

STOPPING THE RIP-OFFS
INTELLECTUAL PROPERTY PROTECTION
FOR
ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES
Issues Paper

October 1994

© Commonwealth of Australia 1994

Cover painting:

Detail from the work *Trinity*, Gayle Maddigan, acrylic on canvas, 1994

'The painting portrays the abstraction of love that unites a family together. It is a statement of the spiritual and blood kinship that is the essence of Aboriginal culture.'

Gayle Maddigan

Victorian Aboriginal artist from the Wamba Wamba and Werrkgia clans

ISBN 0 642 20821 2

Prepared by the International Trade Law and Intellectual Property Branch, Business Law Division, Attorney-General's Legal Practice

Production by the Office of Legal Information & Publishing, Attorney-General's Legal Practice

The Commonwealth wishes to thank Gayle Maddigan for the use of her artwork *Trinity*. It also wishes to thank the ART (Artroundtown) Gallery in Melbourne for its assistance in the launch of this paper.

Printed by National Capital Printing, Fyshwick, ACT

CONTENTS

<i>Foreword</i>	v
<i>Preface</i>	vii
What do you think?	1
Introduction	2
The Government's role in Aboriginal and Torres Strait Islander	
Affairs	2
Present copyright law	3
Performers' rights	3
Moral rights	4
Design	4
Relevant case law	4
<i>Bulun Bulun case</i>	4
<i>Yumulul v Reserve Bank of Australia</i>	5
<i>Foster v Mountford</i>	5
limitations in protection	6
Options for addressing the limitations in present protection	7
Amendments to the Copyright Act.....	7
Amendments to the Aboriginal and Torres Strait Islander Heritage	
Protection Act	8
Special legislation	8
Authentication mark	8
A possible administrative response?	9
The way forward	9
Appendix 1 - International developments	11
Appendix 2- Copyright contacts	14
Appendix 3 - Select bibliography	

FOREWORD

Effective intellectual property protection for Aboriginal and Torres Strait Islander peoples is vital for Australia as part of the continuing process of addressing the particular needs and special interests of Aboriginal and Torres Strait Islander peoples.

In the past, aspects of Aboriginal and Torres Strait Islander cultural expression have not always been adequately protected by the law. This has led to unacceptable exploitation of indigenous works.

The *Copyright Act 1968* provides the same protection for Aboriginal and Torres Strait Islander cultural expression as for other Australian cultural expression. The Government recognises that indigenous cultural expression requires different and more appropriate legislative protection.

This Issues Paper outlines the current copyright protection available for Aboriginal and Torres Strait Islander cultural expression and suggests new ways to improve that protection. The paper has been prepared to provide the community, but particularly Aboriginal and Torres Strait Islander peoples, with an opportunity to comment on this important area. Responses received will assist the development of options for reform.

In the Government's *Creative Nation* statement, the Prime Minister acknowledged that reconciliation with Australia's indigenous peoples demands recognition of the shortcomings in current protection for Aboriginal and Torres Strait Islander arts and cultural expression.

The Government is committed to overcoming these deficiencies to provide the strong protection Aboriginal and Torres Strait Islander cultural expression so clearly deserves.




DUNCAN KERR

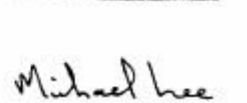
Minister for Justice




ROBERT TICKNER

Minister for Aboriginal and
Torres Strait Islander Affairs




MICHAEL LEE

Minister for
Communications and the Arts

PREFACE

This Issues Paper has been prepared by officers in the Attorney-General's Department, in consultation with officers from the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Australian Cultural Development Office.

The purpose of the paper is to seek comments about the limitations of the law and to address issues that affect the intellectual property protection of Aboriginal and Torres Strait Islander arts and cultural expression.

We welcome your comments in any form - for example, written, faxed, audio-taped or comments over the telephone.

They should be made or sent by **27 January 1995** to:

Ms Catherine Hawkins Business Law Division Attorney-General's Department Robert Garran Offices

National Circuit

BARTON ACT 2600

Tel: (06) 250 6608

Fax: (06) 250 5929

Copies of all submissions and comments received will be sent to ATSIC and the Australian Cultural Development Office. These organisations, with the Attorney-General's Department, will be involved in the Government's consideration of the comments received.

