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ATTENTION

Dr Ian Holland - Committee Secretary, Senate Environment, Communications,
Information Technology and the Arts Committee, PO Box6100,Parliament House
Canberra ACT 2600

Terms of Reference Addressed

A.

The overall financial, cultural and artistic sustainability of the sector;

B.

**Opportunities for strategies and mechanisms that the sector could
adopt to improve its practices, capacity and sustainability, including
how to deal with unscrupulous or unethical conduct;**

In making this submission our company has, as is our policy, prioritized intellectual honesty over purely commercial considerations.

Our perspectives have not been arrived at simply by adopting a posture that is “culturally sensitive”. We believe they are also pragmatic.

A.

We are of the opinion that the central issue bearing upon the overall financial, cultural and artistic sustainability of the Indigenous Arts and Crafts sector is the issue of piracy, fraud, and the lack of legal and practical means whereby Indigenous Artists can protect Intellectual Property.

These concerns have been voiced in a very large percentage of the submissions to the enquiry and are backed by considerable anecdotal information and some empirical data.

Protecting IP involves, primarily, Identifying the creator of a product and ensuring that the product and creator can be identified in future, if required, for legal and commercial purposes.

To achieve this, unique information about the product needs to be established and reliably recorded for easy retrieval. “Marking and Registering” companies such as ours offer these services.

In my opinion the packaged technical solutions for “Marking and Registering” art or craft works that are now available should be adopted by the sector.

However, they should be contextualized with the greatest care and consideration.

I will outline the reason why I am exhorting great care and consideration in the following pages.

Currently there are very few companies in the “Marking and Registering” market because the marking technologies are quite sophisticated and expensive to produce.

However let's suppose for a moment that the market for "Marking and Registering" Indigenous Art was entirely unrestrained and that in two or three years time there were ten or fifteen companies operating, all having an online presence in the form of a data – base, and complimentary, unique, marking technologies.

It would not be unreasonable to assume that some of these companies would be involved in unethical practices.

Further to the consideration of unethical conduct, the pure number of operators would render any practical and sustainable protection of Intellectual Property Rights for Indigenous Artists impossible.

There would be too much information and not enough quality information.

More importantly an unrestrained commercial model would hand the "data" associated with any Mark on any given work of art over to the commercial organization that marked the work, thereby granting them co-ownership of IP by default.

The sector could very well find itself engaged in a future enquiry into;

"The Ethical Standards and Number of "Marking and Registering" Providers to the Indigenous Arts Sector

and / or

"The Problem of Partial IP Ownership of Indigenous Art by Commercial Organizations"

These are practical and IP law matters that need to be addressed and resolved sooner rather than later.

(Our company has no ambitions to charge for registration of, own, leverage upon, or profit from data gathered from Indigenous artists).

We see the natural home for such data being an Industry Group, NGO, or perhaps, Viscopy or NAVA who would administer and deliver profits to the sector.

If the market for the provision of "Marking and Registering" of Indigenous art and craft is entirely unrestrained, the result, in our opinion will be that the **long term overall financial, cultural and**

artistic sustainability of the sector will be overwhelmingly compromised and that it would be almost impossible to re-introduce integrity.

Furthermore, it is clear to us that the sector has a brief window of opportunity to contextualize the new “Marking and Registering” Industry, before unrestrained market forces possibly create more problems than they solve.

B.

There are a number of opportunities for strategies and mechanisms that the sector could adopt to improve practices, capacity and sustainability, including how to deal with unscrupulous or unethical conduct.

Many of these have been outlined in other submissions and we would particularly like to point to the excellent material offered by Alex Malik .

We will restrict our suggestions and observations to our area of activity.

It seems to us that there are a few possible ways that the Marking and Registering Industry could emerge in the Indigenous Arts sector.

The first possibility is that;

Marking and Registering Companies Compete in an Unregulated Market

The outcome described in section **A** would, in our opinion, be the probable result of an unregulated market with many companies competing for market share.

This first possibility has a possible variation;

It is that the market is unregulated and that less than a handful of companies compete. In this case it is likely that certain industry groups, artists and galleries would constellate around their choice of the companies and systems on offer.

This would not be an unworkable situation, as individuals and industry groups would self regulate and attempt to align themselves with the company that offered the highest standards and the best outcomes, however the problem of the concentration of default IP into the hands of these companies may still create difficulties, if the companies involved did not self regulate in this regard. This is highly unlikely as the ownership of data that identifies art or craft works is valuable and some of the companies would want to see the profits from its use on their balance sheets. (our company intends to self regulate).

The aggressive hubris displayed by some early entrants into this emerging market should serve as a real warning.

One example which is clearly problematic, and which has been spruiked to investors into this potentially lucrative market, is

“the creation of the worlds largest online sales site for indigenous Art”;

The scheme is being touted together with the “possible” inference of Government support and accompanied by all the daunting and unreflective self - belief that such “marketing pushes” entail.

It is sobering to consider that if such a grand plan were realized the company that “Authenticates” the work, sells the work. Of course such a site would gain its credibility and power from the claim that all works were” authentic”.

Needless to say, the works are being “Authenticated” by the company itself or its customers.

(To date there has been no recognition that this may represent a conflict of interest).

This is just one, of many possible examples of the inappropriate “leveraging” that is available to the company that has the “Mark” on the work.

