

# **Submission to the Inquiry into the Enforcement of Copyright in Australia from the National Indigenous Arts Advocacy Association Inc.**

## **Introduction**

Indigenous arts and cultural expression is a living and vital part of Indigenous cultural heritage. The songs, dances, stories and images represent important elements of Indigenous society. The objects, paintings and cultural information are forms of continuing expression and maintenance of Indigenous cultures.

In the past, Indigenous arts and cultural expression has been open season for exploiters. The general attitude was that Indigenous arts was “terra nullius” and free for all to use and exploit for commercial gain. In this way, Indigenous Art was seen as “artefacts” to be collected and displayed in museums or as a commercial raw material to be plundered for tourism by the manufacture of tasteless and culturally offensive merchandise.

As Indigenous artists and creators become more aware of their rights and the community at large more sensitised, the limitations of the enforcement of copyright being experienced by Indigenous artists, creators and communities are more manifest.

We find that there are many issues that are common to all artists that the Committee needs to address. However there are culturally specific issues in the Enforcement of Copyright that we submit, require and are capable of being dealt with by appropriate reform. In our submission some of that reform process can and should be dealt with under the *Copyright Act*.

NIAAA wishes to commend to the Committee the need for a more general reform covering Indigenous Cultural and Intellectual Property within which particular amendment to the *Copyright Act* must be informed.

The Coalition Government has acknowledged as much in its Policy Statement “For Art’s Sake - Affair Go” when it stated:

“In consultation with Aboriginal and Torres Strait Islander people, the coalition will give priority to rectifying the deficiencies in existing copyright legislation relating to the cultural and economic protection of Indigenous art.”<sup>1</sup>

In this regard some investigation into the relevant issues was commenced in the “Stopping the Rip-Offs” Inquiry of 1995 which was not completed although many submissions were made. NIAAA in its submission stated :

“The Rip-off issue is not new. The problem has existed for two decades. Various Aboriginal and Torres Strait Islander artists and arts organisations have voiced their concerns and requested that positive action be taken. As noted by Wandjuk Marika in 1976:

‘We have come to understand that we are going to need the same sort of protection that other artists and craft workers have in order to prevent their

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<sup>1</sup> “For Arts Sake - A Fair Go!” issued by Coalition government 1996 at page 27.

works being copied or reproduced in books and in other forms without their permission. We do not wish to prevent anybody from using our non-sacred designs, in books, magazines, postcards, calendars, even on tea-towels and tablecloths, for we are happy to see that people all over the World are interested in the Australian Aboriginal culture. We know that our people are in high demand as painters, potters, and crafts workers, and it would be foolish to do anything that might prevent these people from getting money if they wish to take commercial advantage of their talents. We do, however, seek legal protection.”<sup>2</sup>

### Scope of this Submission

In this submission we propose specific recommendations for amendment to the *Copyright Act* on all of the Terms of Reference within the scope of this Inquiry. In doing so we urge that that focus not be lost upon the Indigenous Cultural and Intellectual Property context of those submissions.

“The dilemma for Aborigines is that in order to gain legal protection they must adopt European values, and often practices. To resist means taking themselves outside of legal protection afforded to white artists, performers and creators.

What’s needed is a full examination of Aboriginal culture in all its forms, and legislation developed accordingly to protect those cultural forms.”<sup>3</sup>

## **1(a) Evidence of the *Types* and *Scale* of Copyright Infringement in Australia**

Indigenous art practice and culture falls both within and outside of copyright. So far as Indigenous art is or has been practised in a material form by individuals who have not been dead for longer than fifty years there is a legal right capable of enforcement under the existing provisions of the *Copyright Act*.

What makes those works a particular type is the identity of the artists and the works within the framework of a unique culture and people. Of particular importance to this Inquiry is the enormous trade that has developed in those works. Contemporary Indigenous art is big business but often the Indigenous people are not benefiting from the exploitation of their culture. What is being created is an “Aboriginal industry for non-Aborigines.”<sup>4</sup>

NIAAA submits that under the *Copyright Act* enforcement should ensure proper protection and remuneration to all copyright owners - including Indigenous creators.

### **1(a)(i) Availability and Accuracy of data on Copyright Infringement**

The following statistics are sourced from documented NIAAA enquires over the 1997 1998 period.

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<sup>2</sup> Wandjuk Marika, “Aboriginal Copyright: Art and Australia”, March 1976 page 242 cited in *Stopping the Rip-offs Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* by Terri Janke May 1995 on behalf of NIAAA.

<sup>3</sup> Michael Mansell, *Barricading our Last Frontier - Aboriginal Cultural and Intellectual Property Rights* 16 August 1996 page 1.

<sup>4</sup> Henrietta Fourmile, “Aboriginal arts in relation to Multiculturalism,” in *Culture, Difference and the Arts*, (ed) S Gunew and F Rizvi, Allen & Unwin Sydney 1994, pp 69 - 85 at 75

Client Issue	Percentage of Total Enquiries
Legal	32
Cultural	9
Industrial	32
Eductaional	4
Projects	.4
Referrals	.19

Often NIAAA receives complaints from third parties who are not the copyright owners of infringing articles. Often, there is a large amount of copyright infringements occurring that the copyright owners themselves are not aware of, as evidenced in the *Carpets Case* below. Other factors also relate to infringements being undetected and unactioned:-

- remoteness of areas in which many Indigenous artists live;
- language barriers;
- copyright infringements occurring outside Australian jurisdictions and in countries which are not signatories to the Berne Convention (Many Indigenous ripoffs are produced in countries such as China and Vietnam)
- misunderstandings as to licensing rights of third parties
- internet and new technology further increases the rate at which infringements are occurring.

NIAAA has found that much of the cases it becomes aware of, or are otherwise litigated, represent a very small percentage of the overall infringements occurring in Indigenous arts.

***NIAAA recommends that a wider survey be conducted which aims to estimate the extent of copyright infringements to Indigenous creators.***

### ***1(a)(ii) The scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners***

The exploitation of Indigenous cultural works is an issue internationally for Indigenous peoples and various countries have attempted to deal with such exploitation by way of case law and legislation. These issues are currently the subject of inquiries being undertaken by the World Intellectual Property Organisation and UNESCO.

Recent copyright infringements involving Indigenous Australia cultural works indicate that a large amount of infringements occur outside Australian boundaries.

The fact that WIPO and UNESCO are investigating the extent of infringement of copyright in Indigenous people's works globally is clear recognition that trade in Indigenous artworks is a significant and distinct industry arising out of many significant, distinct and varied Indigenous Cultures.

NIAAA understands that the impetus for inquiry into enforcement under the Copyright Act arises out of the World Trade Organisation initiative under GATT and TRIPS. A global system of enforcement to work reciprocally must have its member states laws' sufficiently consistent in order to be reciprocally

recognised and enforced. Given the global presence of Indigenous works in that context NIAAA submits that the recognition and enforcement of Indigenous Australian Artists rights under the Copyright Act has enormous application to the global reciprocity of enforcement against infringement.

