

# The Double Movements That Define Copyright Law and Indigenous Art in Australia

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*This article examines the history of the relationship between indigenous art and the Copyright Act 1968 (Cth)<sup>1</sup> in Australia as a social, historical and cultural product. In particular, it is argued that copyright law's treatment of indigenous works is characterized by a double movement of inclusion and exclusion that is, in turn, influenced by the meanings ascribed to indigenous art and culture in wider society. This double movement, despite being in a constant dialogic, continues to leave its mark on the political and the legal. Whilst the parameters of indigenous art's inclusion has widened, the ultimate rejection of cultural difference persists.*

## I Introduction

Considerable scholarly attention has been paid to the inappropriate protection that Australia's *Copyright Act* offers indigenous artworks.<sup>2</sup> In particular, the originality requirement, material form requirement, time duration of rights and the definition of joint authorship that excludes communal interests have been flagged as problematic for the protection of the unique signifiers of indigenous art. Comparatively little attention has been paid, however, to the way in which the relationship between indigenous art and copyright interacts with wider socio-cultural and political phenomena. At a time when the *Copyright Act's* deficiencies have been extensively documented, it is appropriate to examine the relationship between indigenous art and copyright at this broader level. To do so reveals valuable information not only about the operation of the *Copyright Act*, but also the social values and expectations against which indigenous art is measured.

A contextual study of the relationship between indigenous art and copyright involves deconstructing the periods of legal exclusion and legal inclu-

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1 Hereinafter *Copyright Act*.

2 See reports such as Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: Michael Frankel & Company, written and published under commission by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998); Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: World Intellectual Property Organization, 2003). See also journal articles such as Marie Hadley, "A Lack of Political Will or Academic Inertia? The Need for Non-Legal Responses to the Issue of Indigenous Art and Copyright" (2009) 34:3 *AltLJ* 152 at 153; Cate Banks, "The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators" (2000) 9(2) *Griffith LR* 334 at 344; Joseph Githaiga, "Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge" (1998) 5(2) *eLaw J* at 11; Stephen Gray, "Squatting in Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14(2) *LIC* 29 at 41; Colin Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 *EIPR* 227 at 231.

sion of indigenous art from the ambit of the *Copyright Act* with reference to wider socio-cultural values and political developments. It is argued that this examination reveals that a double movement characterizes the interaction between Australia's copyright law and wider society: a dialogic of inclusion and exclusion. This double movement of inclusion and exclusion is dynamic and yet constant in its ultimate withdrawal from acknowledging indigenous cultural difference in a meaningful way. Whilst the parameters of inclusion of indigenous culture has shifted significantly in the last 100 years, there nevertheless remains an element of exclusion in copyright law that continues to mark the relationship between indigenous art and the *Copyright Act* today.

Sections II, III and IV of this article establish the general framework from which the double movement argument will be made. Section II outlines the process by which the relationship between indigenous art and the *Copyright Act* will be deconstructed and the nature of the double movement that characterizes this relationship. Section III gives a brief overview of the functioning of the *Copyright Act*, which grounds later discussion of legal developments. Section IV defines what is meant by such terms as "indigenous art" and "indigenous community" and outlines its unique cultural context.

In Section V, the perceived difficulty with the *Copyright Act*'s originality requirement for the protection of indigenous art will be discussed. This difficulty will be posited as a reflection of socio-cultural understandings of the indigenous as primitive. This theme will be traced through anthropological scholarship as well as the Australian art sector's response to indigenous representations, designs and themes. It will be argued that the exclusion of indigenous artists as insufficiently creative, yet the concurrent fascination with which wider society holds indigenous culture and artworks evidences the double movement of inclusion and exclusion.

In Section VI, this article will explore the ramifications of the rise of indigenous art from the realm of the primitive to fine art. In particular, the effect of the Papunya Tula arts movement will be discussed, as will the greater inclusion of indigenous culture and spirituality within the national identity for tourism purposes. It is argued that the confluence of these events led to the increasing politicization of intellectual property rights, which prompted artists such as Yanggarny Wunungmurra and John Bulun Bulun to sue for copyright infringement.<sup>3</sup> However, though by the 1980s indigenous works were held to be sufficiently original to attract copyright protection and included within the scope of the Act, I argue that the way in which evidence of originality was interpreted and presented by "experts" at this time evidences the exclusionary aspect of the double movement.

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3 See *Yanggarny Wunungmurra v. Peter Stripes Fabrics* (1983) Federal Court, unreported; *Bulun Bulun v. Nejlam Pty Ltd* (1989) Federal Court, unreported.

Section VII proceeds from this point and outlines the next phase of the double movement where the parameters of inclusion of indigeneity were pushed further back by cases such as *Yumbulul v. Reserve Bank of Australia*,<sup>4</sup> *Milpururru v. Indofurn Pty Ltd*<sup>5</sup> and *Bulun Bulun v. R & T Textiles*.<sup>6</sup> Tracing the trajectory of these cases allows the current state of the legal protection of indigenous communal interests to be understood. It also provides a backdrop for discussion of the recent *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth).<sup>7</sup> Whilst this period can be understood as further legally including the cultural significance of indigenous art within the scope of the *Copyright Act*, it is ultimately suggested that the exclusionary aspect of the double movement underlying the relationship between indigenous art and copyright has not been overcome because no free-standing rights for indigenous communities are secured. The double movement of inclusion and exclusion underlying copyright's dealings with indigenous art persists, despite changes to the parameters of inclusion.

## II The Double Movement

The double movement that frames the relationship between copyright law and indigenous art involves the simultaneous acceptance of certain aspects of indigeneity and indigenous production of art, and the concurrent rejection of the unique markers of indigenous art as independently founding culturally appropriate rights protection. Thus, the double movement can be understood as a movement of inclusion that is ultimately undone by its exclusionary elements. For the purposes of this article, "inclusion" and "exclusion" are not used as binaries, but to denote a constant dialogic of push and pull where legal inclusion is judged just as capable of having exclusionary potential as outright legal exclusion.<sup>8</sup>

The double movement of simultaneous inclusion and exclusion is unveiled by examining legal, political and social phenomena during the periods of indigenous art's exclusion and inclusion from the *Copyright Act*. I argue

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4 *Re Terry Yumbulul v. Reserve Bank of Australia; Aboriginal Artists Agency Limited and Anthony Wallis* (1991) 21 IPR 481 [*Yumbulul*].

5 *George Milpururru, Banduk Marika, Tim Payunka and The Public Trustee for the Northern Territory v. Indofurn Pty Ltd, Brian Alexander Bethune, George Raymond King and Robert James Rylands* (1994) 54 FCR 240 [*Milpururru*].

6 *John Bulun Bulun & Anor v. R & T Textiles Pty Ltd* (1998) 86 FCR 244 [*Bulun Bulun v. R & T Textiles*]. The artist in this case (John Bulun Bulun) is the same artist in the case *Bulun Bulun v. Nejlam*.

7 Hereinafter *Indigenous Communal Moral Rights Bill*.

8 For a related discussion of the nature of the exclusion/inclusion of indigenous people in law see Jane Anderson & Kathy Bowrey, *The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas Are Being Advanced?* (Paper presented to the Contexts of Invention Conference, Cleveland, Ohio, April 20-23, 2006) at 1-41, particularly at 24-26.

that exploring the possible connections between these phenomena allows for the latent meanings of the law to be understood as part of the wider process of social inclusion and exclusion of the indigenous. To this end, a “double reading” of the four indigenous art and copyright cases,<sup>9</sup> *Bulun Bulun v. Nejlam Pty Ltd*,<sup>10</sup> *Yumbulul, Milpururru* and *Bulun Bulun v. R & T Textiles* will be undertaken, as will analysis of the *Indigenous Communal Moral Rights Bill*.

### III Defining Indigenous Art

It is difficult to define exactly what is (and correspondingly, what is not) indigenous art. This difficulty arises from the contested nature of the category “indigenous” as much as from the problematic delineation between art produced by an indigenous person, where indigeneity is “peripheral to the work in question,” and indigenous artworks, where cultural connection is paramount.<sup>11</sup> Ultimately, it appears that defining indigenous art hinges on perceptions of authenticity; only *real* indigenous people living in a *real* indigenous community can create *real* indigenous art. However, this general statement is once again problematic because, when it comes to indigeneity, the categories of *real* are often imposed from the outside and do not always neatly correspond to the reality of the production of indigenous art.<sup>12</sup>

It is important not to define indigenous art in an overly prescriptive manner because too often urban artists and artists with fair complexions are discriminated against in the market for not being “real Aboriginals” or practising their “true culture.” As Trevor James, an indigenous man with Arrentye and Kaurna background, notes, “[a]n Indigenous person is one who identifies as a person of that racial group and is accepted by others within that community; the level of darkness or fairness of their skin is not an issue.”<sup>13</sup> It is important to look beyond preconceived notions of what is an authentic indigenous person when it comes to indigenous art. Therefore, I will adopt a broad definition of indigenous art in this article: indigenous art is art produced by a

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9 There is only limited case law that deals with indigenous art and copyright in Australia. Whilst there may be other unreported cases, one known case is *Wunungmurra v. Peter Stripes Fabrics* (1983) Federal Court, unreported. The four cases mentioned above are the core cases in this area of law and those frequently referred to in the literature dealing with this subject.

