether this [material] can be regarded as 'Aboriginal customary law' may be thought a rather arid definitional question, and it is one to which lawyers and anthropologists, in Australia and elsewhere, have tended to give different answers." See Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (Australian Government Publishing Service, Canberra: 1986) at 75-76. See also K. Maddock, "Aboriginal Customary Law" in P. Hanks and B. Keon-Cohen (eds.), *Aborigines and the Law* (George Allen & Unwin, Sydney: 1984) at 212.

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There is a spiritual relationship between Aborigines and their land.[41] The High Court of Australia in its historic judgment in *Mabo v. The State of Queensland (No. 2)* observed that the traditional law or custom is not frozen as at the moment of the arrival of Europeans in Australia in 1788.[42] Subsequent developments or variations do not make the traditional customs or laws less effective provided any changes do not diminish or extinguish the relationship between a particular tribe or group and particular property, e.g., land or folklore.

Folklore belongs to Aboriginal groups, or certain members of them, but under the customary law there is no right of ownership which is distinct from other rights and is equivalent to the concept of property rights under Australian laws. Some have considered non-exclusive rights concept under the Aboriginal law incompatible with the exclusive rights of copyright.[43]

Aboriginal customary law has no distinct right of ownership equivalent to the Anglo-Saxon legal concept of property.[44] As the chair of the Working Group on Indigenous Populations, Erica-Irene Daes has pointed out:

> A song, for example, is not a "commodity", a "good", or a form of "property", but one of the manifestations of an ancient and continuing relationship between a people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song, or any other element of the people's collective identity, could be alienated permanently or completely.[45]

Traditional Aboriginal societies were not materialistic.[46] Nevertheless, land and intellectual property were of great significance.[47]

The ownership of Aboriginal cultural property is governed by a complex system of rights. Aboriginal artists paint according to strict traditional rules of ownership. They are authorized to paint only certain stories and even though there is room for individual creativity, certain subjects must be portrayed in particular ways according to Aboriginal customary law. An important distinction between Aboriginal and Western ownership concepts is the distribution of rights in Aboriginal society amongst groups. Ownership of certain works may vest in a particular clan member, or members, whilst the rights to use the work may vest in various other members for various purposes. Daes goes as far as to suggest that:

> [I]ndigenous peoples do not view their heritage in terms of property at all - that is, something which has an owner and is used for the purpose of extracting economic benefits - but in terms of community and individual responsibility. Possessing a song, story or

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[41] *Aboriginal Land Rights Commission - Second Report* (Australian Government Publishing Service, Canberra: 1974) at paras. 50-51.

[42] Above, note 2 at 422.

[43] *Altman Report*, above, note 17 at 298.

[44] Generally on Aboriginal customary laws, see R.M. Berndt and C.H. Berndt, *The World of the First Australians* (4 ed., Rigby, 1985) especially chapter 10.

[45] Daes, above, note 4 at para. 22.

[46] "The range of directly useful material objects is not large .... Basically for women there is the digging stick. For men there are spears, spear-thrower, and perhaps the boomerang and club.": Berndt and Berndt, above, note 44, at 117.

[47] *Report on the Recognition of Aboriginal Customary Laws*, above, note 40 at 222.

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> medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.[48]

It is not easy to reconcile the two very different legal systems - that of Aboriginal customary law having its group ownership, community involvement and consensus decision-making and the Anglo-Saxon legal system which lays heavy emphasis on personal rights and negotiations and, particularly, the concept of an individual artist's intellectual property. One Canadian researcher expounds the legal setting in an eloquent manner, stating thus:

> Their [First Nations peoples] claims can be heard neither in the international regimes governing cultural property, nor in the domestic regimes governing intellectual property. In cultural property law the competing legal values which frame every question are those of national patrimony and the "universal heritage of mankind"; in intellectual property law the interests to be balanced are those of "authors," conceived of on an individualistic model, and "the public" interest of preserving a common public domain. In all these arenas aboriginal peoples must articulate their interests within frameworks which obliterate the position from which they speak.[49]

What follows is a critical evaluation of the present Australian *Copyright Act 1968* (Cth) and its deficiencies in relation to Aboriginal customary laws relating to ancestral designs and folklore.

3.4 The Viability of Copyright Protection

Probably most works of the *individual* Aboriginal artists will be protected under the *Copyright Act*. But, in so far as it does that, the law will be operating at variance with customary law which embraces the principle of non-exclusive group rights.[50] Moreover, the folklore which lies behind its individual manifestations of culture receives no protection at all, and hence is open to abuse.

Further difficulties arise from the fact that under the copyright system, it is essential to show that the work originated from the author and that it was original. Can a design derived from traditional artistic practices dating back possibly millennia, be subject to protection as an original work? And who could claim authorship and ownership of such works? These points are noted below:

3.5 Authorship and Ownership under the Copyright System

Authorship and ownership are distinct concepts in copyright law. However, even though the author of a work and the owner of the copyright in that work may be two different persons, the basic rule is that the author is the first owner of the copyright. This position is in stark contrast to that of Aboriginal customary law which emphasises the concept of group or collective ownership of tribal designs. The lauding of individual artists is very much a Western response to Aboriginal art, and a facet of Aboriginal artistry which Aboriginal people find quaint.

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[48]Daes, above, note 4 at para. 26.
[49]See Pask, above, note 8 at 63.
[50]*Report of the Working Party on the Protection of Aboriginal Folklore* , above, note 13 at para. 705.