Copies of this Issues Paper are available from the Attorney-General's Department and ATSIC. Please telephone (06) 250 6927.

PROTECTION OF ABORIGINAL AND TORRES STRAIT ISLANDER ARTS AND CULTURAL EXPRESSION

The Government wants to find a better way to protect and promote Aboriginal and Torres Strait Islander arts and cultural expression. We would like to hear your views about how best to achieve this aim. Please comment on the following issues and any others that you would like to add.

WHAT DO YOU THINK?

- What are your experiences of rip-offs of Aboriginal and Torres Strait Islander arts and cultural expression?
- Please describe the Aboriginal and Torres Strait Islander arts and cultural expression produced by you that should be protected by the law.
- What should happen if an artist, musician or dancer from outside your community uses the traditional images, designs, songs or dances of your community without its permission?
- What should happen if a member of your community misuses any traditional images and designs of your community?
- If disagreements between people and your community arise over the use of your traditional arts and cultural expression, what do you think should be done?
- How do you think Aboriginal and Torres Strait Islander arts and cultural expression should be protected by the Australian legal system ?
- Do you think that there should be new laws to:
 - ⇒ protect Aboriginal and Torres Strait Islander arts and cultural expression from being copied without permission by others?
 - ⇒ allow communities to charge fees when people want to copy or use traditional designs, images, songs or dances?
- What other protection is required?

Introduction

This paper sets out an overview of the following factors which are related to the intellectual property protection of Aboriginal and Torres Strait Islander arts and cultural expression:

- The development of the Government's role in this area of Aboriginal and Torres Strait Islander Affairs;
- Present copyright law;
- Relevant case law;
- Limitations in protection; and
- Options for addressing the limitations in present protection.

2. This paper uses the term "arts and cultural expression" to describe the particular kinds of Aboriginal and Torres Strait Islander culture and heritage under discussion. The term is intended to encompass all forms of artistic expression which are based on custom and tradition derived from communities which are continually evolving. We would welcome suggestions for other terms that may be more appropriate.

3. Intellectual property rights play an important role in the promotion and maintenance of aspects of Aboriginal and Torres Strait Islander arts and cultural expression. "Intellectual property" is a generic term that encompasses several areas of statute law including patents, trade marks, designs and copyright as well as common law areas of confidential information and passing off. This paper is principally concerned with the role of copyright, and where relevant designs law, in protecting the ownership and integrity of Aboriginal and Torres Strait Islander arts and cultural expression.

4. Other areas such as biodiversity and indigenous knowledge are sometimes considered to be protected by intellectual property laws. However, these areas often touch on aspects of intellectual property protection without involving property rights themselves. This paper discusses those aspects of the protection of arts and cultural expression that have a close connection with copyright law.

The Government's role in Aboriginal and Torres Strait Islander Affairs

5. Since 1990, prime responsibility for Aboriginal and Torres Strait Islander policy advice, including matters that affect Aboriginal and Torres Strait Islander arts and cultural expression, has rested with the Aboriginal and Torres Strait Islander Commission (A TSIC). A TSIC is a democratically elected representative body of Aboriginal and Torres Strait Islander peoples which, combined with an administrative element, forms a unique decentralised organisation. In 1994, the Torres Strait Regional Authority was established to have direct policy responsibility for matters relating to the Torres Strait. Other relevant bodies that have been established include:

- Australian Institute for Aboriginal and Torres Strait Islander Studies;
- Council for Aboriginal Reconciliation; and
- Office of Indigenous Affairs.

6. A number of other portfolios also have policy responsibility for some aspects of Aboriginal and Torres Strait Islander arts and cultural expression, or areas that impact upon it. In particular, areas of the Australian Cultural Development Office have responsibility for arts and heritage issues, and the Attorney-General's Department has responsibility for copyright law, which includes protection of artistic works and moral rights.