10 (1989) Federal Court, unreported [*Bulun Bulun v. Nejlam*].

11 Christopher Kendall & Sarah Meddin, “Accessorising Aboriginality: Heritage Piracy and the Failure of Intellectual Property Regimes to Safeguard Indigenous Culture” (2004) 16(1) *Bond LR* 166 at 179.

12 Stephen Gray, “Black Enough? Urban and Non-traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art” (1996) 7(3) *Culture and Policy* 29 at 34; Marcia Langton, “Aboriginal Art and Film: The Politics of Representation” (2005) 6 *Rouge*, online: [Rouge <http://www.rouge.com.au/6/aboriginal.html>](http://www.rouge.com.au/6/aboriginal.html).

13 Trevor James & Viscopy [Visual Arts Copyright Collecting Agency], “Supporting Indigenous Artists: Finding a Way Forward” (March/April 2006) 6(18) *ILB* 7 at 7.

self-identifying indigenous person whose work embodies knowledge that is part of the cultural traditions of a community<sup>14</sup> and is perceived as such by the artist. Adopting this definition, both artworks produced in urban settings and those produced in tradition-oriented remote communities potentially classify as indigenous art because they may be equally concerned with the generation and communication of symbolic meaning.<sup>15</sup> In this instance, the concept of “community” refers to a group of indigenous people who generate, preserve and transmit knowledge in an intergenerational context.<sup>16</sup> A broad definition of indigenous art recognizes that many successful indigenous artists operate independently in urban areas, especially in metropolitan centres.<sup>17</sup>

Despite this inclusive approach, indigenous artists living in “settled” communities are often described as lacking culture as compared to “the ‘real tribals’ from the Centre,” and their art as ‘contemporary.’<sup>18</sup> Interestingly, this sense of difference may be articulated and perpetuated by indigenous artists, as well as bemoaned by others. For example, a respected Barkindji artist and culture man from Wilcannia, a town where the local indigenous population is frequently referred to as having “lost” their culture,<sup>19</sup> has spoken of the “Sydney-type” artist who travels to the Centre or Top End to visit people more culturally knowledgeable and gain some power in their work that is otherwise missing:

A lot of artists they just do it for where they wanna be with the old people. They use the old people to get what they want. They come back an’ use it as their own power.<sup>20</sup>

This sense of a loss suffered by urban indigenous artists has also been articulated by artists dwelling in remote areas. For example, Michael Nelson Tjakamarra, a Pintupi man and artist from Central Australia, has expressed that “he feels sorry for” urban artists: “They [whites] want to see [art] from the

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14 See Daniel Gervais, “Traditional Knowledge & Intellectual Property: A TRIPS Compatible Approach” (2005) Spring Mich. St. L. Rev. 137 at 140.

15 Ruth Rentschler & Mirko Bagaric, “The Indigenous Art Market: A Roadmap to a More Equitable and Efficient System” (July 2004) 6(4) ILB 11 at 12.

16 See, for example, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Twelfth Session, *The Protection of Traditional Knowledge: Revised Objectives and Principles* [WIPO/GRTKF/IC/12/5(c)] (Geneva: WIPO, 2008) at Article 5; James Kane, “Custodians of Traditional Knowledge Under the WIPO Draft Principles and Objectives” (2009) 20 AIPJ 24 at 31.

17 See, for example, Jon Altman, “Brokering Aboriginal Art: A Critical Perspective on Marketing, Institutions, and the State,” Ruth Rentschler, ed. (Kenneth Myer Lecture in Arts and Entertainment, Thursday 7 April 2005, Bunjilaka Gallery, Melbourne Museum) at 2.

18 Lorraine Gibson, “Art, Culture and Ambiguity in Wilcannia, New South Wales” (2008) 19(3) *The Australian Journal of Anthropology* 294 at 297.

19 *Ibid.* at 296.

20 *Ibid.* at 308.

Centre ... Urban Aboriginal people *ngurrpaya nyinanya* (“they are ignorant”) [of Aboriginal Law].<sup>21</sup>

While urban-dwelling artists may be members of clans whose social and cultural reality has been “marked by rupture and discontinuity,” this does not mean that they necessarily see themselves in “incomplete” terms.<sup>22</sup> For example, a senior Barkindji artist from Wilcannia has objected to his label as a “contemporary artist,” saying:

What am I, am I a contemporary blackfella or what? If we walk down the street with a *lap-lap* and spear we’d be jailed for indecent exposure and having a deadly weapon. We [are] who people want us to be.<sup>23</sup>

On another occasion, when he and a friend were asked why they were opposed to the term “contemporary” they responded by saying because it meant that they were “not really black—not really Aboriginal.”<sup>24</sup> Another Barkindji artist, Philip Bates, insists that the content of Barkindji art “demonstrates that their Law and ‘Dreamtime [are] still alive.”<sup>25</sup> Murray Bates, yet another Barkindji artist, agrees, stating that he produces art “to try and get some sort of contact with our culture ... Try to, ah, put a message across about our Dreamtime stories.”<sup>26</sup>

It is artificial to exclude works that are self-consciously putting a message across about Dreamtime stories and the unique identity of indigenous communities merely because these communities may not have the same cultural continuity as geographically remote indigenous communities. However, it is also apparent that much of the commentary surrounding the relationship between indigenous art and copyright is premised in terms of indigenous art being that art produced by artists living in geographically remote areas. Altman estimates that there are between 5,000 and 6,000 artists operating under these circumstances.<sup>27</sup> While this art may be produced subject to a variety of cultural norms, some generalizations may be made about the context within which “traditional” art is produced, which will be outlined below. These generalizations may also be applicable to the circumstances within which urban art is produced, and are at the core of the dissatisfaction with indigenous art’s treatment by the *Copyright Act*.

In remote indigenous communities, the artist is rarely free from social ties because art is an exercise in cultural affirmation and part of everyday cultural

21 Michael Nelson Tjakamarra in Fred Myers, “Culture Making: Performing Aboriginality at the Asia Society Gallery” (1994) 21(4) *American Ethnologist* 679 at 689-690.

22 Gibson, *supra* note 18 at 302, 306.

23 *Ibid.* at 308.

24 *Ibid.*

25 Philip Bates in Gibson, *supra* note 18 at 303.

26 Murray Butcher in Gibson, *supra* note 18 at 305.

27 Altman, *supra* note 17 at 1.



life. Each clan has their own designs and artistic styles that reflect a “unique relationship” with the ancestors that “created the landscape.”<sup>28</sup> The creation of artworks fulfills the important function of “communicating themes, beliefs and customs throughout the generations of a particular clan.”<sup>29</sup> As artist Michael Nelson Tjakamarra explains:

Aboriginal Art is different to Non-Aboriginal Art. They make it up in their imagination but ours are not just pretty pictures. Our stories are given to us to carry and pass on to our children. Non-Aboriginal people have to be prepared, when they see our paintings, to learn something about Aboriginal culture.<sup>30</sup>

Art as embodied culture means that Aboriginal artists are regarded as temporary cultural custodians with an overriding duty to accurately preserve the knowledge embodied in their artworks.<sup>31</sup> In order to ensure that cultural truths are presented in the “right way,” a strict network of rules controls the production process.<sup>32</sup> Such strictness is justified because of “[t]he importance of an accurate transmission of themes to a clan’s identity and culture.”<sup>33</sup>

Ownership of stories and the right to represent that knowledge in artworks is divided amongst community members according to categories such as clan, family, inter-clan and in-law ownership and is dependent upon a mix of factors, such as heredity, kinship, age, initiation and sex.<sup>34</sup> Further, each Dreaming, or ancestral story, has rights and responsibilities attached to it that override an author’s individual creativity.<sup>35</sup> As Anmatyerre artist Kathleen Petyarre explains, unauthorized creations are prohibited:

I’m not allowed to paint other [Anmatyerre] people’s Dreaming ... I’ve just got to do my own Dreaming. Otherwise big trouble—our Law says “Not allowed!”

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- 28 Isabella Alexander, “White Law, Black Art” (2001) 10(2) *International Journal of Cultural Property* 185 at 188.
- 29 Margaret Martin, “What’s in a Painting? The Cultural Harm of Unauthorised Reproduction: *Milpurrru & Ors v. Indofurn Pty Ltd & Ors*” (1995) 17 *Syd L Rev* 591 at 593; see also: Githaiga, *supra* note 2 at para. 12; Colin Golvan, “Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun” (1989) 10 *EIPR* 346 at 348; Wandjuk Marika, “Copyright on Aboriginal Art” (1976) Feb *Aboriginal News* 7 at 7.
- 30 Jinta Desert Art, “Michael Nelson Jakamarra,” online: <<http://www.jintaart.com.au/bios/michaelbio.htm>>.
- 31 Stephen Muecke, “Body, Inscription, Epistemology: Knowing Aboriginal Texts” in Emmanuel Nelson, ed., *Connections: Essays on Black Literatures* (Canberra: Aboriginal Studies Press, 1988) 41 at 46-47; Stephen Gray, “In Black and White or Beyond the Pale? The ‘Authenticity’ Debate and Protection for Aboriginal Culture” (2001) 15 *A Fem LJ* 105 at 108.
- 32 Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective* (Sydney: Australian Copyright Council, March 1997) in Githaiga, *supra* note 2 at paras 13-14; Golvan, *supra* note 2 at 230.
- 33 Martin, *supra* note 29 at 593.
- 34 Linda Ford, “An Indigenous Perspective on Intellectual Property” (1997) 3(90) *Abor LB* 13 at 13; Kenneth Maddock, “Copyright and Traditional Designs—An Aboriginal Dilemma” (1988) 2(34) *Abor LB* 8 at 8.
- 35 Gray, *supra* note 31 at 108.