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The social organization of Aboriginal societies[51] reveals the Aboriginal system of collective ownership. As stated earlier, the issue of clan ownership of a sacred design arose in the *Yumbulul* case.[52] The plaintiff had argued that the right to permit the reproduction of the morning Star Pole design rested with the clan which was represented by the elders of the Galpu clan of North-East Arnhem Land. The right did not rest with himself. Therefore with respect to any reproduction of clan-owned sacred designs one must not only obtain the permission of the artist but also the clan managers. If all are not in agreement then one may not reproduce the design. If an artist authorizes the reproduction without prior consultation or in defiance of the clan then that artist is likely to suffer sanctions imposed by the clan. The individual artist will be punished even if he does not knowingly authorize the reproduction as occurred in that case.

It is submitted that in *Milirrupum v. Nabalco Pty Ltd.*,[53] Blackburn J.'s error lay in his perception that proprietary rights in land can only be vested in individuals. There, a group of Aborigines had sued a mining company and the Commonwealth claiming relief in relation to the possession and enjoyment of areas of land owned by them under customary laws. His Honour never recognized the Aboriginal clan as more than an indeterminate collection of individuals and no statute provided for the vesting of title in such a group. This non-recognition of collective ownership of land was corrected by *Mabo*[54] and now the copyright legislation must likewise accommodate for the collective ownership of folklore, including ancestral designs.[55]

One of the factors which is omnipresent in the growth, development and shaping of folklore, is its anonymity. Most works of folklore are the product of the community or group as a whole, and not the creation of individuals. However, it is conceivable that folklore, say a folk song, may owe its origin to a single author, but it does not acquire its folklore character until it submits to the reworkings and reformulations of the community to which the author belongs.[56] This leads to the common belief on the part of various commentators that anonymity creates a barrier for copyright protection. They argue that it is very difficult, often impossible, to identify the author or authors.[57] Many works are the result

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[51]The conception that all Aboriginal people are one is considered far too simplistic a notion by most Aboriginal people. Within and between communities, Aborigines have always recognized both cultural unity and diversity.

[52]*Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 27.

[53](1971), 17 F.L.R. 141 (also known as the *Gove Land Rights* case).

[54]*Mabo v. The State of Queensland (No. 2)*, above, note 2.

[55]A difficulty in affording copyright protection to folklore is that it is often not possible to identify the author of the work. Aboriginal artists customarily do not sign their work. In accordance with the Aboriginal concept of tribal ownership, works that are created by a member of the tribe will, depending on the nature of the work, be "owned" by the tribe or clan. Although joint authorship is recognized by the copyright law, this situation whereby an Aboriginal person draws on the "Dreamtime" or the works of his ancestors or other members of his clan, could not be described as having 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 the contribution of the other authors." (s. 10(1), *Copyright Act 1968*). The Aboriginal concept is rather of joint tribal ownership. Therefore, it is not enough to locate the artists since they cannot rightfully claim to be the joint authors (hence owners) under Aboriginal customary law.

[56]B. F. Klarman, "Copyright and Folk Music - A Perplexing Problem" (1965) 12 Bulletin of the Copyright Society of the U.S.A. 277 at 278.

[57]For an excellent analysis, see B. Ziff, "Acting Appropriately: A Property Law Perspective on the Cultural Appropriation Debate" (unpublished paper presented at the Law and Society Conference, Phoenix, Arizona, 1994) at 45. A copy of this paper is held by the author.

of collective effort, and are often not thought of as the creations of individuals, but of a family, tribal or other social grouping.[58]

One argument which has been put forward time and again in refusing copyright protection for folklore is that folklore has no identifiable author and therefore in some ways it is a spontaneous folk creation.[59] However, one commentator has forcefully refuted this misconception in the following words:

> This opinion does not stand up under critical examination, however, either in copyright or in ethnographic doctrine. Cultural phenomena are generally speaking individual creations, even if they have undergone modification and have been absorbed by a community to the extent of becoming its own cultural property. There are in fact limits to the "collectivization" of creative activity: the making of a judgment, and the combining in a single act of the design and planning of the whole, can indeed only be the work of a single thinking being, which no creative group could ever replace.[60]

In the present author's view, it should be of no consequence that Aboriginal artists draw upon their cultural tradition because no such criterion is used for evaluating non-Aboriginal or European art.[61] Furthermore, in Aboriginal communities two or three people often work on the one painting - the end result being a cooperative endeavour. However, in some clans the tradition is that the person who initiates the choice of ancestral design to be depicted will always be presented as the author even if that person had been assisted by others and occasionally even if that person had not personally done the actual painting.[62] Hence an author can be readily identified for the purposes of protection under the copyright system. However, the problem remains that the underlying folklore, of which individual works are expressions, is **not** protected under the *Copyright Act* because it is communally owned, and no author/group of authors can be isolated.[63]

3.6 Originality

The requirement of originality is said to create another hurdle in the way of copyright protection of folklore. It is argued that since folklore usually draws upon pre-existing tradition and "results from a constant and slow impersonal process of creative activity exercised through consecutive imitation"

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[58]E.g., see S. Ricketson, *The Law of Intellectual Property* (Law Book Co, Sydney: 1988) at 313.

[59]Similar difficulties of identification are encountered in situations involving creation of software, but no one has ever argued that copyright protection of software should be denied on that ground. Furthermore, copyright law has long recognized the system of protecting anonymous works.

[60]M. Niedzielska, "The Intellectual Property Aspects of Folklore Protection" [1980] Copyright 339 at 344.

[61]Again, it is of no consequence that the creativity of an individual Aboriginal artist is controlled by folkloric themes or in some other manner, e.g., selection from a particular clan. These factors do not disqualify non-Aboriginal artists from the protection of copyright law, even if their creativity is kept within the bounds of certain (cultural) norms.

[62]This is consistent with Rodin's practice discussed in R.E. Krauss, *The Originality of the Avant Garde and other Modernist Myths* (MIT Press, Cambridge, Mass.: 1985) at 181, where the author states : "Take, for example, the testimony of George Bernard Shaw. Like everyone else, he was conversant with the facts of Rodin's production and the paradox that the sculptor with the "inimitable touch" was famous for works that he himself had never laid hands on." See also at 178 and 183.