The loss of income to nations from rampant copyright infringement is a priority and NIAAA strongly submits that protection of Indigenous cultural works cannot be lost sight of as a distinct and significant part of that priority.

### **1(a)(iii) The Geographical Spread of Copyright Infringement**

NIAAA is a national organisation which services Aboriginal and Torres Strait Islander artists and creators from all over Australia. The following is a geographical spread of complaints over the 1997-1998 period.

Region	Percentage of total
NSW	42
ACT	2
VIC	8
NT	8
SA	6
WA	11
QLD	11
TAS	2
Overseas	10

In many cases, the act of infringement occurs in different geographical locations from that of the creators or creators' place of residence. For instance, in the *(Deceased) & Others v Indofurn<sup>5</sup>*, (the *Carpets Case* discussed in more detail below at 1(b)(i)) carpets bearing infringing designs were imported into Perth Western Australia whereas the artists lived in Arnhemland and Central Australia.

Our figures indicate that exploitation of Indigenous cultural works occurs largely within the Australian tourism industry in the major business centres of Australia. As noted by ATSIIC Cairns office to the *Stopping the Ripoffs Inquiry*:-

“Cairns is a burgeoning tourism centre with a significant Aboriginal and Torres Strait Islander population. At present there is little recognition or cooperation in developing of viable economic role for the community. Within this context Aboriginal and Torres Strait Islander cultural expression is being exploited by non-Indigenous entrepreneurs who perceived the cultural heritage and community as ‘a resource to be mined’ rather than be ‘developed in equity.’”<sup>6</sup>

### **1(a)(iv) The costs of infringement and impact on Australian Business**

<sup>5</sup>[1998]41 IPR 513

<sup>6</sup> ATSIIC Cairns and District Regional Council per Narelle Nichol, Submission to Issues Paper Stopping the Rip-offs February 1995.

Indigenous people account for approximately 1.6% of the overall Australian population.<sup>7</sup> Despite the fact that Indigenous people are a relatively small percentage of the overall population, the contribution of Indigenous cultural knowledge and resources to Australian industry is enormous. The Indigenous cultural industry is a multi-million-dollar business spanning numerous significant industries<sup>8</sup>

ATSIC's *National Aboriginal and Torres Strait Islander Cultural Industry Strategy* estimated the Indigenous arts and crafts market to be worth almost \$200 million per year.<sup>9</sup> Half of the sales are related to the tourism market, and are likely to increase dramatically with the advent of the 2000 Olympic Games in Sydney.

The percentage of returns to Indigenous people is marginal. In 1989, the *Review of the Arts and Crafts Industry* estimated that Indigenous people receive just over \$7 million per year from the sale of art and crafts.<sup>10</sup> The *Strategy* notes that the economic benefits to Indigenous artists have improved and could now be about \$50 million per year, but that the major portion of the sales benefit goes to art traders rather than to the artists themselves.<sup>11</sup>

Furthermore, no accurate statistics have been prepared on what the value of the "ripoffs" are. This includes pirating Indigenous arts and the unauthorised reproduction of Indigenous arts outside national boundaries. Given the size of the market for Indigenous Australian works NIAAA is in no doubt that infringement is rife and depriving Australian business and Indigenous Artists and communities of economic benefit.

**1(a)(v)      *Whether there is evidence of the involvement of organised crime groups in copyright infringement, and if so to what extent***

NIAAA has received no direct reports of any organised crime groups in copyright infringement. There is ad hoc media information concerning the level of criminal infringement in music and video piracy and the Committee should be aware that this affects Indigenous Australian Film makers, Producers, Composers and Recording Artists.

NIAAA is also concerned that although the infringement of Indigenous Australian works may not be perpetrated by organised crime it is we submit systemic. As noted at page 4 above there is a perception that Indigenous Australian cultural works are 'a resource to be mined'.

***To correct such attitudes and prevent continuation of this systemic 'mining' NIAAA recommends that remedies of apology and education by information as well as by meeting between infringer and applicant.***

**1(a)(vi)      *Likely future trends in the scale and nature of copyright infringement***

Recently, NIAAA has been made aware of infringements including:-

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<sup>7</sup> 1994 Census figures undertaken by the Australian Bureau of Statistics estimate 303,260. Total population is approximately 18,709,700 in 1998 ABS figures.

<sup>8</sup> Kathryn Wells, "The Cosmic Irony of Intellectual Property" in Vol 7 No 3, *Culture and Policy: A Journal of the Australian Key Centre for Cultural and Media Policy*, 1996, pp 45-68. Wells provides a detailed analysis of Indigenous historical and contemporary experience in the main industries of rural, arts, biological and medical, tourism, innovative, mining and technology.

<sup>9</sup>ATSIC, *National Aboriginal and Torres Strait Islander Cultural Industry Strategy*, prepared by Focus with the assistance of Sharon Boil & Associates, February 1997, p 5.

<sup>10</sup>Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee*, AGPS, Canberra, July 1989, note 69.

<sup>11</sup> ATSIC, and Office of National Tourism, *National Aboriginal and Torres Strait Islander Tourism Industry Strategy*, August 1997, p 5.

(some examples of cases NIAAA has heard of recently)

- reproductions on t-shirts
- reproduction of artworks on paper mache boxes made overseas and imported into Australia being passed off as Aboriginal craft work;
- music CDs copying and altering traditional Aboriginal songs;
- jigsaws.

Most of these items appear to be aimed at the tourism market. Exploitation of Indigenous cultural material is increasing in light of the Olympic Games where Australian businesses look for unique and authentic Australian products to market to our world visitors.

Infringement on the Internet will in NIAAA's submission become a more commonplace occurrence as works are scanned and copied into Tourist Web Site Advertising, decoration of Home Pages, Desk Tops, Screen Savers, etc..

## **1(b) Options for copyright owners to protect their copyright against infringement**

### **1(b)(i) *Actions and Expenditure undertaken by Copyright Owners to defend their Copyright***

#### ***Issuing Letters of Demand***

Many infringers do not take the rights of Indigenous creators seriously unless legal representatives are engaged. NIAAA has found that there is a cavalier attitude held by many merchandisers, tourist operators, importers, exporters and music producers and other persons seeking to cash in on the marketability of Indigenous Australian works and culture.

The threat of litigation is one of the most effective means of enforcement available to Indigenous people. The engaging of a solicitor to prepare letters of demand have successfully lead to the settlement of some copyright infringement matters. One example is the case of Sally Morgan.

In 1991 Sally Morgan a well known painter, print maker and best selling author of *My Place* discovered that one of her artworks had been printed on a line of t-shirts selling for five dollars in a Sydney supermarket. The work in question had featured on the cover of the first edition of *Aboriginality: Contemporary Aboriginal Paintings and Prints* by Jennifer Isaacs, Queensland University Press 1989.