Doing wrong Dreaming [someone else's Dreaming]—that would make big trouble for me, big problem.<sup>36</sup>

Artists who paint someone else's Dreaming or in another clan's artistic style without authorization are exposed to sanctions. For example, artist Lili Hargreaves Ngarrayi states that she is only allowed to paint the desert budgerigar, and, if she dared to paint someone else's Dreaming, her people would "sing [her] to death."<sup>37</sup> Other traditional sanctions for unauthorized reproductions include spearing, banishment<sup>38</sup> and the taking away of paint. Kimberley artist Dickie Tatayra concurs, stating that "[i]n the olden days, you'd get a spear."<sup>39</sup>

Although strict rules control the content of what may be drawn upon in creating a work, individuality remains an important part of the creative process. Artists who have rights to the same Dreaming are not permitted to copy each other's works. For example, renowned artist Banduk Marika has said:

I've got to make my work look as my own, I've got to have my own idea. I've gotta have my own originality. I can't make it look exactly like everybody else's in my family. There might be similarity, you can relate your work to your father's or mother's—but it's still yours, it's still your own design.<sup>40</sup>

Further, the rights entrusted to individuals involved in creating a work are distinct and there is often a division of labour and responsibility.<sup>41</sup> For example, Morphy and Frow identify that in Yolngu culture, *mardayin* ("sacred law") rights include ownership of certain images. *Mardayin* rights also include the right to divulge their meaning, and to authorize or restrict the use of a painting. These rights may be exercised independently of each other. Therefore, a person may exercise control over a painting's production and be considered its owner despite not having created that painting.<sup>42</sup> The permissibility of this practice is evident in Centralian and Western desert law which endorses collaboration. Here, the *kirta* ("owner" or "boss") of a Dreaming has the right to "subcontract" the actual painting of an artistic work to *kurtungurlu* ("co-owners" or "guardians") of the Dreaming, yet still sign it as theirs.<sup>43</sup>

36 Christine Nicholls, *From Appreciation to Appropriation: Indigenous Images and Influences in Australian Visual Art* (Adelaide: Flinders University, 2000) at 8 in Ben Goldsmith, "A Positive Unsettling: The Story of Sakshi Anmatyerre" (2000) 9(2) Griffith LR 321 at 330.

37 Ali Gripper, "Tribal Law That Keeps Lili's Dots in Check" *Sydney Morning Herald* (26 September 2000) in Alexander, *supra* note 28 at 188.

38 Alexander, *supra* note 28 at 205.

39 Dickie Tatayra in Debra Jopson, "Misused Spirits of Creation Returned to Proper Custodians" *Sydney Morning Herald* (7 March 2001) at 7.

40 Goldsmith, *supra* note 36 at 330-331.

41 Maddock, *supra* note 34 at 8; Martin, *supra* note 29 at 593.

42 Howard Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (Chicago: University of Chicago Press, 1991) at 58 in John Frow, "Public Domain and Collective Rights in Culture" (1998) 13 IPJ 39 at 42.

43 Christine Nicholls, "What is Authorship?" (2000) 25(4) Alt LJ 187 at 187.

The close supervision of clan members over the exercise of rights in ancestral stories extends beyond the creation stage to the work's subsequent release into the public arena and to reproductions. This enduring control is highlighted by the evidence tendered by Djardie Ashley, *Djungayi* ("manager" or "policeman") in *Bulun Bulun v. R & T Textiles*. Mr Ashley, who had an obligation to ensure that Bulun Bulun maintained the integrity of the land and *mardayin* in the creation of his artworks, said: "[i]f Bulun Bulun wanted to licence *At the Waterhole* so that somebody could mass produce it ... he would need to consult widely."<sup>44</sup>

Despite the cultural markers of indigenous art, it is not synonymous with "pre-contact" art. Indigenous art production is continually evolving and dynamic: "[c]reativity and innovation is continuing and current,"<sup>45</sup> and the use of non-traditional colours, for example, does not, as a matter of course, undermine the sacred meanings and traditional knowledge expressed in works. As Clemenger Prize-winning Kuninjku artist John Mawurndjul explains:

I am doing things differently. I am thinking about what my father told me ... The way I paint is my own idea from my own way of thinking. I changed the law myself. We are new people. We new people have changed things.<sup>46</sup>

Whatever its precise form, indigenous art may be ultimately recognized as cultural capital.<sup>47</sup> And it is as cultural capital that indigenous art is believed to not be adequately protected by the historic and current operation of the *Copyright Act*. Indigenous art is art produced by indigenous people from a variety of circumstances, who may reinterpret cultural themes and sacred knowledge in a multiplicity of ways.

#### IV Copyright Act

As a former English colony, Australia's copyright regime is quite similar to Canada's. Artistic works are a category protected by the *Copyright Act*<sup>48</sup> and a work must be reduced to material form and original<sup>49</sup> for copyright to vest. While "material form" is not explicitly outlined in the *Copyright Act*, it is

44 *Bulun Bulun v. R & T Textiles*, *supra* note 6 at 252.

45 Robert Howell, *The Interconnection of Intellectual Property and Cultural Property ("Traditional Knowledge")*, online: <[http://webcache.googleusercontent.com/search?q=cache:FKqonpBISlcJ:www.fphlcc.ca/downloads/interconnection-of-ip-cultural-property.pdf+Robert+Howell,+The+Interconnection+of+Intellectual+Property+and+Cultural+Property+\(%E2%80%9CTraditional+Knowledge%E2%80%9D\),&hl=en&gl=au](http://webcache.googleusercontent.com/search?q=cache:FKqonpBISlcJ:www.fphlcc.ca/downloads/interconnection-of-ip-cultural-property.pdf+Robert+Howell,+The+Interconnection+of+Intellectual+Property+and+Cultural+Property+(%E2%80%9CTraditional+Knowledge%E2%80%9D),&hl=en&gl=au)> at 2.

46 J. Mawurndjul, "I am a Chemist Man, Myself" in H. Perkins, ed., *Crossing Country: The Alchemy of Western Arnhem Land Art* (Sydney: Art Gallery of NSW, 2004) at 136, in Altman, *supra* note 17 at 16.

47 Gibson, *supra* note 18 at 304.

48 See *Copyright Act* s. 10(1) (definition of "work").

49 *Copyright Act* s. 32. The Act contains no definition of the term "original."

implicit in a number of provisions, such as those relating to the making and publication of works and the reproduction of works.<sup>50</sup> Originality has been interpreted as not requiring something original or novel,<sup>51</sup> and is correlative with authorship, the author being the person who originates or gives existence to the work.<sup>52</sup>

Once these requirements have been met, copyright will subsist automatically in published and unpublished artistic works for the author's life, plus 70 years.<sup>53</sup> It is important to note that under s. 8, copyright does not "subsist otherwise than by virtue of this *Act*."<sup>54</sup> During the copyright period, the author of an artistic work will have the exclusive right to reproduce the work in a material form, to publish the work and to communicate the work to the public.<sup>55</sup> In recent years, the *Copyright Amendment (Moral Rights) Act 2000* (Cth) has expanded copyright protection to non-economic interests through rights of attribution and authorship, consistent with Article 6B of the *Berne Convention*.<sup>56</sup> Infringement of an author's copyright will be established where a substantial part of an original work is taken.<sup>57</sup> If substantial reproduction is found, the infringer may have recourse to the "fair dealing" defences outlined in s. 112 of the Act. Where an infringement claim is successfully made out, three main types of civil remedies will be available: injunction (interlocutory and final), and either damages or an account of profits.<sup>58</sup> In addition, a plaintiff may be entitled to the delivery up of infringing copies.<sup>59</sup>

There are no provisions that deal specifically with indigenous art, although it has been suggested that the recent moral rights amendments may help remedy the cultural harm suffered by artists whose works are produced

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50 For example, an artistic work is considered to be made at the time when it is "first reduced to writing or to some other material form." See *Copyright Act* s. 22(1).

51 See *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-610.

52 See *Sands v. McDougall Pty Ltd v Robinson* (1917) 23 CLR 49 per Isaacs J. at 55; see also *Ice TV Pty Ltd v. Nine Network Australia Pty Ltd* [2009] HCA 14, French C.J., Crennan and Kiefel J.J. at [33]-[34].

53 *Copyright Act* s. 33(2).

54 This has been interpreted as precluding indigenous customs and artistic context from founding an external *sui generis* source of communal ownership in the intellectual property in artworks, see *Bulun Bulun v. R & T Textiles* (1998) 86 FCR 244 at 258.

55 *Copyright Act* s. 31 (1)(b).

56 *Copyright Act* Part IX.

57 *Copyright Act* s. 14(1). Substantiality is primarily a question determined by reference to the quality rather than the quantity of the reproduction; see *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273 per Lord Pearce at 293; *TCN Channel Nine Pty Ltd v. Network Ten Pty Ltd (No 2)* (2005) 145 FCR 35. Cases such as *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd* [1934] 1 Ch 593 illustrate this approach. In addition, an intention to infringe can be relevant to a finding of substantial reproduction, see *Hanfstaengl v. Empire Palace Ltd* [1894] 3 Ch 109.