Present copyright law

7. The *Copyright Act 1968* provides substantial protection for forms of Aboriginal and Torres Strait Islander arts and cultural expression that satisfy the requirements for copyright protection, in the same way that it does for the works of other Australian creators. The basic principles of the Copyright Act derive from Australia's obligations under the

Berne Convention for the Protection of Literary and Artistic Works. Two important principles of the Berne Convention are that protection exists automatically, that is, no registration is required, and works are automatically protected in other Convention countries.

8. The basic principles of the Copyright Act are as follows:

- to attract copyright protection, literary, dramatic, musical or artistic works must be in "material form" and be original (ie, the author's own work, not copied);
- in addition to the protection of those works, copyright also protects sound recordings, films, television and sound broadcasts, and published editions;
- the purpose of copyright law is principally to provide the owner of copyright with specific exclusive economic rights;
- the author/creator of a work not made in the course of employment is usually the first copyright owner;
- the copyright owner has the exclusive rights to reproduce, publish, publicly perform, broadcast and adapt the work;
- the term of protection for copyright works is generally the author's life plus 50 years; and
- copyright subsists upon the creation of an original work - there is no registration or other formality required.

Performers' rights

9. The Copyright Act also grants rights to performers to prevent a range of unauthorised uses of their performances including the unauthorised recording, broadcasting and cable diffusion of live performances. Although performers' rights are provided for in the Copyright Act, they are not assignable like the exclusive economic rights comprising copyright. The issue of extending performers' rights is currently under review.

Moral rights

10. The Government has signalled *its* intention to amend the Copyright Act to ; introduce moral rights for authors and artists of copyright works. The moral rights to be introduced will be the right to be named as author of a work ("the right of attribution") and the right to object to derogatory treatment, for example, mutilation of a work, that is prejudicial to the author or artist's honour or reputation ("the right of integrity"). These *will* be important rights to Aboriginal and Torres Strait Islander creators, especially those who create artistic works.

Design

11. Some instances of Aboriginal and Torres Strait Islander design would be protected under the Copyright Act as artistic works as well as through registration that may be obtainable under the *Designs Act 1906*. Copyright law protects two-dimensional artistic works that are reproduced as designs *in* a two-dimensional way. For example, the reproduction of an artistic design on a T-shirt may have both copyright and designs protection.

12. The law is more complex when a work is reproduced as a three-dimensional item for commercial purposes, for example, when a drawing of the design of a didgeridoo is realised as the didgeridoo itself and marketed in quantity. Where *this* is done with the permission of the copyright owner, it is necessary to obtain registration under the *Designs Act* to be able to prevent others making such three-dimensional reproductions of the work. Copyright law ceases to protect artistic works that are commercially reproduced in a three-dimensional form against further unauthorised reproduction of that kind. The only way they can be protected is by registration under the *Designs Act*.

Relevant case law

13. Court actions in recent years have considered aspects of Aboriginal and Torres Strait Islander arts and cultural expression and drawn attention to the limits of the present law. Three significant cases include:

. *Bulun Bulun case*; 2

. *Yumbulul v Reserve Bank of Australia*; 2 and

. *Foster v Mountford*. 3

Bulun Bulun case

14. In the *Bulun Bulun case*, the plaintiff, an Aboriginal artist, brought a copyright infringement action against the T-shirt design company Flash Screenprinters. The action was brought in relation to the unauthorised reproduction of Bulun Bulun's artistic works on T-shirts by Flash Screenprinters. After the *Bulun Bulun case*

commenced, 14 related actions were brought against the same manufacturer by other Aboriginal artists. It is understood that all these claims were settled out of court.⁴

15. The widespread media attention that these cases received may have had the effect of making potential infringers of copyright in artistic works more wary of making unauthorised reproductions of Aboriginal and Torres Strait Islander art.⁵ This suggests that protection under the Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists.

Yumbulul v Reserve Bank of Australia

16. It is recognised that the system of property ownership in Aboriginal societies differs markedly from the system of individual property ownership. This difference was highlighted in the *Yumbulul case*.