A strikingly similar image appeared on the t-shirts. Morgan's identification mark on the lower right hand corner was obliterated. Morgan approached the then Aboriginal Arts Management Association (now NIAAA). A Letter of Demand was written to the retailer. The retailer replied that the goods were no longer on sale. The retailer blamed the company trading as Busybody. Busybody claimed to have destroyed the original artwork from which the t-shirts were produced but handed over the silk screen. An out of Court settlement was reached. The unsold t-shirts were delivered up. The compensation was comparatively nominal. This was because Busybody's figures were not detailed accurate to calculate counter profits.<sup>12</sup>

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<sup>12</sup> Copyrights *Aboriginal Art in the Age of Reproductive Technologies* touring exhibition 1996 catalogue, author Vivien Johnson.

Whilst the matter was able to be settled outside court, it is important to note that even out of court legal negotiations involve the costs of lawyers fees which are often beyond the means of many Indigenous artists.

## ***Test Cases***

Test cases act to publicise the existence of copyright in Indigenous works, correcting a perception that they a ‘mining’ resource. They also send a message of deterrence to potential infringers that they can and may be sued successfully. Furthermore recent test cases in the area of Indigenous arts have extended the application of copyright to Indigenous cultural works.

### ***Carpets Case***

In 1994, NIAAA coordinated the *Carpets Case*<sup>13</sup> as a test case for Indigenous artists’s rights and copyright application and protection. In all including enforcement proceedings the case cost approximately \$250,000.00 to run and was funded by the Aboriginal Torres Strait Islander Commission and the Australia Council’s Aboriginal and Torres Strait Islander Arts Board. The case was successful in extending the parameters of Copyright Law to apply to Indigenous cultural works.

In the *Carpets Case*<sup>14</sup>, carpets reproducing the artistic works of several well known Indigenous artists were imported into Australia by a Perth based company Beechrow (named Indofurn at the time the action was taken against them). Beechrow arranged for the manufacture of the carpets at a Vietnamese carpet factory. In Vietnam at the time there were no copyright laws. The works copied were of images, symbols and styles of which the artists were the custodians on behalf of their clans. Those images, symbols and styles communicated and maintained significant cultural information.

Indofurn did not seek permission to reproduce the artworks prior to the making of the carpets and directed the Vietnamese company to reproduce the works on carpets by copying them from an educational portfolio from the National Australian Gallery and a calendar produced by the Australian Information Services.

After Indofurn had begun offering the carpets for sale in Australia, Indofurn did attempt to contact NIAAA in order to obtain permission from the artists. A letter seeking permission was allegedly sent to the wrong address. Without waiting for a reply, Indofurn began selling and distributing the carpets before any of the artists were aware that their artworks had been reproduced in this way. Evidence given at trial indicated that permission to reproduce such sacred works on carpets where they would be walked upon, would have never been consented to.

Von Doussa J in finding for the Applicants made observations about the importance of a body like NIAAA to provide culturally specific resources and assistance. He also highlighted the cavalier attitude of the Respondents.

“The evidence demonstrates beyond any doubt that AAMA (now NIAAA) has at all times been acting strictly in accordance with the wishes of the Aboriginal artists, and that without AAMA’s support a very serious copyright infringement of major artistic works could have remained unremedied. The literature on the preservation of Aboriginal Folklore in Australia already referred to had the Respondents’ thought to read it, could have lead them to the same conclusion. At one point the respondents even sought to attack the bona fides of AAMA and it’s objects. Again, the

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<sup>13</sup> Op cit p 4

<sup>14</sup> 30 IPR 209

background to that organisation and the fact that it is controlled by members of the Aboriginal community was publicly available information.”<sup>15</sup>

The Court found in favour of the artists, awarded approximately \$188,000 in damages and ordered Indofurn to hand over the unsold carpets. Part of the award was given in consideration of the personal hurt and “cultural harm”. His Honour found that the misuse of the artwork caused great upset and cultural harm to the artists. Other amounts were awarded against the directors personally for knowingly continuing to import after the proceedings has been commenced.

Whilst the case is an important landmark, it is noted that no damages were ever paid to the Indigenous artists by Indofurn or its directors in respect of the case. In 1996, King and Rylands, the two nominal directors of Indofurn successfully appealed against von Doussa’s decision regarding their own personal liability. Indofurn Pty Ltd has been wound up and Mr Bethune, the active director, has been declared bankrupt.

The decision in the *Carpets Case* shows how the *Copyright Act* can recognise pecuniary penalties as punishment. Unfortunately money does not afford a complete remedy. The *Copyright Act* has no provision for apology from or education of the offender, as exists in other laws.

The *Defamation Act* recognises the benefit of an apology and retraction which we submit should be incorporated into the *Copyright Act*. We submit that such remedies are applicable not just to Indigenous persons but to all artists who can show insult or harm due to the derogatory or offensive nature of the infringement. Such an enforcement would have a salutary effect on infringers and reduce the likelihood of recidivism.

The cultural ambivalence of the *Copyright Act* has the unfortunate affect of creating a right in the Author regardless of that Author’s cultural background. Thus the style or motif of Indigenous cultural works that are in copyright can be imitated and works that are out of copyright can be reproduced entirely without redress.

We submit that this cultural ambivalence seriously erodes Indigenous culture and morale and requires specific provision by recognition in the *Copyright Act*.

“It would seem to us to be wholly unsatisfactory that copyright protection might be given to a person who adapted a traditional work by printing it, for example, upon t-towels. To give such free access by non-Aboriginals to the body of folklore which is traditionally given only to certain people for certain purposes could be to abuse a rich heritage and might even destroy it.”<sup>16</sup>

Despite the success in the Courts of the *Carpets Case* and other decisions it is NIAAA’s experience that the lure of the dollar when it comes to Indigenous art entices infringers to have disregard to the *Copyright Act*.

***NIAAA recommends that the Copyright Act have stronger deterrence/penalty provisions to be supported by complementary provisions in the Commonwealth Crimes Act and a separate Act dealing with Indigenous cultural infringement.***

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<sup>15</sup> Op cit, per Von Doussa at TBA

<sup>16</sup> Attorney General’s Department, “WIPO - Australia Copyright Program for Asia and the Pacific, 2 - 13 November 1987 papers and country reports, protection of expressions of Folklore Mr Peter Banki Chairman Australian Copyright Council from 1981 report of the Australian working party under protection of Aboriginal Folklore at paragraph 1004.



***NIAAA recommends that the Copyright Act have added further remedies of apology, statutory recognition of damages for cultural harm and the Copyright Act and/or Crimes Act have provision for compulsory education processes and plaintiff/respondent meeting provisions similar to the victims and offenders procedures recently introduced in the Criminal Law.***

### ***Bulun Bulun & Anor v R & T Textiles Pty Ltd***

Another major focus of exploitation is that infringers often seek to disguise copying by incorporating one or more copyright works so as to give an item the look and feel of being an Indigenous design. A closer look will reveal the source as evidence.

