# What's in a Painting? The Cultural Harm of Unauthorised Reproduction: *Milpurrurru & Ors v Indofurn Pty Ltd & Ors*

## 1. *Introduction*

In 1976, a well-known Aboriginal artist articulated an increasingly common complaint: that people were reproducing and copying Aboriginal stories, paintings and other sacred objects without first seeking authorisation. This artist had chanced to see a tea-towel on which one of his own paintings had been reproduced without his permission or even his knowledge. The painting in question depicted a particular story which he alone of his clan was allowed to portray. The integral connection between art and spiritual consciousness in Aboriginal culture meant that this unauthorised reproduction amounted to an act of spiritual violation and personal disgrace. He called for Aboriginal artists to at least be accorded "the same recognition [as other artists], that our works be respected and that we be acknowledged as the rightful owners of our own works of art",[1] and further asserted :

> It is not that we object to people reproducing our work, but it is essential that we be consulted first, for only we know if a particular painting is of special sacred significance, to be seen only by certain members of a tribe, and only we can give permission for our own works of art to be reproduced.[2]

Since that time there have been many more demands by Aboriginal people for recognition of these issues, but the problem of unauthorised reproduction of Aboriginal art has generally not been effectively addressed under existing intellectual property laws.[3] In particular, the great differences between Aboriginal and Western notions of property in art have meant that copyright law has been unable to adequately acknowledge and deal with the intricate cultural issues involved when Aboriginal art is reproduced without permission.

However, the significance of art in Aboriginal culture and the harm and offence caused by unauthorised reproduction were recognised in a recent case in the Federal Court of Australia, *Milpurrurru & Ors v Indofurn Pty Ltd & Ors*[4] (*Milpurrurru*). In this case, von Doussa J handed down a judgment which made a record award of damages to eight Aboriginal artists whose work had been reproduced onto carpets without permission, and which took account of

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1 Marika, W, "Copyright on Aboriginal Art" (Feb 1976) *Aboriginal News* 7. It is of interest to note that one of the applicants in the *Milpurrurru* case was this artist's daughter.

2 Ibid.

3 See eg, Gray, S, "Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?"(1991) 9 *Copyright Reporter* 10; Golvan, C, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 11 *European Intellectual Property R* 349, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 14 *European Intellectual Property R*, and *"Tribal Ownership of Aboriginal Art" (1992) 3 Arts and Entertainment LR* 15; Ward, A, "Blind Justice or Blinkered Vision?" (1994) *Arts and Entertainment LR* 6; Ellinson, D A, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17 *UNSWLR* 327.

4 (1995) AIPC 91–116.

the cultural significance of this sort of contravention. In themselves, the facts of this case are not very remarkable. Its significance lies in the recognition accorded by the judge to the harm and offence caused by unauthorised copying of Aboriginal art to the individual artist, their community and culture, and his ruling that this cultural harm was a loss and damage which in itself should be compensated.

## 2. *Facts and Background*

*Milpurrurru* involved a claim made by eight Aboriginal artists that the respondents had infringed copyright and had contravened the *Trade Practices Act* 1974 (Cth) by manufacturing, importing into Australia, offering for sale and selling woollen carpets on which their artwork or substantial parts of it were reproduced. The director of the respondent company[5] had travelled to Vietnam and ordered the manufacture of carpets there, some of which had designs which reproduced in full certain prints of Aboriginal artworks found in calendars and portfolios, whilst others reproduced other Aboriginal designs "along the same lines" but "less busy" than the originals. The artists argued that the respondents had breached copyright, and in particular had infringed section 37 of the *Copyright Act* 1968 (Cth), which provides that copyright in an artistic work is infringed by a person who, without licence of the copyright owner, imports an article into Australia for the purpose of selling or hiring, or offering to sell or hire; distributing; or exhibiting it in public by way of trade, if the importer knew or reasonably should have known that the making of such an article in Australia would have constituted an infringement of copyright. Further, the applicants also claimed that there had been a contravention of sections 52 and 53 of the *Trade Practices Act* in that tags had been attached to the carpets which made false representations in regard to the carpets and the designs on them, and that this amounted to misleading or deceptive conduct.

Von Doussa J devoted the first part of his judgment to a discussion of Aboriginal culture and custom in relation to artworks and their reproduction. He considered these matters to be of great significance, holding that it was "against this background that the conduct of the respondents in question in the present case falls to be considered".[6] Traditionally, the main considerations underlying intellectual property protection in common law jurisdictions have been economic ones, with an emphasis on vesting exclusive property rights in those who facilitate and sponsor the development of creativity rather than protecting the rights of authors in regard to their own work or their continuing interest in its integrity.[7] The existing categories of law are therefore more concerned with the protection of a whole range of economic rights granted in relation to the work, rather than with the integrity of the work itself.