[63]C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" [1992] 7 E.I.P.R. 227 at 229.

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within a traditional community, the condition of originality may not be met under the copyright law.[64] This may be so with sacred restricted ancestral designs which must be replicated precisely. These designs are said to have been given to humankind by the original creator's ancestors and must be reproduced with unfailing accuracy if they are to retain their power in the ceremonial context. Such designs however are not produced for the commercial "open" art market and hence are not of our present concern.

The issue of originality has not been raised in the case law. The *Bulun Bulun*[65] approach amounted to legal acknowledgment that Aboriginal artistic works are capable of being original within the meaning of the *Copyright Act*. This acknowledgment was affirmed in the *Yumbulul* [66] case where the Northern Territory Federal Court held for the first time that originality existed in an Aboriginal artistic work. In the words of French J.: "In the sense relevant to the Copyright Act 1968 (Cth), there is no doubt that the pole was an original artistic work, and that he [Yumbulul] was its author, in whom copyright subsisted."[67]

Many works of folklore are produced from traditional themes derived from the *Dreamtime*. The continual re-creation of these themes serves to sustain spiritual connection to the land. Transmission of themes through Aboriginal folklore from one generation to the next safeguards the authenticity of the *Dreamtime*. The degree of variations in transmission of these themes varies greatly from one group to another and from one medium to another.[68]

Transmission requires creative reinterpretation of themes by individual artists. Evidently, nowhere is an Aboriginal artist merely an automaton.[69] Nor are new themes completely ruled out. Inevitably, changes occur in depicting the same stories in various artistic forms. These changes often are imbued by each artist's individuality, hence giving the work its "originality" in the copyright sense. It is noteworthy that in the words of the Supreme Court of the United States "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[70] To deny that Aboriginal artists produce "original works" will be to deny the dynamic nature of the living Aboriginal culture.

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[64]See C. Masouyé, "La protection des expressions du folklore" (1983) 115 Revue Internationale Du Droit D'Auteur [R.I.D.A.] 3 at 10. See also, J.G. Weiner, "Protection of Folklore: A Political and Legal Challenge" (1987) 18 I.I.C. 56 at 70.

[65]Golvan, above, note 23 at 349-351.

[66]*Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 27.

[67]Ibid., at 484.

[68]J. Riedel, "Folklore of the Americas" (1979) 4 INTERGU Yearbook 239 at 144-145, appears to support this: "[F]olk music, in order for it to be truly that, must be kept alive through continuous transmission and reception .... If a song is created and performed only once, such a song is not a folksong. ... One of the tests of the validity of any given folk song is the existence of varying versions in oral circulation."

[69]*Report of the Working Party on the Protection of Aboriginal Folklore* , above, note 13 at para. 505.

[70]See *Fiest Publications, Inc v. Rural Telephone Service Co, Inc* (1991), 41 B.N.A.'s Patent, Trademark and Copyright Journal 453 at 454; 20 I.P.R. 129 at 132. In this case, copyright protection was denied to a compilation (a telephone directory) on the basis that "sweat of the brow" alone is insufficient to give rise to an original work.

3.7 Fixation

Many items of cultural heritage exist solely in collective and individual memories, e.g., "folk" songs and stories. Although the real substance of traditional songs, stories and genealogies may be relatively unchanged down through the ages, they do not have any material form.[71] In this regard, folklore suffers from an inherent contradiction: while its actual existence is solely for the duration of each occasion, it exists and lasts, notwithstanding its ephemeral character, in the collective memory of a people.[72] The oral nature of much folklore does not, therefore, appear to agree with the fixation requirement of copyright.[73]

One of the fundamental principles of copyright law is that ideas and themes are not protected; the form and not the substance is protected. Nor are artistic styles and techniques protected as such. This means that, for example, the acrylic dot style which Aboriginal painters commonly use is not protected by copyright. Similarly, the copyright law will not prevent non-Aboriginal persons from taking traditional themes and using them for their own works. However, a remedy may be available under the *Trade Practices Act 1974* (Cth) or through the common law action of passing off, e.g., if the use of the style would mislead the public about the identity of the artist or that it is Aboriginal work.[74]

It should be noted that a class action can now be instituted in the Federal Court of Australia by a person called "the representative party", not only on his/her own behalf but also on behalf of other persons (called "group members") who have claims against the same respondent in respect of, or arising out of, the same, similar or related circumstances and giving rise to a substantial common issue of law or fact.[75] Furthermore, the identity of the group members need not be known when the proceeding is commenced. Group members need not consent to involvement in the proceeding. "The

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[71]This is true not only of Aboriginal folklore, but also of folklore of other indigenous people, e.g., Maori, Torres Strait Islanders, Polynesian people. See generally, Pask, above, note 8 at 65-66, and K. Puri, "Copyright Protection of Folklore: A New Zealand Perspective" (1989) XXII Copyright Bulletin 19.

[72]Niedzielska, above, note 60 at 344. See also, G. Blain and R. De Silva, "Aboriginal Art and Copyright" (1991) 75 Copyright Bulletin at 6.

[73]The *Copyright Act 1968* precludes oral works from having copyright protection. Therefore, copyright attaches when the ancestral design is fixed in material or tangible form. Section 22(1) provides that copyright will subsist from the time when "the work was first reduced to writing or to some other material form."

[74]See *Milpurrurru v. Indofurn Pty. Ltd. and Others*, above, note 1 at 39,084, where the Federal Court of Australia held that the contraventions of ss. 52, 53(c) and 53(d) of the *Trade Practices Act* had been made out. In that case, the respondents had imported into Australia woolen carpets which depicted Aboriginal artworks without the licence of the owners of the copyright. The court concluded that the swing tags attached to the carpets which stated, "Proudly designed in Australia by Australian Aboriginals - Made in Vietnam" made false and misleading statements about those carpets.