In *Bulun Bulun & Anor v R & T Textiles Pty Ltd*<sup>17</sup> Johnny Bulun Bulun, a well known Indigenous artist from Arnhemland and member of the Ganalbingu people had his works “Magpie Geese” and “Water Lilies at the Waterhole” altered and copied on fabric imported into Australia by R & T Textiles (the “Company”).

The artistic works incorporated imagery which is sacred and important to the Ganalbingu people’s cultural heritage.

The quality of the fabric was such that it did not have the standard white boarder which is the requirement of Australian produced fabric.

The important aspect of the case was that a co-applicant (now deceased), brought proceedings in his own right, claiming that the Indigenous owners of Ganalbingu country are the equitable owners of the copyright subsisting in the artistic works.

The court found that there was no equitable ownership right to copyright in the artistic works but determined that Mr Bulun Bulun owed a fiduciary duty to the deceased and the Ganalbingu people to protect the ritual knowledge which he had been permitted to use under customary law. The court found that the primary rights, in the event of a breach of obligation by the fiduciary is a right *in personam* to bring an action against the fiduciary to enforce the obligation.

The court considered that Mr Bulun Bulun had fulfilled this obligation by taking legal action against the Company and therefore there was no need for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship.

The examples examined above show how existing copyright laws can recognise specific cultural rights. NIAAA recommends that the precedents set in these cases be enshrined in the *Copyright Act* to prevent against erosion by decisions in higher court that may have effect of eroding these decisions.

***NIAAA recommends that the fiduciary obligation of custodians and the equitable rights of the beneficiary members of custodians’ clans be statutory recognised either by specific amendment to the Copyright Act or by other legislation.***

### **1(b)(ii) Use of existing provisions of the Copyright Act 1968**

There is growing awareness by Indigenous creators that the *Copyright Act* can and does protect and enforce the rights of Indigenous Australian Artists. Cases such as *Bulun Bulun v R & T Textiles*<sup>18</sup> and

<sup>17</sup> (1998)3(4)AILR 547

<sup>18</sup>[1995]30 IPR 209

The *Carpets Case* have extended the parameters of Australian copyright law to protect Indigenous cultural works.

However, whilst copyright, has provided some relief to Indigenous artists whose works have been exploited for commercial purposes many Indigenous artists and creators are unable to use copyright as an avenue for the protection of their cultural material for a variety of reasons including:-

- problems of surveillance. As evidenced in the *Carpets Case*, often Indigenous artists live in remote areas and are not aware of when their works are copied and exploited.
- financial and logistical difficulties in enforcing rights. Remoteness of many Indigenous artists also mean that there are difficulties enforcing rights. There is also limitations given the costs of running a copyright infringement case. This effectively precludes many Indigenous artists from relying on copyright law to protect their Indigenous artworks. The role of Indigenous legal services is limited to criminal matters which does not avail itself to run civil cases relating to copyright infringement.
- the lack of infrastructure to support Indigenous artists actions. Whilst NIAAA has in the past actively supported artists in providing advice to artists, reviewing contract and assisting running of test cases, there is a large amount of infringements that go unactioned.
- Proceedings are expensive and slow. The jurisdiction of Federal Court is limited and expensive.

Existing Copyrights laws are therefore very unaccessable. We note that in South Australia the Local Courts have adopted jurisdiction to hear Copyright matters. Given the recent High Court decision affecting Cross-Vesting Legislation is in doubt. NIAAA believes the Federal Court could inexpensively be used to set up and administer a cheaper system of arbitration similar to that adopted by Local Courts in New South Wales and other states.

Such system would involve accreditation of specialist lawyers to be made arbitrators or adjudicators under the Federal Court in every state. Matters could be dealt with by the listed accredited specialists in the lawyers own offices. The costs of such a system could be met or partially met by fees for accreditation, filing fees and hearing fees.

***NIAAA submits that there is a need for the establishment of specialist arbitration and adjudication tribunals which also incorporate Indigenous law experts and legal specialist in this area.***

### **1(b)(iii) Use of Legislative Provisions other than those of the Copyright Act 1968**

Indigenous Australians have utilised other legislative provisions to protect their cultures including:-

#### **Section 52 and 53 of the *Trade Practices Act 1974, Passing Off***

These provisions were included in the pleadings in the *Carpets Case* and are often used by Indigenous artists and creators where stylised impressions or pastiche of an Indigenous work is copied and it is harder to show a substantial reproduction has occurred.

#### **Cultural Heritage Legislation**

There has been some discussion as to whether Indigenous cultural works can be protected under cultural heritage legislation.<sup>19</sup> It is generally considered by Indigenous people that cultural legislation is extremely limited in protected intangible aspects of culture. This is because the Act focuses on the scientific and historical value of sites rather than the cultural and spiritual values. Furthermore, most cultural heritage legislation empowers a government minister or officer rather than the relevant Indigenous group.<sup>20</sup>

## **Native Title**

The recent case of *Bulun Bulun & Anor v R & T Textiles* it was argued that the traditional ownership of that country was inexorably linked with the ownership of, and the right to authorise and prevent the reproduction of, artistic works.

Bulun Bulun claimed that the Ganalbingu people were the traditional Aboriginal owners of the site known as Djilibinyamurr in the Arafura swamp region, as defined in s 3 of the *Aboriginal Land Rights (NT) Act 1978*. They also claimed to be “native title holders” of that land pursuant to section 224 of the *Native Title Act 1993*. (At the time of acquisition of sovereignty over the Northern Territory of Australia by the Crown the applicant’s ancestors were the traditional Aboriginal owners.)

It was therefore argued that Bulun Bulun’s right to paint and permit the reproduction of the artistic work is subject to the conditions and obligations of and incidental to traditional Aboriginal ownership of the land at Djilibinyarmurr and a Native Title right.

The cited *Yarmirr v Northern Territory of Australia*<sup>21</sup>, where it was held that in the absence of an application for a determination of native title being made, the court has no jurisdiction to make a determination in respect of claimed native title rights. Von Doussa J in *Bulun Bulun -v- R&T Textiles* was of the opinion therefore that in the present case there was no application for determination of native title pursuant to section 74 of the *Native Title Act 1993*, and the Court was without jurisdiction to make a determination of native title in these proceedings.

The recent native title case of *Ben Ward & Ors v State of Western Australia & Ors* upheld native title rights including the right to “trade in resources” and the right to “maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area.”

***NIAAA submits that this aspect of the judgment requires further clarification and recommends that Indigenous artistic cultural practices and the rights in such works be recognised as a concurrent Native Title right.***

## **Breach of Confidence Laws**

In *Foster v Mountford*,<sup>22</sup> the Federal Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action under breach of confidence laws to stop the publication of a book in the Northern Territory.

Mountford, an anthropologist, undertook a field trip in 1940 into remote areas of the Northern Territory. Tribal sites and items of deep cultural and religious significance were revealed to the anthropologist by the

<sup>19</sup> Colin Golvan, “Aboriginal Art and the Protection of Indigenous Cultural Rights” (1992) 7 EIPR 227 at 230.