58 *Copyright Act* s. 115(2).

59 *Copyright Act* s. 116(1).

without permission.<sup>60</sup> Other commentators have pointed to the ongoing incompatibility between the underlying assumptions of the *Copyright Act* and the beliefs, aspirations and practices of indigenous communities.<sup>61</sup> However, whether or not this is true, it is apparent that intellectual property rights in indigenous art have been pursued as a means for protecting cultural resources and promoting indigenous cultural integrity.<sup>62</sup> Accordingly, whilst it is open to argument whether the *Copyright Act* is the best means to protect the unique nature of indigenous art, this article will proceed on the footing that the inclusion of indigeneity within copyright is not only desirable, but is capable of securing material benefits.

## V Indigenous Art as Primitive Art

Until the late 1980s, the underlying cultural markers of indigenous artworks were thought to preclude the conferral of copyright protection because copyright only subsists in “original works,” and indigenous artworks were not considered “original works.”<sup>63</sup> In their 1981 report, the Working Party on Aboriginal Folklore expressed the view that copyright’s originality threshold would be difficult to meet due to “Aboriginal artists drawing upon pre-existing tradition,”<sup>64</sup> although it is immediately acknowledged that originality is commensurate with authorship and does not implicate a standard of novelty or inventiveness.<sup>65</sup> The Working Party also expressed concerns about the difficulties in establishing individual ownership because of tribal ownership of designs, which may not be alienated or transferred.<sup>66</sup> These factors contributed to the position of the Working Party which was to regard the protection of indigenous art a matter of folklore rather than copyright because

60 Patricia Loughlan, “‘The Ravages of Public Use’: Aboriginal Art and Moral Rights” (2002) 7(1) MALR 17 at 17-26, online: University of Melbourne < <http://law.unimelb.edu.au/CMCL/malr/7-1-2%20Ravages%20of%20Public%20Use%20Revised%20formatted%20for%20web.pdf>>.

61 See, for example, Justice Ronald Sackville, “Monopoly Versus Freedom of Ideas: The Expansion of Intellectual Property” (2005) 16 AIPJ 65 at 73; Johanna Gibson, “Traditional Knowledge and the International Context for Protection” (2004) 1(1) SCRIPT-ed 58 at 66.

62 See, for example, Kathleen Birrell, “‘Authorship and the Dreaming’: Indigenous Culture and Intellectual Property Law” (October 2005) 23(2) Copy Rep 32 at 32; Mariann De Beer, “Protecting Echoes of the Past: Intellectual Property and Expressions of Culture” (2006) 12 Cant LR 94 at 101.

63 *Copyright Act* s. 32.

64 Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Department of Home Affairs and Environment: 1981) [Aboriginal Folklore Report] at 13; see also in this Report: “a person making copies of an artistic work by an Aboriginal artist might be able to claim that the work was not protected by copyright. This would be because the work was based on a traditional Aboriginal design and was not therefore an “original” artistic work within the meaning of the Act” at 45.

65 *Ibid.* at 13.

66 *Ibid.* at 9.

“[t]o acknowledge the full copyright of an individual artist would be to deny the contribution of continuing living folklore to the artistic work.”<sup>67</sup> In so doing, the unauthorized use of indigenous artworks advantageously became “a question not complicated by private rights.”<sup>68</sup>

Judged as outside the realm of copyright protection, the indigenous artist is relegated to the status of a slave to tradition or custom and incapable of individual expression—as something less than a non-indigenous artist. Indeed, the Report suggests that to acknowledge copyright in indigenous artworks somehow denies or abrogates its cultural links and importance by treating its embodied folklore as dead. This judgment of “something less” not only operates as part of an exclusionary movement, but also has links to early Australian anthropology and the visual arts sector which equated Aborigines with “unsullied tradition,”<sup>69</sup> and reveals that the political is often shaped by lingering social attitudes.

Anthropology emerged in Australia in the 1870s within the framework of evolutionary thought and targeted stable, traditional, full-blood Aborigines for study as an early form of the human race.<sup>70</sup> For example, in drawing upon Spencer and Gillen’s ethnographic classic, *The Native Tribes of Australia*, Sigmund Freud states that the “most backward and wretched”<sup>71</sup> primitive man, the Australian Aborigine, “assumes a peculiar interest for us, for we can recognise in their psychic life the well-preserved, early stage of our own development.”<sup>72</sup> Views such as Freud’s resonate with the exclusionary stance of the Working Party on the issue of originality because implicit in the relegation of artists to the status of “mere interpreters of traditional stories,”<sup>73</sup> is the assumption that they are too inferior to think or act creatively.

While the Aboriginal Folklore Report excluded indigenous people from the category of “artist,” it is apparent that in their drafting of the *Aboriginal*

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67 *Ibid.* at 28.

68 *Ibid.*

69 Gillian Cowlshaw, “Colour, Culture and the Aboriginalists” (1987) 22(2) *Man* (New Series) 221 at 223.

70 Bain Attwood in Bain Attwood & John Arnold, eds, “Power, Knowledge and Aborigines” *Journal of Australian Studies*, special ed. (Bundoora: La Trobe University Press, 1992) at vii. In response to the anthropological view that Aboriginal people were an inferior race that would eventually die out, artists, scientists and documenters sought to photograph Aboriginal people for posterity. See Catherine Rogers, “Photography and Anthropology: Looking Back at the Camera” (1995) 7(1-2) *Olive Pink Society Bulletin* 28 at 34.

71 Sigmund Freud, *Totem and Taboo: Resemblances Between the Psychic Lives of Savages and Neurotics* (London: Routledge & K. Paul, 1919) at 2.

72 *Ibid.* at 1.

73 Martin Hardie, “Copywrong” (July 1990) *All Asia Review of Books*, 25 in Brad Sherman & Alain Strowel, eds, *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994) at 121.

*Folklore Bill*,<sup>74</sup> the Report is simultaneously accepting of the value of indigenous cultural products and their vulnerability to exploitation, evidencing the double movement in politics and society at this time.<sup>75</sup> The *Aboriginal Folklore Bill* was designed to protect Aboriginal folklore against unauthorized uses, to develop a system of clearances for users and to facilitate payments to traditional owners for items used for commercial purposes. In addition, the *Bill* specifically provides for prohibitions on debasing, mutilating or destructive uses of sacred secret materials and the establishment of an Aboriginal Folklore Board and a Commissioner for Folklore empowered to make determinations about uses of Aboriginal cultural items.<sup>76</sup> The nature of the Aboriginal Folklore Report, as concurrently exclusive of indigenous artists as *artists* and yet inclusive of the value of folklore as a *product*, is symbolic of the dualism that underlies the double movements of inclusion and exclusion in the relationship between indigenous art and copyright in Australia. Inclusion of the value of indigeneity in this political discourse is evident, but it is ultimately abrogated by an assumption of indigenous inferiority.

This type of inclusion that functions as an action of suppression is similarly evident in the development of the Australian arts industry and its non-authorized use of indigenous art's designs and aesthetic qualities during the twentieth century. As Brenda Factor notes, it was hoped that appropriation of "[t]his truly *Australian* style would ultimately bring about an artistic—and a national—identity separate from that of Europe."<sup>77</sup> As early as 1897, the aesthetic potential of "indigenous cultural products" was recognized in books, such as Thomas Worsnop's *The Prehistoric Art, Manufactures, Works, Weapons etc. of the Aborigines of Australia*.<sup>78</sup> It was not long after this that indigenous styles were put forward as a source of inspiration for non-indigenous artists. For example, artist Margaret Preston advocated the benefits of appropriating Aboriginal art, and she contributed four articles to *Art & Australia* between 1925 and 1941 urging non-indigenous artists to draw inspiration

74 The *Aboriginal Folklore Bill* was never adopted in Australia. The Report also suggested the possibility that s. 32 of the *Copyright Act* be amended to specifically include works based on folklore as original works, see Department of Home Affairs and Environment, *supra* note 64 at 45.

75 However, it could also be said that this acceptance in itself entails a double movement because in the process of recognizing the value of folklore the heritage of indigenous Australians is recast as the property of Australia as a nation; the work of "Aboriginal artists can properly be considered to be uniquely part of the Australian cultural heritage," in Department of Home Affairs and Environment, *supra* note 64 at 27.

76 Department of Home Affairs and Environment, *supra* note 64 at 4, 33-39; see also Robin Bell, "Protection of Aboriginal Folklore" (1985) 1(17) *Abor LB* 8 at 8.

77 Brenda Factor, "Marketing an Australian Identity" in Julie Marcus, ed., *Picturing the "Primitive": Images of Racing in Daily Life* (Sydney: LhR Press, 2000) at 177.