[75]The relevant statutory provisions governing class actions or representative proceedings are contained in Pt IVA of the *Federal Court of Australia Act 1976* (Cth). Note that this Part was added by the *Federal Court of Australia Amendment Act 1991* (Cth) and commenced operation on 4 March 1992. For a comprehensive critique on "representative actions", see D. Abrahams, "The Relevance of Representative Proceedings to Aboriginal Tribes in Arts Cases" (1996) 1 Media and Arts Law Review 155. The author argues that the representative procedure is appropriate in virtually every case of Aboriginal arts abuse. The primary reason for this is because of the essentially "communal nature of ownership of Aboriginal art and designs under Aboriginal customs and law" (at 166). The author concludes that at present the representative procedure is unworkable with respect to most Aboriginal arts claims as a result of statutorily imposed limitations." (at 172).

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notion is that they are entitled to take the benefit of, and are bound by, the result of the proceeding unless they opt out of the proceedings by a specified date."[76]

The fixation requirement is construed to imply that unless a work takes a material form, one cannot tell whether it has passed the "idea" phase. This absence of protection has lead to what one commentator terms the "new bastardization" of Aboriginal art as commercial manufacturers create their own versions of Aboriginal art.[77] Tourist shops now stock T-shirts having designs which may appear to be works of Aboriginal art. The use of another person's ideas, artistic style or technique does not infringe copyright. Therefore the Aboriginal community has no legal recourse where a non-Aboriginal artist produces his or her own rendition of a sacred Aboriginal design which appears as an "Aboriginal" artwork but is not copied from a particular Aboriginal artist. Yet in such a scenario Aboriginal customary laws have been breached and great offence is incurred by the community.[78]

Why should a European artist be prevented from altering or interpreting an Aboriginal design? Why should Aboriginal ideas be protected while European religious icons have been made the subjects of interpretation in art work? One possible answer is that sacred Aboriginal designs are not "ideas" in the same sense as Cubism or Dadaism - they are "property" in the most basic sense. The distinction between real and intellectual property is of no significance under Aboriginal customary law. It is a property right, not just a mere idea, which is infringed when a sacred design is employed in an unauthorised way.[79] More importantly, as a Canadian researcher points out eloquently:

> There is ... a significant difference in the scope of the claims that can be made on behalf of a culture, and those that can be made on behalf of an individual author. Copyright laws enable individual authors not only to claim possession of their original works as discrete objects, but to claim possession and control over any and all reproductions of those works, or any substantial part thereof, in any medium. Cultural property laws, however, enable proprietary claims to be made only to original objects or authentic artifacts.[80]

A remedy may be available under the consumer protection provisions of the *Trade Practices Act 1974* (Cth). The relevant provisions prohibit deceptive or misleading conduct in trade. An action under these provisions may apply where a person sells artwork representing it to be the work of Aboriginal artists when in fact that is not the case.[81]

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[76]See *Tropical Shine holdings Pty Ltd. v. Lake Gesture Pty Ltd. and Others* (1993) 118 A.L.R. 510 at 511 per Wilcox J.

[77]Golvan, above, note 63 at 229.

[78]Further support for this analysis can be found in Terry Yumbulul's comment that the Morning Star Pole "is a sacred object. When someone copies it, it is like stepping into someone else's property." See *Time* (16 July 1990) at 61.

[79]See S. Gray, "Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?" [1992] Law Institute Journal 47 at 49.

[80]R.J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) VI Canadian Journal of Law and Jurisprudence 249 at 264 (footnote omitted). For another excellent article in which the author explores every avenue which could assist native peoples to reclaim from Canadian public institutions certain items of great significance to their cultural survival, see R. Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (1991) 49 Univ. of Toronto Faculty of Law Rev. 1.

[81]E.g., *Milpurrurru v. Indofurn Pty. Ltd. and Others*, above, note 1.

The need for material form leads to difficulties in protecting not only visual ancestral designs but the other forms of ancestral design, viz. music, dance, myths. Since these are not recorded (e.g., on tape, video or film, paper), they are not protected. Another vexed question is regarding the use of tape recorders by participants in secret ceremonies as the person who reduces the ceremony to material form (e.g., via a film) is the copyright owner of that particular film.

Likewise, folk tales which have been passed down orally are not protected by copyright unless they are recorded in a material form. There would be difficulties in protecting visual art as well since it is not usually in a tangible form, such as body painting and ground painting. The need for material form can, however, be overcome by making sound recordings or films of performances of music or dance. If that was done, the act of recording works would be the technical determinant of the time of the making of the works and hence copyright protection would be available, assuming that other copyright requirements will be met. But this is not always practical or desirable, given the secret and sacred nature of some ceremonies or other works.

It is submitted that the fixation requirement should not apply to ancestral designs and works of folklore. Such works form part of cultural heritage of Aborigines and their very nature lies in their being handed on orally or visually from generation to generation. Interestingly, unlike the countries following the Anglo-Saxon legal tradition, in countries which follow the continental legal system (e.g., Germany), works need not be fixed in some material form to be protected. It is worth noting that the *Tunis Model Law on Copyright 1976* made an exception to the fixation rule (as applicable in countries following the Anglo-Saxon legal approach), particularly since, if this requirement were sustained, the copyright in such works might well belong to the person who takes the initiative of fixing them.[82] Therefore if comprehensive copyright protection for ancestral designs is to be attained, the need for writing, notation, printing and publishing of the work must be removed.

3.8 Duration of Protection

In the light of the cultural and religious significance of ancestral designs, the term of 50 years after the death of the author is grossly inadequate. For thousands of years prior to colonialism in Australia, ancestral designs, which have imbued individuals with kinship ties, religious beliefs, and land ownership, were passed on and continue to be passed on from one generation to the next.