<sup>20</sup> Terri Janke, *Our Culture: Our Future - Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*, (Discussion Paper) Michael Frankel and Company, Sydney, 1997 page 51.

<sup>21</sup> (unreported, Federal Court, 4 April 1997), Onley J

<sup>22</sup> (1977) 14 ALR 71.

Pitjantjatjara male elders. Mountford recorded the information and later revealed them in a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory. The book contained photographs, drawings and descriptions of persons, places and ceremonies of deep religious and cultural significance to the Pitjantjatjara people.

The wide dissemination of this information could have caused serious disruption to Pitjantjatjara culture and society should this material have been revealed to women, children and uninitiated men. The information was shown to have been given to Mountford in confidence.

Whilst this type of cause of action is available to non-widely disseminated material, it would not be available to published information, which often has been recorded by ethnographers, anthropologists and the like, often without the continuing consent of the relevant Indigenous groups.

Copyright of the recorded form of such information and material, often vests with the compiler, researcher and publisher and there is often very little the owners of the knowledge can do to protect and limit dissemination of cultural material.

## **Trade Mark Law**

There is growing awareness of Trade Mark law to protect trading aspects of Indigenous cultural works. NIAAA notes, however, that there is often a reluctance of Indigenous individuals to register trade marks relating to cultural items as they are aware of the communal ownership of material and do not wish to assert individual ownership and control, contrary to their cultural ethics.

Indigenous regional arts sectors are now developing locally devised trade marks to market their artistic works for their local regions.

Furthermore, NIAAA has registered a certification mark to be used as a “Label of Authenticity”. The idea is that the labelling system will be adopted to raise consumer awareness of the rip off problem, thereby promoting authentic products and increasing the returns to Indigenous artists and their communities.

One of NIAAA’s current projects is the development and trademarking of a National Indigenous Authenticity Label.

The Label of Authenticity is a certified trade mark that was developed to enable the protection of Australian Indigenous art, cultural products and cultural performances by way of a national certification system for the authentication of the works of Indigenous people. The Label of Authenticity mark enables people to easily identify products and performances as authentic works of Aboriginal and Torres Strait Islander and will help educate consumers about the diversity of traditional and contemporary Indigenous artistic expression, art and stories.

Any Aboriginal or Torres Strait Islander person who meets the standard set by the Rules may apply for certification entitling that person to use the Label of Authenticity in relation to their works and to reap the benefits of the certification system.

The certification system is a two tiered system. The Label of Authenticity is subject to the Rules and can only be used in relation to a work or service which is created, authored or produced wholly by an Indigenous person. The second Label of Authenticity can be used where the work or service is authored, created or produced by an Aboriginal and Torres Strait Islander person with the assistance or

input of a non indigenous person or where a product or service incorporates the work of an Indigenous person.

### **1(b)(iv) Non-legislative measures for Copyright Protection**

#### **Contracts**

In the absence of adequate legal protection, many Indigenous creators and clan and community groups are looking to contracts to fill the shortfalls in the law in protecting Indigenous copyright works.

NIAAA suggests that there is greater scope for developing model terms etc which can facilitate this together with the development of protocols in all areas of use including film, visual arts, research and digital technology.

### **1(b)(iv) Technological or other non-legislative measures for Copyright Protection**

In the past NIAAA has assisted subsequent users of Indigenous works, including publishers, merchandisers, etc to locate Indigenous artists for permission to use their artworks. In this way, NIAAA has also assisted with the artists being able to negotiate rights of usage to ensure that their cultural rights are respected.

A difficulty is that, in many cases, artists require specialist legal and industry advice which needs greater resources to establish. In this respect, NIAAA observes that there may be benefits in collective administration and recommends that a study be commissioned which looks at the possibility of developing an Indigenous Copyright Collecting Systems, operating at local, regional and national levels, which can facilitate permeations and licensing fees for appropriate usages of Indigenous cultural works.

Such a central administration system would also facilitate the identity of works and owners and establish a fighting fund for the identification and enforcement against infringement of copyright.

Such a central administration system could also ensure water-marking and/or encryption of works used on the net with proper royalty administration.

## **1(c) The Adequacy of Criminal Sanctions against copyright infringement**

The criminal provisions in the *Copyright Act* make it a criminal offence for a person to sell, or possess for the purpose of sale, import and distribute an article that he or she knows to be an infringement of copyright, (section 132 *Copyright Act*). The *Copyright Act* also provides the Australian Federal Police with the powers to investigate the matter and if satisfied, seize any infringing material.

Under these provisions, a magistrate can impose fines and order that infringing items be destroyed, given to charity or to the owner of the copyright in the work.

In our experience, the criminal sanctions are not sufficient enough to act as a deterrent against infringement of Indigenous copyright works.

Furthermore, there are no sanctions for use of Indigenous styles, motifs or works out of Copyright. There is a need for separate legislation with criminal provisions to deal with this.

***NIAAA recommends harsher infringement penalties with further community and industry awareness of same.***

***NIAAA recommends that there be statutory recognition of Indigenous styles, motifs with penalties for their infringement.***

## **1(d) The adequacy of Civil Actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement**

### ***The appropriateness of Remedies***

Under the *Copyright Act*, remedies available include delivery up, account of profits and damages, punitive damages and under section 116 conversion damages.

The allocation of punitive damages for cultural harm in the *Carpets Case* illustrated that there is some flexibility in the legislation. As noted by McKeough and Stewart:

“Remedies under the *Copyright Act* are in any event fairly flexible. On this occasion the Judge awarded damages under three categories. Section 116 of the *Copyright Act* allows for Conversion Damages ie the infringer must pay the Copyright owner an amount representing the value of the infringing copy (or copies) as if the copyright owner had actually owned the items themselves and they had been stolen by the infringers. The Conversion Damages were assessed at an average cost as if the carpets were worth \$190 per square metre. This came to \$90,981.50. This was an addition to damages under Section 115(ii), which permits compensation for loss of value of the copyright, in this case assessed with reference to the loss of value resulting from the degradation of the artwork and the resulting commercial use to which it had been put by Bethune and Beechrow. These damages were assessed at \$1,500 in respect of each artwork.

...Importantly von Doussa J accepted that the ‘personal and cultural hurt’ suffered by the artist in their community should be compensated. However, he decided not to compensate for this ‘pirating of cultural heritage’ under Section 115(ii)... however the *Copyright Act* does allow for additional damages for flagrant infringement under Section 115(iv) and in this instance the copyright infringement was found to be deliberate and calculated. Accordingly the element of ‘cultural harm’ was reflected in an Award under that provision. These additional damages were assessed at \$70,000 and would have been higher but for the other damages already granted.”<sup>23</sup>

***NIAAA notes that there is no right of a copyright owner to claim cultural harm damages and recommends that this aspect of damages be legislatively acknowledged in the Copyright Act or other legislation.***

Whilst there is scope for cultural harm and personal hurt in relation to the calculation of damages (i.e. monetary compensation), there is little scope for alternative remedies including:-

<sup>23</sup> Jill McKeough and Andrew Stewart, “Intellectual Property and the Dreaming” in *Indigenous Australians and the Law*, (ed) Elliot Johnson QC, M Hinton and Daryle Rigney, Canendish Publishing (Australia) Pty Ltd, at page 66.