78 Laurie Duggan, *Ghost Nation: Imagined Space and Australian Visual Culture 1901-1939* (St Lucia: University of Queensland Press, 2001) at 211.

from indigenous works.<sup>79</sup> Similarly, Leonhard Adam, a historian, philologist and anthropologist, wrote in 1944:

[T]he most promising side of aboriginal art is undoubtedly *decorative* ornamentation, those conventional figures and geometric patterns with which the aborigines adorn their weapons, tools and ritual objects, especially the churingas. It can be safely said that almost all of these designs, which, to us, seem to be purely decorative have some symbolic significance ... From the artistic point of view, the arrangement of these ... symbolic markings, often reveals an astonishing sense of rhythm, and the way these drawings—actually engravings in either slate or wood—are fitted into a given space cannot fail to arouse our admiration. The Australian aborigine definitely has good taste.<sup>80</sup>

Artists increasingly embraced indigenous art for its ornamental possibilities and “good taste.” For example, during the 1930s, many Aboriginal motifs appeared in Margaret Preston’s paintings, the pottery of Allan Lowe, who was inspired by photographs of Aboriginal art from anthropologist Charles Mountford’s expedition, and in Frances Derham’s linocuts, which were influenced “by her visit to the Wik community of Aurukun.”<sup>81</sup> Inspiration for Aboriginal-style creations came from sources such as photographs, art books and bark paintings, and works were often reproduced in part or in their entirety.<sup>82</sup> Copyright issues, if considered at all, were discounted as “unproblematic.”<sup>83</sup>

Up until World War II, the Aboriginal-style art industry predominantly applied indigenous motifs in fine art paintings, but, by the 1950s and 1960s, this style was applied more widely to textiles, home wares and souvenirs.<sup>84</sup> The images that were displayed on household goods relied not only on indigenous artworks for inspiration, but also on the traditional imagery of the untouched noble savage: the dusty hunter with a wallaby slung over his shoulder, a lone man playing a didgeridoo, boomerangs, naked Aboriginal children with flies in the corners of their eyes, and the enigmatic hunter gazing off into the distance and standing on one leg, counterbalanced with his spear.<sup>85</sup> The popularity of such kitsch attests to the fascination with indigenous culture and its role as exotica during this period.

79 Ian McLean, “Aboriginalism: White Aborigines and Australian Nationalism” (1998) 10 AuHR at para. 12, online: Australian Humanities Review <<http://www.australianhumanitiesreview.org/archive/Issue-May-1998/mclean.html>>.

80 Leonhard Adam, “Has Australian Aboriginal Art a Future?” (1944) Autumn Angry Penguins 42 at 50 in Duggan, *supra* note 78 at 207.

81 Duggan, *supra* note 78 at 188, 211.

82 Factor, *supra* note 77 at 182.

83 Frederick McCarthy, *Australian Aboriginal Decorative Art*, 8th ed. (Sydney: The Australian Museum, 1974) in Duggan, *supra* note 79 at 211.

84 Factor, *supra* note 77 at 178.

85 Lynette Russell, “Going *Walkabout* in the 1950s: Images of ‘Traditional’ Aboriginal Australia” (1994) 6(1) Olive Pink Society Bulletin 4 at 4.



The social permissibility and popularity of Aboriginal-style art appropriation supports a finding of the double movement of inclusion and exclusion during the period where originality was perceived by government to be an issue for the subsistence of copyright in indigenous works. Mieke Bal's understanding of the difference between artefact and art is helpful in understanding the limited parameters of the acceptance of indigenous art in both law and society at this time. Bal suggests that as ethnography, primitive art is only readable as culture, regardless of its aesthetic qualities. As an artefact then, it "takes for granted what the [artwork] represses: the possibility of cultural difference."<sup>86</sup> Bal's argument suggests that when the interpretation of indigenous art as ethnography is made, the assumption that it is not representative of an individual's creative expression naturally follows. This distinction between ethnography and art is then reinforced by the repression of cultural difference that the art classification encourages: as art is purely aesthetics, indigenous "decorations" may be divorced from their cultural meaning and the process of appropriation considered value-free. In support, Factor has argued that indigenous art's ethnographic qualities means that it is unacceptable as art in its original form and requires "the mediation of a European artist to take it from its 'primitive' context, and replace it within a 'civilised' one."<sup>87</sup> She writes that because indigenous works have no value as art, they are effectively neutralized. As a result, a non-indigenous artist "could copy a motif and still view it, and have others perceive it, as an original work."<sup>88</sup>

The incongruousness of the position where an artwork produced by a non-indigenous artist could have copyright even though it was a substantial reproduction of an indigenous artwork (for which copyright was perceived not to subsist) is clearly legally dubious.<sup>89</sup> However, if one applies Bal's logic of art and artefact, the distinction between the privileged position of the non-indigenous artist and the inferior standing of the indigenous artist becomes understandable as a social construction. Anderson and Bowrey's argument that "[i]ndigenous people were valued because of perceived associations with nature, but devalued within other contexts such [as] science, progress and human improvement"<sup>90</sup> sheds further light on this double movement. Indigenous people were included within socio-cultural fields such as the visual

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86 Mieke Bal, "The Discourse of the Museum" in Reesa Greenberg, Bruce Ferguson & Sandy Nairne, eds, *Thinking About Exhibitions* (London: Routledge, 1996) at 206 in Duggan, *supra* note 78 at 221.

87 Factor, *supra* note 77 at 189.

88 *Ibid.*

89 It is important to note that although this assumption has been made in the literature, there is no case law that explicitly states that a reproduction of an indigenous painting may have copyright protection whilst the original painting does not.

90 Anderson & Bowrey, *supra* note 8 at 25.

arts, but only insofar as they were equated with nature and perceived as primitive, as other. When it came to the question of legal protection of intellectual property this same association with nature then operated to prevent their standing as intellectual, creative beings. The Working Party on Aboriginal Folklore's perception that indigenous artworks would have difficulty satisfying the *Copyright Act's* originality requirement can be understood as part of the wider socio-cultural penchant for regarding indigenous people as primitive but fascinating beings.

## VI Indigenous Art as Fine Art

The underlying assumption of indigenous primitivity that informed the stance of the Working Party on Aboriginal Folklore became increasingly hard to sustain during the 1980s following the rising popularity of indigenous art produced by indigenous artists. This popularity can be understood as a by-product of the Papunya Tula arts movement and indigenous art's participation in the global market which combined to raise the status of indigenous art from the realm of the primitive to fine art and evidences the social inclusion of this art form.

In 1971, teacher Geoffrey Bardon arrived at the Central Desert government settlement of Papunya and, after witnessing children making drawings in the sand, was instrumental in sparking a community-wide painting movement.<sup>91</sup> Bardon encouraged the Papunya artists to produce art for sale as an avenue for expression of cultural identity and pride and, in 1972, the Papunya artists established their own cooperative, Papunya Tula Artists Pty Ltd, the first Aboriginal-owned arts centre in Australia. The Papunya Tula arts movement generated excitement as a "new" fine art style almost from its inception<sup>92</sup> and was "an important catalyst for the more widespread acceptance of other regional art styles as fine art."<sup>93</sup> For example, in August 1971, Papunya artist Kaapa Tjampitjinpa won equal first prize at the Alice Springs Caltex Art Award.<sup>94</sup>

The interest generated in the Papunya Tula works contributed to the establishment of the Aboriginal Arts Board of 1973, and, following concern that the

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91 Susan McCulloch & Emily McCulloch Childs, *McCulloch's Contemporary Aboriginal Art: The Complete Guide*, 3d ed. (McCulloch & McCulloch Australian Art Books, Fitzroy, Victoria, Australia, 2008) at 19; see also Kathy Bowrey, "Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?" (2009) 13(2) AILR 35 at 37.

92 Altman, *supra* note 17 at 5.

93 *Ibid.* at 5.

94 McCulloch & McCulloch, *supra* note 91 at 19. See also Dick Kimber's discussion of the early recognition of the significance of this painting movement in S. McCulloch, interview, 1996, in McCulloch & McCulloch, *supra* note 91 at 21.

supply of Papunya art was exceeding demand, the Board suggested the unique solution that the works be sent overseas. The art was donated to overseas museums on the proviso that it would be on public show.<sup>95</sup> As Kimber notes, this turned out to be “one of the most subtle and brilliant marketing exercises in Australian art.”<sup>96</sup> Subsequently, Papunya artists, such as Clifford Possum Tjapaltjarri, have had solo exhibitions at the Institute of Contemporary Arts in London, and there was a Papunya Tula artists’ exhibition in May–June 1989 at the John Weber Gallery in New York City.<sup>97</sup>

The social inclusion of indigenous art as fine art, as distinct from its exclusion as primitive cultural expression, occurred against the wider socio-cultural backdrop of a renewed interest in indigenous culture and spirituality. This was reflected, in part, by the inclusion of aboriginality within the national identity for the purposes of cultural tourism in the 1980s. At this time, Australians increasingly looked to indigenous people and the natural world as an iconic alternative to other traditional markers of national identity, such as language, food and costume.<sup>98</sup> Worshipping of the land and indigenous spirituality is evident, for example, in the promotional campaigns of the Australian Tourist Commission during the 1980s. The central marketing motifs adopted in the campaigns are visions of pristine beaches, untouched rainforests and indigenous culture.<sup>99</sup> This trend is also apparent in the state-commissioned tourist literature of the early 1990s, which reinforced the idea of cultural and biological difference.<sup>100</sup>

Although Aborigines continued to be defined by their relationship with the land in the nationalism of the 1980s, this now formed the basis of their acceptance in the national identity for tourism purposes, rather than merely signal their primitivity.<sup>101</sup> However, this inclusionary movement did not occur without an exclusionary aspect, because it was accompanied by an exponential growth in the unauthorized reproduction of indigenous artworks, most likely the result of the interest of tourists in purchasing Aboriginal arts and crafts.<sup>102</sup>

95 McCulloch & McCulloch, *supra* note 91 at 22.

96 S. McCulloch, interview, 1997, in McCulloch & McCulloch, *supra* note 91 at 22.

97 See, for example, Annette Van den Bosch & Ruth Rentschler, “Authorship, Authenticity, and Intellectual Property in Australian Aboriginal Art” (2009) 39(2) *J. Arts Mgt., L. & Socy* 117 at 127.