The rationale involved in Aboriginal protection of artworks provides a stark contrast to such ideas. Aboriginal art and culture are tightly inter-woven,

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5 At all relevant times the company name was "Beechrow". It later changed its name to "Indofurn Pty Ltd".

6 Above n4 at 39,058.

7 These "moral rights" are recognised in the legal systems of many other countries, especially in Europe.

and share the same underlying traditions, customs and beliefs. Traditional designs and art forms are intimately connected with Aboriginal religion, and some works are regarded as being so closely associated with sacred things as to be sacred themselves, and so are subject to restrictions as to who can reproduce or even view them. Often the art forms making up Aboriginal folklore are a means of communicating themes, beliefs and customs throughout the generations of a particular clan.[8]

> Our art is indeed an integral part of our life. It is not separate from the rest of our life, it is the expression of a total cultural consciousness and is interwoven into the texture of our everyday life. In song and dance, in rock engraving and bark painting we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structures of our society.[9]

The process of transmitting these themes involves both creative reinterpretation by individual artists within a clan, and adoption of new themes either from the spirit world of the dreaming or from neighbouring tribes. Thus the creation of an artistic work by an individual artist in the clan cannot be shaped only by reference to his or her own personal inclination, but rather must accurately reflect the folklore themes which are to be passed on. The importance of an accurate transmission of themes to a clan's identity and culture means that both the selection of artists and the creation of the work using the family's designs are supervised by those in the clan who have "the law of the art".[10] In his judgment, von Doussa J noted that :

> Painting techniques, and the use of totemic and other images and symbols are in many instances, and almost invariably in the case of important creation stories, strictly controlled by Aboriginal law and custom. Artworks are an important means of recording these stories, and for teaching future generations. Accuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the faithful reproduction of an artwork can cause great offence to those familiar with the dreaming.[11]

He stated that this need for accuracy was especially acute in relation to the artworks involved in *Milpurrurru*, since an aspect of their style involved the artists "encoding" into them secret parts of sacred legends and beliefs, which would be recognisable only to those initiated into the secrets or close to the culture.[12] Full and proper permission therefore was necessary to ensure accuracy and to avoid giving offence.

Another factor contributing to the inadequacy of copyright law in protecting Aboriginal art is the issue of ownership. Under Australian copyright law, the only person allowed to reproduce a work is a clearly identifiable copyright owner. In Aboriginal culture, artworks are traditionally owned by a clan or group aggregately. The family owns clan designs which identify a particular work as belonging to that group.[13] In addition, different people within the

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8 Bell, R, "Protection of Folklore: the Australian Experience" (1985) 19 *Copyright Bull* 6.
9 Above n1 at 7.
10 Aboriginal artist Banduk Marika quoted in Ward, above n3 at 5.
11 Above n4 at 39,056.
12 Above n4 at 39,057.
13 Banduk cited in Ward, above n3 at 5.

clan hold distinct rights in respect of these designs, it may mean that only some are allowed to look upon the design, whilst one or more may be authorised to depict the design, another to wear it on their body during a ceremony, and still others (often tribal elders) to authorise the reproduction of such designs.[14] This means that the right to create artworks depicting significant stories or to use clan designs usually will rest with a group of people who collectively have the authority to decide whether the stories or designs can be used, who can use them, and the terms and means of reproduction.

Where unauthorised reproduction of a story or imagery takes place, von Doussa J noted that the traditional owners have the responsibility of preserving the dreaming and punishing the offenders. When a third party inappropriately or without authorisation reproduces an artwork originally created by an Aboriginal artist with the permission of their clan, that artist is held responsible for the offence, and is sanctioned. Generally, reproductions of artworks are allowed when treated with respect and sensitivity, and are for the purpose of educating whites in regard to Aboriginal culture. However, the reproduction of significant and sacred images onto carpets, with the result that "the dreaming would be walked on",[15] is completely inappropriate and offensive, and the artists involved would have been punished by their clans. In *Milpurrurru*, some of the artists had attempted to hide the unauthorised reproductions of the artworks from their communities in order to avoid being so sanctioned. This was a factor which the Judge took into account in the award of damages, especially additional damages.

It should also be noted, albeit in passing, that the originality of the artworks depicted in the prints was not questioned in this case. Originality as a prerequisite for copyright protection may be potentially problematic for Aboriginal artists who in general draw upon tradition and pre-existing works. This condition is generally not difficult to meet, since it does not require a work to be absolutely novel and inventive, but rather that the work should "originate from the author".[16] Originality has been held to be "a matter of degree, depending on the amount of skill, judgment or labour that has been involved in making the work".[17] However, a person is not an author of a work if they have merely copied or transcribed another work.[18] Since many Aboriginal works are derived from existing motifs and designs, they may be vulnerable to the argument that they were simply copied. However, in this case it was held that "[a]lthough the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality".[19]

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14 Maddock, K, "Copyright and Traditional Designs — An Aboriginal Dilemma" (1988) 2 *Aboriginal L Bull* 8.