- letter of apology;
- right of the copyright owner to explain cultural significance of work and impact of infringement on culture.

***NIAAA recommends that the Copyright Act be amended to allow the Copyright owner access to other remedies eg: right of retraction; letters of apology and right of the copyright owner to explain cultural significance of work and impact of infringement on culture.***

### ***Communal rights to enforce cultural and intellectual property rights***

There is need under the *Copyright Act* to recognise communal rights as distinct from works of joint authorship. This has been touched on above in relation to the custodial rights argued in the *Bulun Bulun -v- R&T Textiles* case. This issue has been the subject of numerous articles and we draw the Committee's attention to the following extracts:

“Notions of responsibility under Aboriginal law differ from those of the English Common Law. If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming and that work is later inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred even if the artist had no control over or knowledge of what occurred.

... in times past the ‘offender’ could be put to death. Now other forms of punishment are more likely such as preclusion from the right to participate in ceremonies, removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community, or being required to make a payment of money: but the possibility of spearing was mentioned by Mr Wangarra as a continuing sanction in serious cases.”<sup>24</sup>

“... spiritual or cultural interests are another matter altogether. If these are to be appropriately accommodated, a different legislative framework altogether would seem to be needed. Apart from the long overdue enactment of a moral rights regime (hopefully in a form which goes beyond the present, slightly disappointing proposals), there appears to be a strong case either for implementing the key recommendations of the 1981 Working Party report or for adopting Golvan's suggestions of an extension to existing laws relating to sacred sights and objects.”<sup>25</sup>

### ***Costs of litigation***

As noted above in relation to the *Carpets Case*, very often the costs of litigation outweigh the benefits in bringing an action. An applicant must not only have legal fees of bringing their own case, but must also weigh up the costs of the other party's legal fees, should the action be unsuccessful.

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<sup>24</sup> “Indigenous Australians and the Law” Cavendish Publishing (Australia) Pty Limited edited by Elliott Johnston QC, Martin Hinton and Darryl Rigney of the Flinders University of South Australia page 54.

<sup>25</sup> “Indigenous Australians and the Law” at pp 78 and 79, Chapter 5, “Intellectual Property and the Dreaming”, Jill McKeough and Andrew Stewart.

Often claims for Indigenous copyright are met with strong opposition (as observed in *the Carpets Case*) as Indigenous cultural works has for so long been perceived as being in the public domain. The Indigenous creator and group bears the burden of providing that copyright subsists in cultural works as original works. Even when this is established and infringement proven, there are also the difficulties of enforcing judgments.

We refer to our recommendation for a cheaper and quicker form of access to the Courts by accredited arbitrators at 1(b).

## 1(e) The desirability of amending the law to provide further assistance to copyright owners

### Amendments to Copyright Law

Many commentators consider that copyright is not the adequate vehicle to protect Aboriginal culture as the following table illustrates:

COPYRIGHT	INDIGENOUS
* Emphasis on material form	* Generally orally transmitted or performance based
* <b>Emphasis on economic rights - generation and protection of income</b>	* <b>Emphasis on preservation and cultural integrity of works</b>
* Individually based - created by individuals	* Socially based - created through the generations via the transmission process
* <b>Intellectual property rights are owned by individual creators, non-Indigenous collators such as research companies</b>	* <b>Communally owned but often custodians are authorised to use and disseminate</b>
* Intellectual property can be freely transmitted and assigned - usually for economic returns - for a set time, in any medium and in any territory.	* Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications
* <b>Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned</b>	* <b>There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material</b>
* Intellectual property rights are generally compartmentalised into categories such as artistic works, musical works etc	* An holistic approach, by which all aspects of Indigenous cultural works are often inter-related.

### Recognition of Indigenous Cultural and Intellectual Property Rights



Many Indigenous people prefer the inception of a separate Act which will provide rights to Indigenous Cultural and Intellectual Property. (See *Our Culture: Our Future*) Such rights are supported in a range of international documents including the Draft Declaration on the Rights of World Indigenous Peoples:-

“...The *Draft Universal Declaration on the Rights of Indigenous Peoples* indicates that international conventions will impinge even more in the future on Indigenous Intellectual Property Rights:

‘Indigenous peoples have the right to special measures for protection as Intellectual Property, of their traditional cultural manifestations, such as their literature, designs, visual and performing arts, cultigens, medicines and knowledge of the useful properties of fauna and flora.’

And Indigenous people should:

‘Have the right to own, develop, control and use the lands and territories and other resources which they have traditionally owned or otherwise occupied or used.’” (article 27).<sup>26</sup>

As Michael Mansell comments:-

“While it is true that existing laws of copyright, breach of confidence and trade practice may be useful to protect Aboriginal artists, there will be many more instances of exploitation of Aboriginal art forms unable to be prevented by these laws. The crux of the problem is the non-recognition of the collective Aboriginal ownership of traditional art forms. The national law has needed to vest Aboriginal communities with ownership rights over their traditional art forms. Provision also needs to be made for the Aboriginal group to authorise the use of its art. The legislation should not spell out how that authority may be exercised, for that is the self determination issue for the local group.

Finally, a reform of the law in these areas can act as a turning point in attitudes towards the value and meaning of Aboriginal culture and heritage. Legislation has a three pronged purpose: One is to clarify the rights, another to punish wrongdoers. The third is to educate.”<sup>27</sup>

The need for independent legislation addressing Indigenous Cultural and Intellectual Property rights was recommended by a Working Party into the Protection of Aboriginal Folklore (1983):-

‘2.6.1 There be an Aboriginal Folklore act to protect Aboriginal Folklore by providing for:

- 2.6.1.1 Prohibitions on traditional uses of sacred secret materials.
- 2.6.1.2 Prohibitions on debasing, mutilating or destructive uses.
- 2.6.1.3 Payments to traditional owners of items being used for commercial purposes.
- 2.6.1.4 A system of clearances for prospective uses of items of Folklore.
- 2.6.1.5 An Aboriginal Folklore Board to advise the Minister on policy matters.
- 2.6.1.6 A commissioner for Aboriginal Folklore to issue clearances and negotiate payments.

<sup>26</sup> “Protecting Secret-Sacred Designs - Indigenous Cultural and Intellectual Property Law” op cit at page 73.

<sup>27</sup> Michael Mansell op cit at page 10.