Unless the copyright law is amended to incorporate the need for protection in perpetuity for ancestral designs, there exists a very real possibility that in the next two to three decades, recorded and/or published ancestral designs could be bought on the open market, which in turn would result in non-Aboriginal people owning works of traditional Aboriginal culture, custom, language and history. Hence with the present limitation under the *Copyright Act*, Aboriginal descendants, who in a traditional context would be the owners of such works, may become culturally dispossessed and impoverished to the point that they must seek permission to use or have access to information once owned and/or created by their ancestors. Significantly, the Working Group on the Intellectual Property Aspects of Folklore Protection, established under the joint auspices of Unesco and WIPO, felt that the duration of protection should not be limited in time.[83]

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[82] See s. 1(5bis), *Tunis Model Law on Copyright for Developing Countries* (Unesco-WIPO 1976) (reproduced in [1976] Copyright 165 at 167.)

[83] *Working Group on the Intellectual Property Aspects of Folklore Protection* [1981] Copyright 111 at 113. Reference should also be made to section 33(3) of the *Copyright Act 1968* (Cth) which provides that the copyright in literary, dramatic and musical works that have not been published, performed in public,

[Footnote continued on next page]

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3.9 Other Problems under the Copyright System

Under the provisions of section 65 of the *Copyright Act 1968* (Cth) where a sculpture or a work of artistic craftsmanship is on public display "other than temporarily", anyone may photograph, film, draw or paint the work without permission from the owner of copyright. There is no requirement that the reproduction be for private or non-commercial purposes. Section 68 allows the reproduction to be published without permission. The problems created by these provisions were aired in the *Yumbulul* case.[84] The agent had argued that the reproduction in question was permitted under sections 65 and 68 of the *Copyright Act*, as those sections permitted the reproduction of a sculpture which is on permanent public display.[85] The applicant's response had been that the pole was not a sculpture and therefore the sections did not apply. While French J. did not have to decide the question, his Honour stated that if the agent's argument was correct, "then it may be the case that some Aboriginal artists laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. "This question and 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."[86]

The *Copyright Act* is deficient in its application to works of Aboriginal art also because it fails to recognize the fact that even though an individual artist may purport to assign copyright ownership to a non-Aboriginal person, the community retains the underlying right to the folklore - the *Madayin* - represented in the work. It has been suggested that this problem could be avoided by recognizing in the traditional owners equitable rights in copyright over traditional Aboriginal designs.[87] However, under the current legislation problems would arise "where a 'legal' owner of copyright cannot be

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broadcast or recorded (and these records sold to the public) during the author's lifetime "continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the work is first published, performed in public, or broadcast, or records of the work are first offered or exposed for sale to the public, whichever is the earliest of those events to happen." It is to be noted that this provision does not apply to artistic works. On the face of it, therefore, it would be theoretically possible for copyright in an ancient Aboriginal work (other than an "artistic work") which has not been published, etc., to continue to subsist in perpetuity. However, section 33(3) would not save ancient Aboriginal **artistic** works from falling into public domain. See, *Report of the Working Party on the Protection of Aboriginal Folklore*, above, note 13 at para. 707. Query, whether Aboriginal paintings could be considered to be "literary" works within the meaning of the *Copyright Act*. Given the highly symbolic nature of Aboriginal art, and given the absence of any other form of written Aboriginal language, it may be contended that these artistic works in fact constitute "literature".

[84] *Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 27.

[85] The "Morning Star Pole" design was on permanent public display in the Australian Museum, Sydney.

[86] Above, note 27 at 492.

[87] Golvan, above, note 63 at 230. Interestingly, Von Doussa J. observation in *Milpurrurru v. Indofurn Pty. Ltd. and Others*, above, note 1 at 39,081 that "[n]o attempt was made in the proceedings to advance an argument that beneficiaries of the estates held interests as equitable owners in the copyright sufficient to support claims by them for personal harm suffered in their communities, being claims which the Public Trustee as legal owner could bring on their behalf" seems to suggest that the court will give careful consideration to any argument put forward in the future that rested on equitable ownership by traditional owners.

identified, or where the legal copyright owner is not able to be joined with the equitable owners for the purposes of obtaining a permanent injunction."[88]

3.10 Other Legislative Protection: *Designs Act*

Another area of concern is the interaction between copyright and designs law. The *Designs Act 1906* (Cth) is relevant to the protection of artistic works in respect of industrial applications. Because of a policy to prevent simultaneous protection of a design under both laws, it is easy for an artist to find himself or herself with no legal protection at all for a design. Furthermore, legal protection offered under the *Designs Act* is inherently limited in its ability to meet the needs of protecting works of folklore. Duration of protection is less than for copyright, and "[t]his can be inadequate for designs of special cultural and spiritual significance, where protecting the integrity of the design may be of greater importance than exploiting its commercial value."[89]

3.11 Heritage Legislation

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) sets out procedures for the protection of Aboriginal places, objects and remains, and provides heavy penalties for offences under the Act. Under the Act, the Minister for Aboriginal Affairs, on the request of Aboriginal people, may declare that a certain site or object is protected as part of Australia's Aboriginal heritage.[90]

It is submitted that the approach taken under heritage legislation of piecemeal declarations on request does not address the fundamental issues involved in indigenous peoples' rights to control and preserve their own cultural heritage.[91] As Daes notes it is difficult to attempt to nominate specific sites of cultural importance since "[a]ll lands and resources are, to a greater or lesser extent, sacred and integral to indigenous peoples' cultures and spiritual life, and often the most important places cannot be revealed to outsiders."[92] In short, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is administratively cumbersome and it is questionable whether it overcomes the inadequacies of the *Copyright Act*.