17. The action in *Yumbulul* concerned reproduction on the special bicentennial \$10 bank note of the design of a "Morning Star Pole" that had been created by Mr Yumbulul, an Aboriginal artist. Yumbulul had entered into an exclusive licence agreement with the Aboriginal Artists Agency which in turn had sub-licensed the Reserve Bank of Australia to reproduce the "Morning Star Pole" design on the \$10 note. Yumbulul brought an action on the basis that the director of the Aboriginal Artists Agency had misled the artist about the nature of the licence and the intended use of the work. However, the court held that there had not been misleading, deceptive or unconscionable conduct. As the licence stood, Yumbulul's claim was unsuccessful.

18. The *Yumbulul case* turned on whether the applicant had understood the nature of the licence that he had entered into with the Aboriginal Artists Agency Ltd and not the relationship between Aboriginal customary law, communal ownership and copyright law. However, the *Yumbulul case* demonstrates the limitations of the Australian statute law, as reflected in the Copyright Act, to address the communal ownership of Aboriginal and Torres Strait Islander designs. In the *Yumbulul case*, the applicant stated that the rights to *reproduce* the "Morning Star Pole" rested with the tribal owners of the designs, the Galpu clan in North-East Arnhem Land although, according to customary law, Yumbulul had authority to *paint* the design. This contrasts with the rights granted by the Copyright Act which give Yumbulul, as the creator and first owner of copyright in the pole as an artistic work, the right to authorise reproduction of the work. In the *Yumbulul case*, French J noted that copyright laws may fail to take account of Aboriginal customary law and communal ownership:

" And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin." ⁶

Foster v Mountford

19. The Copyright Act provides rights that are principally for the economic exploitation of works although, in the case of works not intended to be so exploited, for example, private letters or diaries, the rights may be used to prevent such

exploitation by others and thus preserve the privacy of the works. In the case of sacred-secret Aboriginal and Torres Strait Islander arts and cultural expression it is also economic exploitation that Aboriginal and Torres Strait Islander groups may wish to prohibit. However, the use of copyright to prevent unwanted public exposure of arts and cultural expression is limited by the requirement that such expression must be original and fixed in a material form.

20. Publication of sacred-secret materials has also been successfully prevented using a breach of confidence action. In *Foster v Mountford* members of the Pitjantjatjara Council obtained an interlocutory injunction, on the basis of breach of confidence, to restrain the publication of a book entitled *Nomads of the Australian Desert*. The plaintiffs successfully argued that the book contained information that could only have been supplied and exposed in confidence to the anthropologist Dr Mountford. The plaintiffs also successfully argued that the "revelation of the secrets contained in the book to their women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community"⁷ Copyright infringement could not have been employed by the plaintiffs because the work in question (ie, the book), was not written by them and they had not acquired copyright in it.

Limitations in protection

21. As discussed earlier, the Copyright Act provides protection for some aspects of Aboriginal and Torres Strait Islander arts and cultural expression. The major limitations of the Copyright Act to protect the full range of Aboriginal and Torres Strait Islander arts and cultural expression that have been identified are as follows:

- While joint authorship of a work by two or more authors is recognised by the Copyright Act, collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest the community with ownership of any creation of its members, is not recognised;
- The requirement of material form prevents copyright from subsisting in oral story telling, dance and song;
- Sacred-secret material is not specially protected as such by the law;
- Under the proposed moral rights legislation, the rights must attach to authors individually;
- The term of protection, which is usually the author's life plus 50 years, prevents copyright subsisting in rock art and cave paintings of traditional Aboriginal and Torres Strait Islander designs; and
- An author must be identifiable to satisfy the originality requirement.

22. Even when the Copyright Act does afford protection to Aboriginal or Torres Strait Islander arts and cultural expression, there may be practical limitations inherent in the broader Australian legal system which prevent Aboriginal and Torres Strait Islander peoples benefiting from *this* protection. Such practical limitations include a lack of knowledge about the legal rights that copyright may afford creators, lack of understanding of who is a copyright owner, unequal bargaining power and the limited funding available to bring copyright infringement actions.

Options for addressing the limitations in present protection

23. Widespread consultation with Aboriginal and Torres Strait Islander people is vital to determine the most appropriate way to address the limitations in the present protection of Aboriginal and Torres Strait Islander arts and cultural expression.