- 2.6.2 Amendment of the Copyright Act to ensure the continuing freedom of customary uses to exercise their customary rights in the use of items of Aboriginal Folklore.
- 2.6.3 Control of the exporters significant items of Aboriginal Folklore.
- 2.6.4 Detailed consultations on all proposals with representatives of Aboriginal people and current users of Folklore material.’ (at p225)”

A Report entitled *Our Culture: Our Future* commissioned by ATSIC and AIATSIS also supported the development of new legislation in this area with the following features:-

- The legislation should include provisions which:
  - ⇒ Prohibit the wilful distortion and destruction of cultural material;
  - ⇒ Prevent misrepresentations of the source of cultural material;
  - ⇒ Allow payments to Indigenous owners for the commercial use of their cultural material;
  - ⇒ provide special protection for sacred and secret materials.
- The legislation should not inhibit the further cultural development of materials within their originating communities. That is, customary and traditional use should not be affected.
- The legislation should consider how it will interact with existing copyright and intellectual property laws; for example, perhaps the legislation should apply only to Indigenous cultural works outside of copyright period – where copyright does not exist.
- The legislation should also consider how pastiche and stylised “rip-offs” of cultural material should be dealt with; that is, false and misleading provisions which make it an offence to make false statements or misleading provisions.
- A central network administration system should be set up with local, regional and state offices. The organisation should be an Independent Indigenous Authority making use of existing national, regional or local authorities to provide administration.
- An Indigenous Cultural Tribunal should also be established to mediate disputes. The tribunal should be made up of custodians, owners, specialists in Indigenous law and community elders. Use of ADR procedures with culturally sensitive mediators. There must be avenues to the Federal Court for determinations.
- Prior authorisation provisions should be included, based on respect, negotiation and free and informed consent.
- There should be fair dealing provisions only for traditional and customary use (this to be defined), research and study, and judicial proceedings. But judicial proceedings relating to sacred/secret material should not be made public or used for other purposes. No innocent infringement provisions.
- There should be a system which allow members to negotiate fees and collect royalties. To this end, voluntary collecting schemes at the regional level are advised. This might be done by a voluntary system of registering material that can be commercially used and by identifying groups,

individuals or organisations who can authorise use. Lists of inappropriate material can be generated, taking into account Indigenous secrecy laws.

- To facilitate authorisation and/or fee collection, Indigenous groups could develop protocols on acceptable uses and prohibited uses.
- Particular communities should decide on fees to be charged and how this should be collected and distributed. The Tribunal could act as a guide, and act as arbitrator if disputes arise.
- The legislation should allow particular groups of Indigenous people to bring civil actions against infringers of their cultural and intellectual property and to obtain remedies similar to those under existing intellectual property laws. For example, damages; account of profits; injunction to restrain use and delivery up of infringing material.
- The legislation should include offences such as:
  - Criminal sanctions for more serious offences such as destruction and severe mutilation of Indigenous sacred and secret material.
  - Fines for breaches of cultural rights.
- Confidentiality provisions should set out what can be disclosed to the public and what cannot be; for example, closed tribunal hearings.
- There should be a grace period of 12 months to allow commercial users to come into line with new amendments.
- There should be extensive consultations with Indigenous people concerning the introduction of any proposed legislation.<sup>28</sup>

### **Comparative US Laws**

In the United States there are laws relating to the misleading and deceptive ambush marketing practices of stylising Indigenous products.

“The *Indian Arts Crafts Act* does away with many problems posed by native style images and artefacts manufactured by non-Indigenous peoples. The American market has been flooded with cheap Asian-manufactured ‘Indian’ crafts. The remedial legislation is controversial, draconian and very effective.

It is unlawful to offer or display for sale or sell any good with or without a government trade mark, in a manner that falsely suggests it is Indian-produced, an Indian product, or the product of a particular Indian tribe or Indian arts and crafts organisation resident within the United States (Section 104).“

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<sup>28</sup> Terri Janke, “The Protection and Recognition of Australian Indigenous Cultural and Intellectual Property Rights: An overview of the Australian Project Our culture: Our Future,” presented to the Symposium on the protection of traditional knowledge and expressions of Indigenous cultures in the Pacific Islands, Noumea, New Caledonia, 15 - 19 February 1999.

## Copyright Provisions that can be Accommodated

However, in the absence of such legislation, and even if such legislation were to be adopted, there may be some measures that can be adopted within the existing *Copyright Act* to better enhance the ability of the *Copyright Act* to meet the needs of Indigenous people.

*NIAAA recommends that:*

- *Amendments to ensure that cultural harm damages can be claimed;*
- *Recognition of the decision in R & T Textiles case - that Indigenous artist has fiduciary duty to clan group for Indigenous cultural works;*
- *Recognition of the rights of Indigenous communities to bring actions in respect of infringements relating to collective owned clan designs;*
- *Amendments to moral rights which introduced right of attribution and cultural integrity will benefit Indigenous artists;*
- *Amendments to performer's rights which recognises copyright in performance would benefit Indigenous artists.*
- *Access to fast-track and low-cost tribunals; Arbitration and mediation attached to Federal Court which include a list of expert lawyers to deal with the matters outside of court.*

### 1(f) Border Seizure in Division 7 of the Copyright Act

We refer to our comments below at 1(g)(iii)

### 1(g) The effectiveness of existing institutional measures for the enforcement of copyright

#### 1(g)(i) *The Role and Function of the Australian Federal Police*

The role of enforcing criminal provisions are the responsibility of the Australian Federal Police. To utilise these provisions, it is necessary to make out a case to the Australian Federal Police (AFP). Often the AFP do not have specialist legal expertise to consider copyright infringements let alone issues relating to Indigenous Cultural and Intellectual Property Rights. The decision of whether to take action by the AFP also takes into account the copyright owners ability to take action under the civil provisions of the *Copyright Act*.

In the past NIAAA has been able to liaise with AFP on one matter to provide a remedy where the copyright was not able to afford civil action. As noted in NIAAA's submission to the *Stopping the Ripoffs* Inquiry, original copyright works of Indigenous artists, Dale Oliver, were copied on boomerangs

and sold at the Nite Markets in Cairns. When NIAAAA contacted the AFP to refer the matter for prosecution, the initial response of the AFP indicated that they were not familiar with notions of copyright. However, NIAAAA was able to persuade the AFP by way of written submission as to the copyright infringement. The AFP decided to investigate the matter and took seized the infringing articles from sale.<sup>29</sup>

Another more recent example involved an Indigenous Art Organisation and the unauthorised importation and sale of paper mache boxes which copied original works by Indigenous artists. The works were exclusively licensed to be reproduced on paper mache boxes made in India, by an official licensee. Unauthorised articles were imported and sold in Australia by an import company. Complaints were made to the AFP requesting that the retailer, the importer and the distributor be prosecuted. The matter is being assessed by AFP as a copyright infringement matter it is not considered a high priority.

As noted above, the high costs of enforcement via civil copyright actions often acts as a barrier for Indigenous artists in enforcing their copyright. The criminal provisions of the *Copyright Act* offer alternative means of enforcing copyright for Indigenous creators. However, there is a need for greater liaison between the AFP and Indigenous artist groups.