What should not be underestimated is that the company or group that puts a “Mark” on a piece of art or craft, by default gains equity in the work. The associated IP can be on sold and leveraged upon.

In a fully unregulated market with less than a handful of participants there would be the natural balancing factor of market forces.

However significant damage could still result from one or more less than fully aware companies, “appropriating and leveraging IP by default”, which would, no doubt, occur and be of great detriment to artists and ultimately, the entire sector.

The second possibility is that;

Companies Compete in a Fully Regulated Market

If the market were to be fully regulated, some suggested regulations are that;

1. Companies involved in “Marking and Registering” works of art or craft should be constrained from buying or selling (either directly or indirectly) the works they mark.
2. All data collected about or placed on works of art or craft (photos, serial codes etc.) and other information about the Mark should not be the property of the Marking and Registering Company and as far as it is practicable they should not profit from it.
3. No technologies should be used to mark works of art or craft that, in the opinion of competent conservators, have any likelihood of damaging the artwork. (e.g. adhesive stickers on the back of canvases).

The third possibility is that;

Companies Compete in a Partially Regulated Market

One and three of the above would apply but the Marking and Registering Companies would compete for the custom of industry groups by also promoting their data-management profit strategies and ethics as a part of their overall system and product.

In all of the possible outcomes outlined above a small number of companies would be preferable to a large number.

Related Considerations

There are two categories of “Product” in the Indigenous Arts sector.

One could be described generally as “Fine Art”, usually highly priced and more collectible, and which requires a certain degree of connoisseurship to identify.

The second group of products might be called “Commercial Art and Craft”. This would include most products aimed at the tourist market and, more broadly speaking, “retail outlet” type of products.

In the case of Fine Art any “Marking and Registering” model will only be useful and meaningful if it is widely adopted and has inbuilt mechanisms to encourage ongoing industry cohesion, without coercion. We have designed such a model.

Such a system would function as a provenance enhancement and tracking service and would be of tremendous benefit to the sector.

In the area of Commercial Art or Craft a “Mark” or “Identifier” on the work is useful and meaningful only if it is accompanied by a commercially based ‘Market Watch” program that has sophisticated monitoring, reporting and sampling systems.

Our company has such a capacity. We did this at the Sydney Olympics very successfully, and also do it for large - scale sports merchandising.

To rely upon industry self regulation or the police or customs for “Market Monitoring” is wishful thinking.

Even if there is an industry standard or standards for the management of data that is highly centralized, in the case of “Fine Art” it need not exclude individuals or groups from accessing the technologies that are available so that they can manage their own Marking and Registering.

Some may wish to purchase and use the new technologies or use a combination of existing certificate based approaches and the new technologies.

Retail Art and Craft would need a more fully controlled program of certification of retailers and a comprehensive Market Watch program.

If it is clearly demonstrated that the Industry has developed solutions for "Fine Art" and retail Art and Craft that benefit individuals or groups financially and culturally the solutions will catch on. As mentioned we believe we have a model that will achieve this.

The Certification of Dealer Networks and Industry Groups may assist in the progressive cohesion of the Industry and enhance overall IP management.

All of the problems can never be solved, given the scope, but vast improvements can be made.

Many large industry stakeholders are apprehensive about the emerging Marking and Registering Industry.

This is understandable.

Systems have been floated in the past – the most notable recent attempt being the highly technical and convoluted, Digital Nano – Partical Dot to Dot Authentication Scheme, aggressively promoted in Alice Springs at least in part by a very officious sounding organization.

The man in the street may have thought it was a Government or Semi – Government agency. Some industry members thought so!

It wasn't.

Although promoted very officiously as "something which is happening", It failed spectacularly due to broad rejection by industry groups which claimed a lack of political sensitivity and industry consultation.

The promoters have re-launched the scheme under another banner.

This was an example of a company paying lip service to cultural and commercial sensitivities and offering up a scheme intent on "wrapping up the market".

I point out this example for a reason.

Partially as a result of this episode some large industry groups are very alive to the possibility of being unwillingly “railroaded” into proprietary systems that corral identification IP for a particular commercial group.

It is necessary to demonstrate, possibly by pilot projects, or documents such as this, that the technologies being offered are an opportunity and not a threat or burden to the sector.

“Quick, large, proprietary and highly centralized and leveraged solutions will not benefit the sector, and if the failure of the “Digital Nanotech Authentication Dot to Dot Scheme” at Alice Springs is any indication, the sector doesn’t want them.

But it wants something; that is clear –

Business and technology can do a lot to meet new needs when they emerge. It is as perfect a mechanism as we have for doing this, however in socially and culturally sensitive areas its natural enthusiasm needs to be tempered.

This can be achieved through the creation of enlightened policy settings.

We believe that one of these settings should be the licensing of two or three Marking and Registering companies to operate in a partially regulated market where minimum operational and ethical standards apply.

Conclusion

The issues and perspectives outlined in this submission are, we believe, at the centre of the IP problem for the Indigenous Arts sector.

We also believe that the issue of IP is the central concern of the enquiry.

To the extent that this is true I would urge the Committee to give serious consideration to the emergence of commercial “Marking and Registering” companies and the positive and negative impacts they could have on the sector.

We look forward to further discussions with both the Committee and industry stakeholders to further define sensible, sustainable and equitable outcomes.

Kim Willison

Managing Director

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