15 Above n4 at 39,057.

16 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 602.

17 *Apple Computer Inc v Computer Edge Pty Ltd* (1986) 161 CLR 171 per Gibbs CJ.

18 *Walter v Lane* [1900] AC 539 and *University of London*, above n16.

19 Above n4 at 39,064.

## 3. *The Decision*

### *A. Copyright Infringement*

In relation to the carpets which were exact reproductions of the artworks, it was held that infringement of section 37 had clearly occurred since the respondents had imported the carpets into Australia for each of the purposes described in the section. The respondents were also held to have had "knowledge" that the articles would have infringed copyright if made in Australia, as they had "notice of facts such as would suggest to a reasonable person having the ordinary understanding expected of persons in the particular line of business that a breach of copyright was being committed".[20] It was held to be sufficient that the respondent had actual or constructive knowledge of infringement of some form of intellectual property rights, and they need not know the exact nature of the rights. On the facts of the case, the director of the respondent company was found to have had the knowledge required by section 37 of the *Copyright Act*, and this knowledge was imputed to the company.[21]

The issue became more complicated in relation to the carpets which were not exact reproductions of artworks. There were two main questions to be determined in regard to these carpets. First, did the carpets reproduce a substantial part of the artworks; and second, whether the importer had the requisite knowledge under section 37 that the articles would have constituted an infringement if made in Australia.

#### i Substantial Part

Section 31(1)(b)(i) of the *Copyright Act* provides that one of the exclusive rights attaching to an artistic work is to reproduce it in a material form. This is satisfied if a substantial part of the work is reproduced. Von Doussa J relied on four tests of substantial copying as stated in *Ravenscroft v Herbert & New English Library Ltd.*[22] These are first the volume of material taken, remembering that quality is more important that quantity; second, how much of the matter is the subject-matter of copyright; third, whether the defendant had an *animus furandi*, that is an intention to take from the plaintiff in order to save time and money; and fourth, the extent to which the plaintiffs works are competing with the defendant's works.

It was held that on the facts there had been substantial reproduction in relation to all three carpets which were not exact reproductions of original artwork, since there were "striking similarities" between the "complex" and "distinctive" designs. Even where the area of copying was not great in comparison with the whole,[23] the copying was substantial in quality. A very important consideration was that there had been an *animus furandi* on the part of the respondents. On the evidence, the artwork had been before both the director

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20 Id at 39,065.

21 *Beach Petroleum NL & Anor v Johnson & Ors* (1993) 115 ALR 411 at 568ff.

22 [1980] RPC 193 per Brightman J, cited with approval by Lockhart J in *International Writing Institute Inc v Rimila Pty Ltd & Anor* (1993) AIPC 91–035.

23 This occurred in relation to the Green Centre Carpet which had partially reproduced "Kangaroo and Shield People Dreaming".

of the importing company and the carpet factory manager when they decided on the final design of the carpet. The original artworks had been heavily relied on, with the only changes being to eliminate some features of the original and transfer some colours, since the originals were thought to be "too busy" for carpet designs.

#### ii Knowledge

Using similar reasoning as for the carpets which were direct reproductions, von Doussa J held that the respondents had the requisite knowledge to have infringed section 37. He held that the respondents had "realised from the outset that the artworks from which the carpets were derived were the subject of copyright, and that the carpets reproduced those artworks in substantial parts".[24] But even if they had not had this actual knowledge, they had the requisite constructive knowledge, that is knowledge of facts which would suggest a breach of copyright if the carpets were made in Australia.

### *B. Trade Practices Infringement*

Attached to the carpets were tags which stated among other things that the carpets had been "proudly designed in Australia by Australian Aboriginals", and that "[t]hese artists are paid royalties on every carpet sold".[25] This text was held to be false in many respects, and constituted false representation under section 53(c),[26] and misleading or deceptive conduct under section 52 of the *Trade Practices Act*. Injunctions were awarded against further contraventions, and damages for any loss occasioned by the infringements was held to have been fully compensated by the damages sum awarded for the copyright infringements (see below).