4. PROPOSALS FOR REFORM

Clearly there are a number of ways in which Aboriginal and Torres Strait Islander people can seek protection under existing legal structures. Yet, none of these is completely comprehensive in

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[88]S. Gray, "Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land post-Mabo" (1993) 63 Aboriginal Law Bulletin 10. Note that Golvan (above, note 63 at 229) has argued for the extension of heritage protection under the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth) to protect works of Aboriginal art.

[89]Daes, above, note 4 at para. 145.

[90]In *Wamba Wamba Local Aboriginal Land Council v. Minister Administering The Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989), 86 A.L.R. 161 at 169, the Court stated that the power given under the Act is facultative, not imperative.

[91]See Pask, above, note 8 at 78-81.

[92]Daes, above, note 4 at para. 166. See also, Pask, ibid. at 81: "Perhaps the most glaring point of dislocation is between the demand of Native Communities for control over access and the demand of the legal system for disclosure."

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securing their cultural heritage and folklore. Several committees at the international level have enquired whether copyright was the right framework for folklore protection, e.g., the Joint Committee of WIPO and UNESCO of 1975.[93] In Australia, the need for such an inquiry arose following well-publicised concern in the early 1970s about the unauthorised reproduction of original artworks particularly as designs on tea-towels and souvenir products.[94]

4.1 Recommendation of the Australian Working Party of 1981[95]

The Working Party concluded that it was essential to protect the Australian Aboriginal folklore which, in the committee's view, was a national resource deserving protection both in the interests of Aboriginals and of the general public. It found that the present Australian copyright and designs laws offered inadequate protection, and that mere amendment of the *Copyright Act* was an unsatisfactory solution. The committee stated that the existing Australian law did not in general provide adequate legal protection for Aboriginal artists when drawing upon their tradition. It made reference to the hurdles in protecting folklore under the *Copyright Act*, viz., difficulties relating to originality, ownership, fixation, and term. Copyright protection was also considered unsuitable in principle from a customary perspective.

The Working Party recommended that there be a special, *sui generis,* legislation, i.e., an Aboriginal Folklore Act which should provide for (i) prohibition on non-traditional uses of sacred-secret material; (ii) prohibitions on debasing, mutilating or destructive uses; (iii) payments to traditional owners of items being used for commercial purposes; (iv) a system of clearances for protective users of items of folklore; (v) an Aboriginal Folklore Board to advise the Minister on policy matters; and (vi) a Commissioner for Aboriginal Folklore to issue clearances and negotiate payments. The report suggested a mechanism for the examination by the Aboriginal Folklore Board of proposed uses of items of folklore by non-customary users on a case-by-case basis.

No special legislation has been enacted in pursuance of the recommendations of the Working Party.[96] Instead, the issue of protection of Aboriginal folklore has been debated, albeit in passing, by three other inquiries since the 1981 Report of the Working Party.[97]

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[93]"The issue of legal protection of folklore was very much to the fore in initial stages of the UNESCO process during the 1970s and culminated in the final formulation of *Model Provisions for National Laws*, UNESCO-WIPO, 1985. Since then little has happened on this 'prohibitive' line of folklore protection because of mounting criticism against the Model Provisions and, above all, the obvious difficulties encountered in their implementation." L. Honko, "Australia in the Frontline of the Safeguarding Process" [1989] Australian Folklore 3 at 9. Note that the 1987 inquiry opposed the idea of applying the Model Provisions on a broad basis in Australia, see *Report on Folklife - Our Living Heritage*, above, note 6 at 271.

[94]See *Altman Report*, above, note 17 at 296.

[95]Above, note 13.

[96]It is interesting to note that the *sui generis* alternative has not received universal endorsement: "Critics of any one of the proposed forms of *sui generis* protection of folklore are quick to point out that it is difficult enough to enforce and continually revise the existing forms of intellectual forms of intellectual property protection, such as the Berne Convention, the Universal Copyright Convention or the Paris Convention, to mention just a few. This logistics argument is both plausible and persuasive ....": Weiner, above, note 64 at 91.

[97]See *Report on the Recognition of Aboriginal Customary Laws*, above, note 40; *Report on Folklife - Our Living Heritage*, above, note 4; and *Altman Report*, above, note 17. It is interesting to note that the last-mentioned committee recommended piecemeal reform, instead of reform through comprehensive

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The Working Party defined "folklore" in its broadest sense. The definitional aspects lead to the two prime characteristics of Aboriginal folklore which uniquely present the legal difficulties in protection: the manner in which it is developed and depicted, and the notion of collective ownership.

The Working Party's recommendations amounted to an acceptance of a notion akin to the moral rights concept in copyright law of certain countries of the world, particularly those with civil law background. The main recommendation was for legislative recognition of the integrity of works of folklore and a scheme of remuneration for traditional owners. it is most unfortunate that to date the Working Party's recommendations have not been implemented by the successive Australian federal governments.[98]

In 1986, the Australian Law Reform Commission published a major report recommending recognition of Aboriginal law in a number of specific situations.[99] A recent Australian inquiry on folklife has raised the important issues of economic and moral rights regarding the collection and use of folklore.[100]

4.2 "Stopping the Rip-offs" Issues Paper[101]

This paper sought to discern and define appropriate measures for effective intellectual property protection in order to stop the exploitation of indigenous peoples' works. After detailing the current copyright protection available for Aboriginal and Torres Strait Island peoples' cultural expressions

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legislation. Its recommendations included (i) increased dissemination of information within the Aboriginal arts and crafts industry; (ii) establishment of a centralized artists' collection agency on the lines of several existing collection agencies in Australia (e.g., Aboriginal Artists Agency [AAA], Australasian Performing Right Association [APRA], Australasian Mechanical Copyright Owners' Society [AMCOS], Copyright Agency Limited [CAL], Australian Contemporary Music Development Company [ACMDC]. It is to be noted that the committee did not favor a specialist Aboriginal copyright collection agency; (iii) increased legal assistance to Aboriginal artists; and (iv) increased participation by art centers and representative bodies in issuing reproduction licenses and addressing copyright infringements. On the whole, it seems that the committee found the existing legal framework satisfactory, but that increased awareness and administration were desirable.