98 Julie Marcus, “Introduction” in *supra* note 77 at 9.

99 Michael Simons, “Aboriginal Heritage Art and Moral Rights” (2000) 27(2) *Ann Tourism Res* 412 at 413.

100 See Carol Simondson “Tourism, Primitivism and Power: An Analysis of Some Advertising Literature of the Australian Tourism Industry” (1995) 7(1-2) *Olive Pink Society Bulletin* 22 at 22-27.

101 McLean, *supra* note 79 at para. 19.

102 In support, in 1990 the Australian Council of the Arts commissioned a survey to track the buying patterns and levels of interest of international tourists in Aboriginal cultural products. The findings indicate that 49% of the international tourists surveyed were interested in learning about Aboriginal arts and culture and that 30% of these people had purchased items. The estimated value of the Aboriginal cultural products purchased over the 12-month period prior to the survey

The accompanying spate of reproductions did, however, have the positive benefit of leading to tourism, cultural heritage and the sale of indigenous art becoming matters “inextricably linked to the broad issue of intellectual property rights.”<sup>103</sup> This brought to the fore issues surrounding the *Copyright Act*'s ability to cope with cultural difference.

The increasingly politicized nature of the relationship between indigenous art and intellectual property rights in the 1980s is highlighted by artists taking action for copyright infringement. For example, in the 1983 unreported case *Wunungmurra v. Peter Stripes Fabrics*<sup>104</sup> artist Yanggarnny Wunungmurra and the Aboriginal Arts Agency commenced action for breach of copyright in Wunungmurra's bark painting *Long Necked Fresh Waterhole Tortoises by the Fish Trap at Gaanan*, which had allegedly been reproduced onto fabric without the artist's consent.<sup>105</sup> Six years later, in the unreported case *Bulun Bulun v. Nejlam*, Johnny Bulun Bulun commenced an action under the *Copyright Act* and the *Trade Practices Act 1974* (Cth) concerning the unauthorized appropriation of his artworks *Magpie Geese and Waterlilies at the Waterhole* and *Sacred Waterholes Surrounded by Totemic Animals of the Artist's Clan* by Flash Screenprinters onto T-shirts.<sup>106</sup>

These cases demonstrate the way in which the *Copyright Act* was perceived by indigenous artists as a tool to stem the unauthorized appropriation of their works. Thus, in a sense, indigenous artists forced the issue on their perceived exclusion from the ambit of the *Copyright Act*. However, whilst these cases demonstrate an increasing awareness of the social underpinnings of indigenous art appropriation and the potential for legal intervention, they do not signal an end to the inclusion and exclusion dynamic because, like the earlier period where indigenous art was redefined and accepted as fine art, the double movement merely redefined its parameters. Further discussion of *Bulun Bulun v. Nejlam* and the key role accorded to expert evidence in establishing originality is instructive on this point.<sup>107</sup>

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was estimated to be in excess of \$25 million. See Peter Brokensha & Hans Hoegh Guldberg, *Cultural Tourism in Australia: A Report on Cultural Tourism* (Canberra: Australian Government Publishing Service, 1992) at 3-6.

103 Simons, *supra* note 99 at 412.

104 (1983) Federal Court, unreported.

105 For a discussion of this case see Nina Stevenson, “Case Note: Infringement in Copyright in Aboriginal Artworks” (1985) 17(1) *Abor LB Bulletin* 5, online: Australasian Legal Information Institute <<http://www.austlii.edu.au/au/journals/AboriginalLB/1985/76.html>>; Jane Anderson, “Introduction” in *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Cheltenham UK and Northampton USA: Edward Elgar, 2009).

106 For a discussion of this case see Colin Golvan, “The Protection of *At the Waterhole* by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights” in Andrew Kenyon, Megan Richardson & Sam Ricketson, eds, *Landmarks in Australian Intellectual Property Law* (Port Melbourne: Cambridge University Press, 2009) at 191-208.

107 It is important to note that this case only went as far as injunctions; the matter was settled outside of court before it proceeded to a hearing.

In *Bulun Bulun v. Nejlam*, Bulun Bulun submitted affidavits to the court attesting to the significance of the imagery in his paintings and the possibility for original interpretations of his Dreaming:

Many of my paintings feature waterhole settings, and these are an important part of my Dreaming, and all the animals in these paintings are part of that Dreaming ... The story is generally concerned with the travel of the long-necked turtle to Garmedi, and by tradition I am allowed to paint [that part of the story] ... According to tradition, the long-necked turtle continued its journey, and other artists paint the onward journey. The many different versions of the waterhole story ... are indicative of the range of possibilities in telling the traditional story.<sup>108</sup>

Bulun Bulun also related, via his affidavit, the unique suffering he experienced as a result of the reproductions:

This reproduction has caused me great embarrassment and shame, and I strongly feel that I have been the victim of the theft of an important birthright ... I have not painted since I learned about the reproduction of my artworks, and attribute my inactivity as an artist directly to my annoyance and frustration with the actions of the respondents in this matter.<sup>109</sup>

He also deposed:

My work is very closely associated with an affinity for the land. This affinity is at the essence of my religious beliefs. The unauthorized reproduction of artworks is a very sensitive issue in all Aboriginal communities. The impetus for the creation of works remains their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe.<sup>110</sup>

He also revealed that, while he was trained as a painter by his father and both men depict waterhole scenes in their works, the works are different:

My father ... painted the dreaming stories of our tribe, the Gunilbingu, including the waterhole scenes. He painted such scenes in his own way. I do not have any of his works, and have never tried to copy any of them.<sup>111</sup>

However, when it came to building a case for originality, much reliance was placed on the depositions of “experts.” Golvan argues that it was the strength of depositions such as that of Margaret West, then curator of the Northern Territory Museum of Arts and Sciences, Peter Cooke and Charles Godjuwa, both art advisers, Kerry Steinberg, a Sydney Gallery operator, and Wally Caruana, curator of Aboriginal art at the Australian National Gallery,

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108 Reproduced in Golvan, *supra* note 106 at 197.

109 *Ibid.* at 195.

110 *Ibid.*

111 Reproduced in Golvan, *supra* note 29 at 348.

in relation to Johnny Bulun Bulun's skill, that were vital in this case as those depositions indicated that "no blanket view ought to be adopted in relation to the application of the concept of 'originality' to Aboriginal artworks."<sup>112</sup> For example, West deposed:

the works are clearly products of considerable skill, and reflect facets of the Applicant's [Bulun Bulun's] distinctive style. I note, for example, the fineness and detail of the cross-hatching, which is one of the most important features in any Aboriginal bark painting ... I am not aware of any other artist who depicts magpie geese, long-necked turtle and water snake at waterholes in the fashion of the Applicant. I would describe the works as very decorative, very busy and very nicely composed ... I would rate the Applicant as amongst the best exponents in his art form, just as one might rate a particular Western artist as a leading exponent in his particular art form of, say, sculpture or watercolour painting.<sup>113</sup>

In addition, Cooke deposed:

The very fine cross-hatching in the Applicant's work requires an immense amount of precision. People who produce this kind of work often complain of back ache from sitting over a painting, as well as eyestrain. The quality of the cross-hatching work is often the feature which appeals most readily to art buyers. Few artists are able to produce cross-hatching of the fineness and precision of the Applicant.<sup>114</sup>

Similarly, Steinberg deposed that:

In particular, I note the detail of his work and the strong story content. His work is also not readily available. In a review of the 1987 exhibition at the Hogarth gallery in Sydney, the critic of the *Sydney Morning Herald*, Bronwyn Watson, wrote in that newspaper on 18 September 1987 that the Applicant was "one of the most eminent exponents of bark painting." Ms Watson said the exhibition shows the development of his work from his early style (depicting animal and plant forms) to a more complex style of his dreamtime paintings.<sup>115</sup>

She also said:

The Applicant is particularly well known for his depiction of "waterhole" settings. These settings are of special importance to him because they are key parts of the dreaming of his yirirdja moiety. His depiction of the "waterhole" setting is quite distinctive, particularly as regards the detail and style of the internal cross-hatching.<sup>116</sup>

The reliance placed on expert evidence such as that of West, Cooke and Steinberg in this case perhaps means that Bulun Bulun's evidence was only accepted insofar as it was interpreted and restated by the predominantly non-

112 Golvan, *supra* note 29 at 349.

113 Reproduced in Golvan, *supra* note 106 at 198.

114 *Ibid.*

115 Reproduced in Golvan, *supra* note 106 at 199.

116 *Ibid.*

indigenous panel of experts. In support, Anderson and Bowrey have argued that “indigenous subjects are firstly rendered visible by expert knowledges, much more than through their own agency and articulation.”<sup>117</sup> This appears to be what has happened in this case despite it being regarded as a defining moment in the protection of indigenous art by the *Copyright Act* because the originality requirement was satisfied.<sup>118</sup> Bulun Bulun’s evidence was rendered visible by expert testimony. This supports a finding of the inclusion and exclusion double movement: inclusion of cultural difference by the *Copyright Act* is evident, but conditional upon being confirmed by an expert. This indicates that the exclusionary movement remains informed by the social devaluing of indigeneity which, in this instance, operates to trump the legal inclusion.