### *C. Remedies for Copyright Infringement*

It is in relation to the remedies and in particular the award of damages that the radical nature of this case becomes evident. The form and amount of damages awarded reflects legal recognition of the cultural harm caused by the unauthorised reproductions. First, von Doussa J was prepared to accommodate the applicants' request that the court express its judgment "in terms which defined the aggregate liability of each respondent to the applicants as a group" rather than give individual judgments in favour of each applicant, so far as the rules of court would allow.[27] He took note of the submission that Aboriginal law and custom would treat each of the applicants in such a case equally, and that the fruits of the action would be shared equally between the parties. By handing down his judgment in this form, he therefore allowed the applicants to "agree upon a division of the damages which met with their cultural and other wishes".[28]

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24 Above n4 at 39,070.

25 Id at 39,084.

26 Section 53(c) provides that a corporation shall not represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have.

27 Above n4 at 39,077.

28 Ibid.

### i Section 116 and Conversion Damages

Section 116 of the *Copyright Act* entitles the copyright owner of the work to "the rights and remedies, by way of action for conversion or detinue". Accordingly, von Doussa J ordered that any infringing carpets which had not been sold should be delivered up to the applicants, since the reproduced artwork was so "inextricably mixed with the fabric of the carpet that the two cannot be separated".[29] In addition, conversion damages were to be paid in regard to all carpets which had been sold at a rate of $190 per square meter.[30] This resulted in a total of damages in excess of $90 000.

### ii Section 115(2) and Commercial Potential

This section concentrates on any monetary loss or diminution of commercial potential which may result from the exploitation by the defendant of the plaintiff's copyright. There was no evidence of any monetary loss being suffered by any of the applicants, but the judge was prepared to make "a modest award of damages" to each copyright owner "in respect of the possible diminution in the commercial value of the copyright in respect of other uses of the artwork".[31] Von Doussa J did not consider this to be an appropriate way in which to compensate the "personal and cultural hurt" caused by the infringements, since it would result in different damage awards for each artist.

### iii Section 115(4): Flagrant Infringement and "Other Relevant Matters"

Damages can be awarded for flagrant infringement. Von Doussa accepted "flagrancy" as "implying 'the existence of scandalous conduct, deceit and such like; it includes deliberate and calculated copyright infringements'".[32] In this case, von Doussa J held that the infringement was indeed calculated and deliberate, with the respondents continuing to manufacture and import the carpets even after they knew of the breach of copyright. The degree of flagrancy was mitigated somewhat by the respondents' initial attempts to obtain permission through the Aboriginal Art Management Association.

However, the most significant aspect of the award of damages is the use made by von Doussa J of section 115(4) which allows the court to have regard to "all other relevant matters". He decided that it was in relation to this section that "the cultural issues which are so important to the artists and their communities assume great importance".[33] He therefore used this provision to make an award for additional damages to reflect the degree of hurt and offence cause by such unauthorised and inappropriate reproductions of Aboriginal artwork, and to compensate for this "culturally based harm". He therefore opened the way for copyright law to recognise issues of cultural harm as relevant. The award of additional damages amounted to $70 000, and von Doussa J asserted it would have been even higher but for the fact that the damages awarded under section 116 went beyond a mere account of profits. He explained that

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29 Id at 39,078.

30 This figure had been agreed upon by Counsel during the course of the trial as the appropriate average sum for conversion damages.

31 Id at 39,080.

32 Id at 39,082, quoting from *Ravenscroft*, above n22.

33 Id at 39,083.

these damages were partly exemplary or punitive in nature, and partly they were to reflect the degree of harm done.

## 4. *Conclusion*

In light of the general past ineffectiveness of copyright law in protecting Aboriginal culture, the decision in *Milpurrurru* reflects a welcome development towards more adequate legal safeguards for Aboriginal art and culture. In *Milpurrurru*, von Doussa J has done more than merely acknowledge the cultural significance of Aboriginal art or show sensitivity to the cultural offence and harm caused by unauthorised and insensitive reproductions of indigenous art works. He has accorded legal significance to these issues by classifying them as "relevant matters" to which courts should have regard when deciding upon appropriate remedies. This recognition of cultural harm as being in itself a form of damage and loss which should be compensated is extremely significant. The amount of damages awarded in *Milpurrurru* also serves to underline the gravity of the offence involved in unauthorised reproduction of Aboriginal art, since the award was the largest ever made to Australian artists for infringement of copyright in artwork.

It is to be hoped that this case marks a turning point in the approach of the Australian legal system to the issues involved in unauthorised reproduction of Aboriginal art. It can be regarded as a landmark case in the protection of indigenous culture and the rights of Aboriginal artists under Australian copyright law, and will hopefully help to deter further unauthorised, insensitive and irresponsible copying of Aboriginal artwork.

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* BA(Hons), LLB(Hons). I would like to thank Dr Patricia Loughlan who supervised the writing of this case note.