[98]See P. Banki, "The Report of the Working Party on the Protection of Aboriginal Folklore" [1983] Copyright Reporter 8. See also, R Bell, "Protection of Aboriginal Folklore: Or do they Dust Reports?" [1985] Aboriginal Law Bulletin 6-8.

[99]Above, note 40. Issues of intellectual rights were treated as being outside the scope of the Law Commission's reference, but it noteworthy that the Commission endorsed the need for adequate legal protection for Aboriginal folklore (ibid. at 338).

[100]*Report on Folklife - Our Living Heritage*, above, note 4. It is to be noted that this inquiry was confined to Anglo-Celtic Australia and did not cover Aboriginal cultures. The report presented 51 recommendations to the government regarding the study, conservation, preservation, and extension of folklife. The report dwelled at length on the possibility of applying existing copyright principles to folklore materials and suggested numerous solutions, e.g., a system of public domain payments, a legal deposit requirement ensuring the acquisition of copies of all materials for the national collections, a formal set of ethical standards, and codes of practice in the documentation, archiving and use of folklore materials, etc.

[101]International Trade Law and Intellectual Property Branch, Business Law Division, Attorney-General's Legal Practice, October 1994. See further, C. Hawkins, Stopping the rep-offs: Protecting Aboriginal and Torres Strait Islander Cultural Expressions" (1995) 20 Alternative Law Journal 7.

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under the copyright and designs legislation, the paper sets out the inadequacies and limitations of this form of protection. However, it does little to advance the position outlined in the Working Party report published in 1981. Like the Working Party, the paper proposes several measures to overcome the inadequacies in copyright legislation, including amendments to the *Copyright Act*. However, the paper recognises that there would be practical difficulties in incorporating the concept of communal ownership in the copyright legislation. The paper also suggests that the *Aboriginal and Torres Strait Islander Heritage Protection Act* should be amended in a manner that allows communities a right of action to protect artistic works of traditional significance, with no limit on the term of the protection for such works and no requirement of material form.

Among the other options suggested in the paper for addressing the limitations in present protection, the one relating to introduction of an "Authentication" mark seems to have led to some follow-up action on the part of Aboriginal people. The authentication mark aims to combat proliferation of articles that falsely represent aboriginal origin or influence.[102] Of course, the effectiveness of this depends on how effectively the authentication mark is administered, and the way in which the public reacts to its use. Finally, two points are noteworthy. One, the paper does not favour the use of the word "Folklore"; instead, it refers to "arts and cultural expressions." And two, there is emphasis on works of an artistic nature rather than "cultural expressions" in the form of song, dance, myth, etc., that comprise folklore.

4.3 Moral Rights[103]

Copyright, in countries with the Anglo-Saxon legal system, including Australia, is primarily concerned with economic rights. Protection of moral rights (*droit moral*) does not exist in these countries. However, for Aboriginal folklore, moral rights are very significant for preventing debasement, mutilation or destruction of such cultural works. Under the present Australian copyright law, there is no obligation to acknowledge the creator of an artwork when the work is displayed in public or a reproduction is published, although sections 189 to 195 of the *Copyright Act 1968* (Cth) do require that works not be attributed incorrectly to a person other than the artist or author. Where the artist owns the copyright, proper attribution can be made a condition of the permission to use the work. The artist who does not own the copyright (or who does not have the negotiating power) does not have the opportunity to ensure attribution. Nor does any artist have the general legal right to ensure that their name appears where the original work is displayed.

Another moral right is the right to prevent distortions or alterations to the work (original or reproduction) that may not only damage the artist's reputation but in Aboriginal art spheres cause grave offence being a disrespectful act or disregard to Aboriginal religious beliefs. What must be understood is that almost all Aboriginal artistic objects have a meaning which, with varying degree, expresses Aboriginal religious beliefs. Sacred art, which the clan managers permit sale of, possesses a

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[102] See K. Wells, "The Development of an Authenticity Trade Mark for Indigenous Artists" (1996) 21 Alternative Law Journal 38.

[103] For an interesting review of the concept of moral rights in the Australian context, see D. Vaver, "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither such rights now?" (1988) 14 Monash Law Rev. 284. See generally, A. Dietz *Copyright Law in the European Community* (Sijthoff & Noordhoff, 1978) 66-78, for an excellent analysis of *droit moral* in the Continental-European countries. It is noteworthy that New Zealand has already introduced moral rights protection for creators in the *Copyright Act 1994* (NZ). For a comment on the new provisions, see A. van Melle, "Moral rights: The right of integrity in the Copyright Act 1994" [1995] N.Z.L.J. 301.

sacred meaning and general public meaning. The art buying public is told the public meaning, whereas the sacred meaning is kept secret by the Aborigines.[104] While expressly recognizing moral rights along the lines of civil law countries, which in Australia would have to be achieved by statute, attention would need to be given to the collective rights of the clan, in addition to effectively protecting the rights of individual Aboriginal artists.