### **1(g)(ii) The relationship between enforcement Authorities and Copyright Owners**

There is a greater need for forging relationships between Indigenous copyright owners and groups and enforcement authorities.

*NIAAAA recommends that:-*

- *The AFP should also consult with Indigenous specialist organisations such as NIAAAA.*
- *NIAAAA recommends that the AFP develop relationships with Indigenous artists organisations to develop an awareness of the issues for Indigenous artists.*
- *There should be greater consultation between the AFP and government lawyers in the Attorney Generals Department, Government Solicitor's Office and DPP to instruct the AFP on copyright issues.*
- *Further, NIAAAA recommends that an education and awareness program concerning copyright and Indigenous cultural issues be conducted in the AFP.*
- *It is also recommended that instead of Indigenous artists having to put the legal case to the AFP (this often involves having to have a lawyer draft the letter) before they will make the decision, NIAAAA suggests that the AFP investigate enquiry via phone or in person.*

<sup>29</sup>NIAAAA, *Submission to Stopping the Ripoffs*, 1994, at 1.11

### **1(g)(iii) *The Role and Function of the Australian Customs Service at the border in detecting and policing copyright infringement***

It seems that the Australian Customs service either does not have the legal authority or the administrative capacity or awareness to protect Indigenous artists' copyright by seizing infringements at the point of entry, as the following example taken from the Touring Exhibition Catalogue from 'Copyrites Aboriginal Art in the Age of reproductive Technology', 1996 Author Vivien Johnson, illustrates.

“Sarongs with copies of original paintings for Aboriginal artists printed on them had been on sale in Australia for several years before examples of the range were purchased at Darling Harbour in 1993 for the case of the Stolen Designs Exhibition at Macquarie University. All of the six copies found appeared to be taken from the same publication *Australian Aboriginal Art*, a souvenir book of Aboriginal art and the Australian National Gallery, written by Wally Caruana 1987. The sarongs had a label “Made in India”. The artist did not know of the copying and certainly never gave permission. However there seems little the artists can do to prevent their work being copied and distributed illegally in this way. It would be extremely difficult to find the Indian producers and even more difficult to take legal action against them, the cost would be very high. However like much of the material manufactured offshore for sale in Australian tourist industry the sarongs found their way back to souvenir shops and places like Darling Harbour and on route they must pass through customs.

Customs laws are inadequate. Mr Ven, Regional Manager, Import/Export Patrol Mr Richard Janeczko advised in a press release that “customs would do everything possible to ensure that imported goods using unauthorised Aboriginal artwork and designs did not mislead consumers that they were buying genuine Aboriginal works. It's an offence to import goods that falsely imply country of origin or that falsely suggest they are the subject of an existing copyright trade mark or privilege. The penalty for importing such goods is \$1,000 plus the loss of the imported goods.”<sup>30</sup>

***NIAAA recommends that Customs illegal importation penalties be increased and that Customs Officers are educated and informed in respect to illegal importation of artistic and Indigenous cultural and artistic works.***

### **1(g)(iv) *Coordination of Copyright Enforcement***

As noted above, NIAAA has been instrumental in coordinating cases and advises for Indigenous artists to enforce their copyrights and to generally extend the application of laws to the protection of Indigenous Cultural and Intellectual Property Rights.

There is greater scope for coordination of copyright enforcement in this area including:-

- ⇒ running of test cases;
- ⇒ coordination of appropriate consent procedures and development of protocols for use of Indigenous Cultural and Intellectual Property;
- ⇒ regional, local and state levels of infrastructures to support copyright enforcement;
- ⇒ internet services linking Indigenous organisations both nationally and internationally.

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<sup>30</sup>“Copyrights Aboriginal Art in the Age of Reproductive Technologies”, Vivien Johnson op sit page 33.

## Conclusion

NIAAA submits that its recommendations apply in many cases equally to all Artists practising in Australia. Where our recommendations are specific to Indigenous Artists NIAAA submits that this can be dealt with by a more general reform covering Indigenous Cultural and Intellectual Property within which particular amendment to the *Copyright Act* can be informed.

## Executive Summary of NIAAA's Recommendations

1. *NIAAA recommends that a wider survey be conducted which aims to estimate the extent of copyright infringements to Indigenous creators.*
2. *NIAAA recommends that the Copyright Act have stronger deterrence/penalty provisions to be supported by complementary provisions in the Commonwealth Crimes Act and a separate Act dealing with infringement including Indigenous cultural infringement.*
3. *NIAAA recommends that the Copyright Act have added further remedies of apology, statutory recognition of damages for cultural harm and the Copyright Act and/or Crimes Act have provision for compulsory education processes and plaintiff/defendant meeting provisions similar to the victims and offenders procedures recently introduced in the NSW Criminal Law.*
4. *NIAAA recommends that the fiduciary obligation of custodians and the equitable rights of the beneficiary members of custodians' clans be statutorily recognised either by specific amendment to the Copyright Act or by other legislation.*
5. *NIAAA recommends that Indigenous artistic cultural practices and the rights in such works be recognised as a concurrent Native Title right.*
6. *NIAAA recommends harsher infringement penalties with further community and industry awareness of same.*
7. *NIAAA recommends that there be statutory recognition of Indigenous styles, motifs with penalties for their infringement.*
8. *NIAAA recommends that the Copyright Act be amended to allow the Copyright owner access to other remedies eg: right of retraction; letters of apology and right of the copyright owner to explain cultural significance of work and impact of infringement on culture.*
9. *NIAAA recommends:*
  - *Recognition of the decision in R & T Textiles case - that Indigenous artists have a fiduciary duty to clan groups for Indigenous cultural works;*
  - *Amendments to moral rights which introduced right of attribution and cultural integrity will benefit Indigenous artists;*

- *Amendments to performer's rights which recognises copyright in performances*
  - *Access to fast-track and low-cost tribunals; Arbitration and mediation attached to Federal Court which include a list of expert lawyers to deal with the matters outside of court.*
10. *NIAAAA recommends that:-*
- *The AFP should also consult with Indigenous specialist organisations such as NIAAAA.*
  - *The AFP develop relationships with Indigenous artists organisations to develop an awareness of the issues for Indigenous artists.*
  - *There should be greater consultation between the AFP and government lawyers in the Attorney Generals Department, Government Solicitor's Office and DPP to instruct the AFP on copyright issues.*
  - *An education and awareness program concerning copyright and Indigenous cultural issues be conducted in the AFP.*
  - *instead of Indigenous artists having to put the legal case to the AFP (this often involves having to have a lawyer draft the letter) before they will make the decision, NIAAAA suggests that the AFP investigate enquiry via phone or in person.*
11. *NIAAAA recommends that Customs illegal importation penalties be increased and that Customs Officers are educated and informed in respect to illegal importation of artistic and Indigenous cultural and artistic works.*