24. This paper is intended to facilitate consultation with Aboriginal and Torres Strait Islander people on the range of issues involved in the protection of Aboriginal and Torres Strait Islander arts and cultural expression. The "*What do you think?*"

questions at page 1 are designed to promote feedback. Responses from Aboriginal and Torres Strait Islander people on these issues will be important for the development of policy options in this area.

25. Options to address the limitations in the protection of Aboriginal and Torres Strait Islander arts and cultural expression include:

- Amendments to the Copyright Act;

- . Amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
- Special legislation;
- An authentication mark; and
- A possible administrative response.

Amendments to the Copyright Act

26. Consideration could be given to amending the Copyright Act to address the limitations of the protection currently afforded to Aboriginal and Torres Strait Islander arts and cultural expression by introducing separate provisions to protect it. Such provisions could provide for copyright-related protection and include an unlimited term of protection, no material form requirement, and provisions that address the collective ownership of Aboriginal and Torres Strait Islander creative works.

27. There would be considerable practical difficulties to be overcome in framing the necessary legislation to establish a workable scheme. If there was no requirement of material form, proof of the existence and nature of the work would be one difficulty. Identification of the membership of a group claiming collective ownership of a work would be another. The determination of the ownership of copyright in works with a perpetual copyright, particularly when claimed by a community, will be increasingly difficult as time goes by.

28. Australia's international copyright obligations under the Berne Convention (see para 7) generally require that any copyright protection afforded to Australian nationals must also be afforded to the nationals of Convention countries. Depending on how generally the legislation was framed, amendment of the Copyright Act to afford special protection to Aboriginal and Torres Strait Islander arts and cultural expression may oblige Australia to extend protection to nationals of other countries without any guarantee of reciprocal protection. Any proposal for new provisions would need to be carefully considered bearing in mind these international copyright obligations.

Amendments to Aboriginal and Torres Strait Islander Heritage Protection Act

29. Currently the Aboriginal and Torres Strait Islander Heritage Protection Act provides a discretionary regime for the protection of areas and objects, under *serious* and immediate threat of injury or desecration, that are of particular significance to Aboriginal and Torres Strait Islander peoples in accordance *with* their traditions. The Act could be amended to afford Aboriginal and Torres Strait Islander *communities* a right of action to protect artistic works of traditional significance, with no limit on the term of protection for such works and no requirement of material form.⁸

Special legislation

30. Special legislation to protect and promote Aboriginal and Torres Strait Islander arts and cultural expression was recommended in the *Report of the Working Party on the Protection of Aboriginal Folklore in 1981*. The Working Party Report recommended the introduction of an Aboriginal Folklore Act to protect Aboriginal folklore⁹ as follows:

- to prohibit non-traditional uses of sacred-secret materials;
- to prohibit debasing, mutilating or destructive uses of folklore;
- to facilitate payments to traditional owners of folklore *items* used for commercial purposes;
- to develop a system of clearances for prospective users of folklore;
- to establish an Aboriginal Folklore Board to advise the Minister on policy issues; and
- to establish a Commissioner for Aboriginal Folklore to issue clearances and negotiate payments.¹⁰

31. Also in the early 1980s, the international intellectual property organisation, the World Intellectual Property Organization (WIPO), developed specific Model Provisions for the Protection of Expressions of Folklore from Illicit Exploitation and Other Prejudicial Actions. Appendix 1 provides an overview of the Model Provisions and other relevant international developments.

Authentication mark

32. The souvenir industry produces reproductions, or purported reproductions, of Aboriginal and Torres Strait Islander designs and other objects for the tourist market.

" Many of them are cheap items that convey an impression - whether accurately or inaccurately - of Aboriginal influence. To combat proliferation of articles that falsely represent Aboriginal origin Or influence, the Aboriginal Arts Management Association (AAMA) is currently developing a certified trade mark for authentic Aboriginal and Torres Strait Islander works. *This* type of mark would be designed to help consumers distinguish authentic Aboriginal and Torres Strait Islander works from fake items. It would work in a similar way to the international woolmark.

33. Consultation on the authentication mark is being carried out by AAMA with Aboriginal communities and business organisations.