## VII Fine Art to Communal Rights

In cases subsequent to *Bulun Bulun v. Nejlam*, the focus on the protection of indigenous artworks shifted to the issues surrounding a community’s communal ownership of designs. For example, in *Yumbulul*, French J. recognized that indigenous communal interests are not adequately protected by the *Copyright Act*:

And it may also 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 communal in origin.<sup>119</sup>

In this case, Terry Yumbulul came under considerable criticism from his mother’s clan, the Galpu people, for his licensing of the copyright in his work *Morning Star Pole* to the Reserve Bank to reproduce on a commemorative \$10 banknote. The reproduction was made under a sublicense of the copyright in the work granted to the Bank by the Aboriginal Artists Agency Limited which, in turn, held an exclusive licence from Yumbulul. Yumbulul contended that he had been induced to sign the licence by misleading conduct on the part of the Agency, that he would not have authorized the licence to the Reserve Bank if he had fully understood the nature of the agreement and that, in any

117 Anderson & Bowrey, *supra* note 8 at 25.

118 Colin Golvan has stressed the importance of this case as a turning point for assessing the originality of indigenous works. He states that while this case “did not go to judicial determination, it was considered that a precedent had been set, in particular, laying to rest any suggestion of there being no copyright in traditional Aboriginal Art.” See Colin Golvan, “Protection of Australian Indigenous Copyright: Overview and Future Strategies” (2006) 18(10) *AIPLB* 154 at 154. Acceptance of indigenous art as sufficiently original to attract copyright protection was mirrored at the government level in the *Aboriginal Arts and Craft Industry Report* of 1989, which stated that the *Copyright Act* “does provide for recognition of copyright in artistic works of individual [Aboriginal] artists.” See Jon Altman, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (Canberra: Australian Government Publishing Service, 1989) at 302.

119 (1991) 21 *IPR* 481 at 490.



case, he did not have the power to assign reproduction rights because they were vested in the elders of the Galpu clan.

His Honour was of the opinion that, on the evidence, Yumbulul had understood the general nature of the licence he was signing, noting that Yumbulul's "need for funds overcame the reluctance to sign the licence agreement"<sup>120</sup> and that the licence was legally valid. On the issue of whether Yumbulul's cultural obligations were relevant to the issue of assignment, French J. acknowledged the criticism Yumbulul came under from the Galpu community for permitting the reproduction of the *Pole* by the Bank, despite finding that no cause of action had been established.<sup>121</sup> French J. stated that "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is [ultimately] a matter for consideration by law reformers and legislators."<sup>122</sup>

The acceptance of indigenous cultural context and significance of artworks as part of the background facts to a case accompanied by the stripping of these facts of legal significance reveals the nature of the double movement. Inclusion of cultural difference is evident, but it is strictly circumscribed and excluded from challenging the nature of existing legal rights. Such an interpretation of the double movement underlying the relationship between the *Copyright Act* and indigenous art may also be sustained by a reading of the *Milpurrruru* case which arguably further pushed back the boundaries of inclusion, yet remains trumped by an exclusionary movement.

*Milpurrruru* involved the importation, from Vietnam between 1992 and 1994, of carpets which reproduced a number of well-known indigenous artworks in part or in their entirety. Central to the claim was s. 37 of the *Copyright Act*, which prohibits the importation of artistic works for sale "if the importer knew, or ought reasonably to have known, that the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of ... copyright."<sup>123</sup> In this instance, the importers, Indofurn Pty Ltd, were aware of the Aboriginal copyright interests in the images on the carpets and continued to import the carpets after the Aboriginal Arts Management Association had objected to this activity on behalf of the artists whose works had been infringed. The artists were ultimately successful in their claim for importation infringement.

The question of further damages in this case is pertinent to understanding the double movement underlying the relationship between indigenous art and copyright. In assessing further damages, von Doussa J. was of the opinion that aboriginality is a material factor to be taken into account when assessing

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120 *Ibid.* at para. 19.

121 *Ibid.* at para. 21.

122 *Ibid.* at para. 24.

123 *Copyright Act* s. 37.

damages. He noted the cultural harm suffered by the artists as a result of the unauthorized reproductions and the flagrancy of the defendant's conduct and awarded exemplary damages for "culturally based harm." He states at 277:

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 tortuous wrongdoing experienced by Aboriginals in their particular environments are properly to be brought to account.<sup>124</sup>

Subsequently, von Doussa J. awarded additional damages of \$90,000, bringing the total damages up to \$190,000.<sup>125</sup> These damages were awarded collectively to the artists so that they could distribute it amongst the various groups and communities:

to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist.<sup>126</sup>

In determining damages with reference to the unique harm suffered by the artists and aggregating the award, the court took the unique step of recognizing indigenous artistic practices. As Miller notes:

[t]he real effect of the court's orders in *Milpurrruru* was to compensate the wider indigenous clan or community for the affront that it as a community had experienced by the infringement of a copyright owned ... by only one of its members.<sup>127</sup>

*Milpurrruru* thus further pushed back the legal boundaries of inclusion from *Yumbulul*, where evidence of indigenous artistic practice was heard, but to no legal effect. However, the damages awards in *Milpurrruru*, as Mackay argues, "[do] not equate with judicial recognition of the nature and obligations of indigenous groups in establishing copyright *ownership*."<sup>128</sup> This is because aboriginality is treated as a "relevant matter" that the court may take into account under s. 115(4) of the Act following the establishment of an infringement of copyright, a circumstance, rather than a source of freestanding rights

124 (1994) 54 FCR 240 at 277.

125 Part of this \$190,000 was awarded against two non-executive directors of Indofurn; however, this was successfully appealed in the Full Federal Court in *King & Rylands v. Milpurrruru* (1996) 31 IPR 11. It should also be noted that ultimately, the artists in this case experienced difficulties receiving payment because Indofurn went into receivership and the active director was declared bankrupt. See Janke (2003) *supra* note 2, at 19.

126 (1994) 54 FCR 240 at 273.

127 Duncan Miller, "Restitutionary and Exemplary Damages For Copyright Infringement" (1996) 14 ABR 143 at 161.

128 Erin Mackay, "Indigenous Traditional Knowledge, Copyright and Art—Shortcomings in Protection and an Alternative Approach" (2009) 32(1) *Univ of NSWLJ* 1 at 6. Emphasis in original.

of ownership in accordance with indigenous artistic production.<sup>129</sup> The exclusion of indigenous interests persists, despite von Doussa J.'s attempt to route around the cultural restrictiveness of the *Copyright Act*.

The relationship between communal interests and the *Copyright Act* was further explored in *Bulun Bulun v. R & T Textiles*. In this case, joint proceedings were commenced by Mr Bulun Bulun, the copyright holder, and a second applicant, Mr Milpurrurru,<sup>130</sup> who sued in his own right and as a representative of the Ganalbingu people. Milpurrurru claimed that the Ganalbingu people were the equitable owners of copyright in Bulun Bulun's work *Magpie Geese and Waterlilies at the Waterhole*. The respondents admitted the infringement of Bulun Bulun's copyright, but did not admit Milpurrurru's claim of equitable ownership. In the absence of a respondent, the trial was contested *amicus curiae* by the Attorney-General for the Northern Territory and, as intervenor, by the Minister of Aboriginal and Torres Strait Islander Affairs.

On the question of joint authorship, von Doussa J. held that the community's oversight and authority over production was too ephemeral to satisfy the definition of joint authorship<sup>131</sup> as Bulun Bulun was the sole creative author of the work, and that:

[t]o conclude that the Ganalbingu people were communal owners of the copyright in the existing work would ignore the provisions of s. 8 of the *Copyright Act*, and involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia.<sup>132</sup>

Moreover, von Doussa acknowledged that "[w]hile it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so."<sup>133</sup> It appears that for joint authorship to subsist in a work, more is needed "than the mere 'inspiration' that intergenerational group knowledge can provide."<sup>134</sup>

On the question of whether a trust existed between Bulun Bulun and the Ganalbingu people, von Doussa J. held that there was no evidence of such an intention.<sup>135</sup> He then considered whether a fiduciary relationship existed between Bulun Bulun and the Ganalbingu people. Due to the evidence that the works were created pursuant to important ritual knowledge and the strict observance of customary law, von Doussa J. held that the Ganalbingu peo-

129 *Ibid.*

130 Mr Milpurrurru is the same person as the artist in the *Milpurrurru* case.

131 "[A] work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors." See *Copyright Act* s. 10(1).

132 (1998) 86 FCR 244 at 258.

133 *Ibid.* at 257.