5. CONCLUSIONS AND RECOMMENDATIONS

European settlement of Australia brought about the dispossession and dispersal of Aboriginal people from their lands and the destruction of much of their cultural heritage. Of all the injustices done to Aboriginal people, expropriation of their traditional land and flagrant exploitation and destruction (without recompense) of their culture are the losses they feel most keenly.[105]

Changes in government policy towards Aborigines have been slow and half-hearted.[106] Until the Australian legal system fully appreciates and recognizes the Aboriginal folklore, the indigenous peoples of Australia, like their counterparts of Anglo-Celtic background will forever remain victims of the dreaded "cultural cringe."[107] However, there seems to be the acceptance of the idea that Aborigines have (within certain limits) the "choice" to retain their racial identity and their folklore.[108] The pressures for change gained impetus from the 1967 national Referendum, which, by an overwhelming majority, empowered the federal parliament to enact special laws for Aborigines.[109]

Degradation of images through inappropriate use or application, such as the classic instance of reproducing sacred or semi-sacred images on tea towels or T-shirts, is an offence for which the Australian law provides no remedy. Many Aboriginal commentators place the wholesale appropriation

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[104]According to Ms. Anne Marie Brody, curator of the Holmes á Court collection, there is "an enormous imbalance between what is known about Aboriginal art and what there is to be known. The culture remains inaccessible despite the art. Aborigines jealously guard all that is secret and sacred." *Time* (16 July 1990) at 59.

[105]This sentiment has been expressed succinctly by Deane and Gaudron JJ. in their decision in *Mabo,* above, note 2 at 449 in the following words: "An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

[106]This continuing failure is in stark contrast with the position in the United States, Canada and New Zealand, e.g., the North American Indians have for a long time been recognized "as collectivities with their own legal status and powers, and with collective title to their lands." See J. Crawford, "The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal" (1989) 63 A.L.J. 392 at 398.

[107]A stern warning has been given recently in these words: "Over the ages, indigenous peoples have developed innumerable technologies and arts. They have devised ways to farm deserts without irrigation and produce abundance from the rain forest without destroying the delicate balance that maintains the ecosystem; they have learned how to navigate vast distances in the Pacific using their knowledge of currents and the feel of intermittent waves that bounce off distant islands; they have explored the medicinal property of plants; and they have acquired an understanding of the basic ecology of flora and fauna. Much of this expertise and wisdom has already disappeared, and if neglected, most of the remainder could be gone within the next generation." E. Linden, "Lost Tribes, Lost Knowledge" *Time International* , vol. 138 no. 12 (23 September 1991) at 50.

[108]See generally, *Report on the Recognition of Aboriginal Customary Laws*, above, note 40 at 18.

[109]See s. 51 (xxvi) of the *Australian Constitution.*

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of Aboriginal art in the context of wider cultural colonisation and dispossession.[110] This has the potential of breeding disharmony among people. This takes variety of forms including the commodification of Aboriginal art and culture, in particular its packaging as Australia's number one tourist resource, and a proliferation of Aboriginal-style works by non-Aborigines.[111] This abuse has a two-fold significance. Firstly, it deprives Aboriginal people of an important economic base. And, secondly, if trivialised, it can undermine the autonomy of unique Aboriginal traditions. "It is reflective of our legal order that the sacrilegious use of sacred objects and images is neither a civil nor a criminal offence, while the re-introduction of the Summary Offences Act makes swearing in public an offence punishable by imprisonment."[112]

Aboriginal people can be excellent "cultural ambassadors" for Australia. Already, Aboriginal and Torres Strait Islander dance groups and craftspeople have toured and gained public acclaim in countries in Europe, Asia, North America, and the Pacific. This will give rise to direct and indirect economic benefits - through tourism, employment creation, multiplier effects, and above all, it will make the original inhabitants of this vast continent feel at home in their "own" home.[113]

There is a strong case for the argument that the *Mabo* judgment can be broadened beyond the realm of real property rights and extended to cultural and intellectual property rights, provided that there has been a continued observance of Aboriginal customary laws despite the existence of the common law. Recognition by the Australian common law of "Aboriginal native title" in land must necessarily imply recognition of Aboriginal communal rights in sacred designs.

As we have seen above, in the past 20 years or so various committees have debated the matter regarding protection of indigenous peoples' cultural and intellectual property rights and suggested different solutions, ranging from a *sui generis* protection to all-out protection under the copyright law. But this debate has generated more heat than light and until the path breaking decision in *Mabo,* this had left a bitter residue of distrust. Be that as it may, what is remarkable is that no one has voiced any opposition to giving protection to Aboriginal culture and folklore. It is hoped that this *consensus* would lead to some legislative activity in this matter of national and global significance. The present author perceives that a "native intellectual property right" similar to the *Mabo* "native title" will be the best solution. Truly, there is a need for a new approach in this area, viz., a *sui generis* legislation dealing exclusively with expressions of folklore. In drafting such legislation, consultation with indigenous communities is vital. The primary aim of the new law should be to enhance the preservation and conservation of expressions of folklore. It should acknowledge the role of community ownership and control within that culture, where appropriate. Furthermore, the new legislation should include moral rights provisions, recognizing a communal interest as distinct from an individual artist's moral rights. Finally, a note of optimism - it is gratifying that

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[110]See Weiner, above, note 64 at 57, 65. See generally, Ziff, above, note 57. In his comprehensive treatment of the topic, the author warns that arguments against cultural appropriation must be not dismissed lightly.

[111]*Altman Report*, above, note 17 at 301-303.

[112]*Editorial* (1988) 34 Aboriginal Law Bulletin 3.

[113]The Australian history reveals that "the Aborigines have been treated as trespassers to be driven by force if necessary, from their traditional homelands." per Deane and Gaudron JJ. in *Mabo,* above, note 2 at 450. In the same vein, Toohey J. remarked that it was a startling consequence that, upon annexation, all indigenous people became trespassers on their own land. "That was not a consequence the common law dictated; if it were thought to be, this Court should declare it to be an unacceptable consequence, being at odds with basic values of the common law." Ibid. at 484.

the Federal Court of Australia in its recent judgment in *Milpurrurru* [114] has followed the lead of *Mabo* by exhibiting a sensitive and flexible approach towards the cultural barriers confronted by Australia's indigenous peoples.

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[114] Above, note 1 and the accompanying text.