A possible administrative response?

34. The present protection for Aboriginal and Torres Strait Islander arts and cultural expression may also be improved by an administrative response. Examples of possible administrative responses include enhancing the role of AAMA, facilitating AAMA's relationship with VISCOPY (the proposed collecting society for visual artists) and encouraging relevant copyright interests to educate Aboriginal and Torres Strait Islander peoples about their rights. These administrative options may make the existing law more accessible and effective.

The way forward

35. Comments and ideas submitted will be considered by a working party comprised of officers from the Attorney-General's Department, ATSIC, and the Australian Cultural Development Office.

36. The three Ministers will consider the recommendations of the working party with a view to the formulation of a joint submission to Government in early 1995. Ministers will aim to have legislation introduced into Parliament later that year .

-
- 1 *Bulun Bulun v Nejlam Pty Ltd*, unreported, Federal Court action in Northern Territory in 1989. See further Golvan, C, "Aboriginal Art and Copyright: The Case of Johnny Bulun Bulun" (1989) *EIPR* Vol 10, pp 346-355.
- 2 (1991)21IPR481.
- 3 (1976) 29 FLR 233.
- 4 Golvan, C, *An Introduction to Intellectual Property Law* (Federation Press, 1992), p 51.
- 5 Golvan, C, "" Aboriginal Art and the Protection of Indigenous Cultural Rights" *Aboriginal Law Bulletin*, (1992) Vol12, No 56, pp 5-8, at p 6.
- 6 *Ibid*, p 490.
- 7 *Ibid*, p 236.
- 8 Golvan, C, " Aboriginal Art and the Protection of Indigenous Cultural Rights", (1992) *Aboriginal Law Bulletin* Vol 2, No 56, at p 8.
- 9 The term "folklore" is used here as the Working Party Report uses this term in its title and recommendations. The term is also used in relation to the international instruments that are discussed in Appendix 1 for the same reasons.
- 10 Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, 1981, p 4.

APPENDIX 1

INTERNATIONAL DEVELOPMENTS

The main international agreements, documents and developments concerning the intellectual property and arts and cultural expression of indigenous people include:

- . Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
- . World Intellectual Property Organization (WIPO) Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (the WIPO Model Provisions);
- Tunis Model Law on Copyright for Developing Countries;
- . Draft Declaration of the Working Group on Indigenous Populations (WGIP); and
- . The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.

2. None of these developments imposes international obligations on Australia to specifically protect the arts and cultural expressions of Aboriginal and Torres Strait Islander peoples. While the Berne Convention, in requiring member countries to legislate for copyright protection standards, effectively secures some protection for arts and cultural expression, it does not include mandatory protection for it as such. The WIPO Model Provisions and the Tunis Model Law provide model legislation, but they do not impose obligations on countries to adopt the models. The WGIP Draft Declaration has not been finalised and the Mataatua Declaration is a statement of principles.

3. Despite the absence of binding international obligations on Australia in relation to indigenous arts and cultural expression, international developments indicate that there is significant interest in the protection of the intellectual property of indigenous peoples.

Berne Convention

4. The Berne Convention does not impose express obligations on members to protect Aboriginal and Torres Strait Islander arts and cultural expression. However, it is generally accepted that the optional provision for protection for unpublished works of unknown authors in Article 15(4) is intended to cover such expressions (see *Guide to the Berne Convention* (1978), p 95).

WIPO Model Provisions for Expressions of Folklore

5. The WIPO Model Provisions were developed to encourage protection of "folklore" separately from copyright. The term "expressions of folklore" emphasises the special nature of the Model Provisions. The Model Provisions define folklore as follows:

, "Expressions of Folklore" mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals, reflecting the traditional artistic expectations of their community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals,

whether or not reduced to material form; and

(iv) tangible expressions, such as

(a) productions of folk art, *in particular*, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;

(b) musical instruments;

(c) architectural forms].'

6. The Model Provisions protect expressions of folklore from unauthorised commercial use and failure to appropriately indicate the source of an expression of folklore. The Model Provisions provide that a competent authority should be established to administer protection of folklore.