134 Mackay, *supra* note 128 at 5.

135 *Bulun Bulun v. R & T Textiles*, *supra* note 6 at 258.

ple had a key interest in preserving the integrity of their culture and that the relationship between Bulun Bulun and his clan should be protected by fiduciary principles. Bulun Bulun was obliged “not to exploit the artistic work in any way that is contrary to the laws of the Ganalbingu people”<sup>136</sup> and to take reasonable action to restrain and remedy any infringement that occurs.<sup>137</sup> As Bulun Bulun had taken action against R & T Textiles to remedy the infringement that had occurred, von Doussa J. dismissed the proceedings brought by Mr Milpurrruru because there was no breach of fiduciary obligations.<sup>138</sup> However, he did acknowledge that:

[t]he occasion might exist for equity to impose a remedial constructive trust upon the copyright owner to strengthen the standing of the beneficiaries to bring proceedings to enforce the copyright. It may be necessary if the copyright owner cannot be identified or found and the beneficiaries are unable to join the legal owner of the copyright.<sup>139</sup>

This judgment has attracted widespread support as an example of how indigenous conceptions of authorship can be protected by alternative legal means,<sup>140</sup> and clearly has set the parameters of inclusion of indigenous artistic practices wider than those recognized in *Milpurrruru*. However, like *Milpurrruru*, it can be criticized because something less than communal equitable title is recognized.<sup>141</sup> Further, von Doussa J.’s judgment could be regarded as disappointing because he does not consider different interpretations of joint authorship or overtly acknowledge the cultural specificity of the accepted definition.<sup>142</sup> As Bowrey argues:

[v]on Doussa hints at the cultural particularity of the law, but fails to directly address the privileged cultural values at stake ... Ultimately, he prevents the hearing of a debate that could lead to a challenge to the presumed neutrality, generality and universality of copyright law.<sup>143</sup>

Thus, whilst obviously sympathetic to the cause of indigenous artists and creative in his novel appeal to equity, von Doussa J.’s lack of direct engagement

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136 *Ibid.* at 263.

137 *Ibid.*

138 *Ibid.*

139 *Ibid.* at 264.

140 See, for example, Erika Burke, “The Aboriginal Artist as a Fiduciary” (1999) 3 FJLR 283 at 286; Paul Kelly “Equity to the Rescue: A Fiduciary Duty to an Aboriginal Clan” (1999) 3 SCULR 233 at 239; Howell, *supra* note 45 at 10.

141 See, for example, Erin Mackay, “Recent Developments: Copyright and the Protection of Indigenous Art” (December/January 2008) 7(2) ILB 11 at 11; Michael Dodson & Olivia Barr, “Breaking the Deadlock: Developing an Indigenous Response to Protecting Indigenous Traditional Knowledge” (2007) 11(2) AILR 19 at 19; V.J. Vann, “Copyright By Way of Fiduciary Obligation—Finding a Way to Protect Aboriginal Artworks” (2000) 5(1) MALR 13 at 21.

142 Kathy Bowrey, “The Outer Limits of Property Law—Where Law Meets Philosophy and Culture” (2001) 12(1) L & C 75 at 79-82.

143 *Ibid.* at 82.

with the cultural specificity of the *Copyright Act* evidences the continuing rejection of indigenous interests. Although his hands are tied by s. 8 of the Act that states that the *Copyright Act* is the only legal source of copyrights, he fails to acknowledge that copyright privileges certain cultural values over others. It is evident that indigenous interests are accepted, but only to the point that they do not compete with or challenge the non-indigenous, universal logic of the *Copyright Act*. The exclusionary aspect of the double movement continues to undo legal inclusion. This double movement has been mirrored, notably, in the political arena in the drafting of the *Indigenous Communal Moral Rights Bill*.<sup>144</sup>

The *Indigenous Communal Moral Rights Bill* was released in 2003 so that indigenous communities would have a “means to protect unauthorised and derogatory treatment of works that embody community images or knowledge.”<sup>145</sup> Under the Bill, indigenous communities have the right to be attributed, the right not to be falsely attributed and the right to take action if material embodying their traditional culture and wisdom “is subjected to inappropriate, derogatory or culturally insensitive use.”<sup>146</sup> Five conditions must be met before these rights arise:

the work must be “made,” the work must draw on the traditions, beliefs, observances or customs of the community, the work must be covered by an agreement between the author and the community, the community’s connection with the work must be acknowledged [with notice shown on the work, and a] written notice of consent must have been obtained by the author ... from everyone with an interest in the work.<sup>147</sup>

The then Attorney-General, Philip Ruddock, was positive about the form that this Bill takes, stating that the rights conferred “will assist in protecting the integrity and sanctity of indigenous culture.”<sup>148</sup> However, despite these high hopes, not only has the Bill not been introduced, feedback on its provisions has been overwhelmingly negative. In particular, the Bill’s third requirement has been extensively criticized, because the existence of rights is

144 See, generally, Jane Anderson, “The Politics of Indigenous Knowledge: Australia’s Proposed Communal Moral Rights Bill” (2004) 27 (3) *Univ of NSWLJ* at 585-604, online: Australasian Legal Information Institute <<http://www.austlii.edu.au/au/journals/UNSWLJ/2004/34.html>>.

145 Liberal Party of Australia, *The Howard Government: Putting Australia’s Interests First: Election 2001—Arts for All* (2001), online: Liberal Party of Australia <<http://www.liberal.org.au/documents/arts.pdf>> in Anderson, *supra* note 144.

146 Ian McDonald, *Indigenous Communal Moral Rights* (Redfern: Australian Copyright Council, 2003) at 1.

147 Samantha Joseph & Erin Mackay, *Moral Rights and Indigenous Communities* (Arts Law: 2006), online: Arts Law <<http://www.artslaw.com.au/artlaw/Archive/2006/06MoralRightsAndIndigenousCommunities.asp>>.

148 Hon. Philip Ruddock, “Copyright: Unlucky for Some” (Australian Centre for Intellectual Property and Agriculture Conference, Brisbane, Australia, 13 February 2004), in Matthew Rimmer, “Australian Icons: Authenticity Marks and Identity Politics” (2004) 3 *Indigenous LJ* 139 at 150.

voluntary. For example, the need for voluntary submission to the Bill has led Anderson to comment that “it is difficult to imagine any circumstance arising where remedy could be attained for infringement,”<sup>149</sup> because those people who did not want to respect indigenous communal rights could merely opt out of the Bill. Ian McDonald also identifies the limitations of this requirement:

If it is necessary to have an agreement in place before a community has any communal rights in relation to its traditional cultural property, then a community will not have any communal rights where people with whom they have no direct or indirect relationships use Indigenous material inappropriately or offensively.<sup>150</sup>

Thus, in situations like *Milpururru* where the reproduced images were copied from publicly available textbooks and the parties had no prior dealings, communities would have no control over the use of their works and would not be protected by the Bill.

This attempt to meet indigenous needs highlights the government’s fundamental unwillingness to develop legal principles that overcome the double movement underlying indigenous art and copyright law. Although this Bill aims to include indigenous communal interests in the integrity of artworks, it simultaneously reinforces the superiority of the interests of people outside the communities. Furthermore, the necessity for a prior agreement between the creator and community not only operates unfairly, but is also inconsistent with both copyright law and the moral rights protection granted to individuals where rights are conferred automatically upon creation of a work.<sup>151</sup> Thus, the *Indigenous Communal Moral Rights Bill* not only subjugates indigenous interests whilst attempting to elevate them through legislation, it also ranks those that it does confer lower than those already existing in the *Copyright Act*.

Despite clear legislative intention, the inclusion of indigenous communal interests has not occurred in a meaningful, genuine way, evidencing the strength of the exclusionary movement. The inferiority of indigenous interests is secured by the very provisions of the Bill meant to elevate them. The double movement of inclusion and exclusion persists in the relationship between indigenous art and the *Copyright Act* into the twenty-first century, despite the fact that the parameters of this dialogic have steadily been pushed back by *Yumbulul*, *Milpururru*, and *Bulun Bulun v. R & T Textiles*.

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149 Jane Anderson, “Indigenous Communal Moral Rights: The Utility of an Ineffective Law” (2004) 5(30) ILB 8, online: Australasian Legal Information Institute < <http://www.austlii.edu.au/au/journals/ILB/2004/15.html> > .

150 Ian McDonald, “Indigenous Communal Moral Rights Back on the Agenda” (2003) 16(4) AIPLB 47 at 47.

151 Joseph & Mackay, *supra* note 147.

## VIII Conclusion

So how then can we understand the double movement underlying the relationship between indigenous art and copyright in Australia? Clearly, socio-cultural understandings of indigenous people have shifted since the time when the originality of indigenous artworks was regarded as suspect and indigenous culture relegated to the domain of the primitive. The increasing popularity of indigenous art and the politicization of intellectual property rights have also obviously reaped benefits for individual artists, and, by derivation, their communities. However, beyond this, even with sympathetic judges and positive legislative intentions, the double movement has not eradicated its element of exclusion of indigeneity. Thus, the question is raised whether perhaps this double movement is the product of some wider disingenuous cross-cultural relations. This is clearly an area for further research.

By seeking to situate the *Copyright Act's* relationship with indigenous art within a broader socio-cultural and political framework, it is argued that the double movements that underlie law and society are rendered visible. The intricate dialogue of inclusion and exclusion that this entails has shifted over the periods of legal exclusion and legal inclusion of indigenous art from the *Copyright Act*. However, it is apparent that, whatever the exact parameters of inclusion of indigeneity, these changing parameters have always been undercut by a strong movement of exclusion.