7. Authorisation is unnecessary for the use of expressions of folklore where an expression of folklore is "borrowed" to create an original work by an author. Accordingly, the Model Provisions do not displace copyright protection. Also, there is no time limit for protection in the Model Provisions. The protection is for a community whose existence is not limited in time rather than for individual creators.

8. Since the development of the WIPO Model Provisions in the 1980s, there has been limited international consideration of the protection of expressions of folklore.

Tunis Model Law on Copyright for Developing Countries

9. The Tunis Model Law, developed by UNESCO and WIPO in 1976, provides copyright protection for works of national folklore. Works of national folklore are likely to be orally passed down through generations. As such, the Tunis Model Law provides for copyright protection for folklore which is not fixed in material form.

Draft Declaration - Working Group on Indigenous Populations (WGIP)

10. The Draft Declaration on the Rights of Indigenous Peoples has been developed by the Working Group on Indigenous Populations (WGIP), established by the United Nations. Governments have not been formally represented on the WGIP. As such, the Draft Declaration does not represent the views of governments. The Australian Government has regularly attended the WGIP meetings as an observer.

II. The central provisions of the Draft Declaration are based on the recognition of the right of indigenous peoples to self-determination. Paragraph 19 of the Draft Declaration provides that indigenous peoples have the right to intellectual property protection for their traditional cultural manifestations.

12. In March 1994, an inter-departmental committee (IDC) was established to consider Government policy concerning the *issue* of Aboriginal and Torres Strait Islander cultural and intellectual property. The IDC assisted in the preparation of the brief for the Australian delegation to the 12th session of the WGIP in July 1994.

The Mataatua Declaration

13. In 1993, the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples was convened in Whakatane, New Zealand. At that conference the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* was prepared.

APPENDIX 2

COPYRIGHT CONTACTS

Legal advice

Australian Copyright Council
Suite 3, 245 Chalmers Street REDFERN NSW 2016
Ph: (02) 3181788
Fax: (02) 698 3536

Arts Law Centre of Australia
The Gunnery
43 Cowper Wharf Road
WOOLLOOMOOLOO NSW 2011
Ph: (02) 356 2566

Aboriginal Arts Management Association (AAMA)
Suite 401, 4th Floor
60-62 Foveaux Street
SURRY HILLS NSW 2010
Ph: (02) 2812144

National Association of Visual Artists (NAVA)
Suite II, The Gunnery
43-51 Cowper Wharf Road
WOOLLOOMOOLOO NSW 2011
Ph: (03) 608 8647

Copyright Collecting Societies

Australasian Performing Right Association (APRA)
PO Box 567
CROWS NEST N.S.W 2065 Ph: (02) 922 6422
Fax: (02) 9250314

Australasian Mechanical Copyright Owners Society (AMCOS)
14th Floor, 56 Berry St
NORTH SYDNEY NSW 2060
Ph: (02) 954 3655
Fax: (02) 954 3664

Audio-Visual Copyright Society Ltd (AVCS)
1A Eden Street
CROWS NEST NSW 2065
Ph: (02) 9593177

Phonographic Performance Company of Australia (PPCA)
PO Box Q20
SYDNEY NSW 2000
Ph: (02) 267 7996
Fax: (02) 264 5589

Copyright Agency Ltd (CAL)
Level 19, 157 Liverpool St
SYDNEY NSW 2000
Ph: (02) 3947600
Fax: (02) 394 7601

APPENDIX 3

SELECT BIBLIOGRAPHY

Attorney-General's *Proposed Moral Rights Legislation for Copyright Creators*, Department Discussion Paper, (June 1994).

Australian Copyright Council *Aboriginal Arts and Copyright*, Bulletin No 75.

Australian Labor Party Election Statement Cultural Policy, 1993. *Distinctly Australian: The Future of Australia's Cultural Development*,

Australian Law Reform Commission 1986 *The Recognition of Aboriginal Customary Law*, Vols 1 & 2,.

Bell, Robin "Protection of Aboriginal Folklore: Or Do They Dust Reports?" *Aboriginal Law Bulletin* Vol 17, December 1985, pp6-8.

Caruana, Wally *Aboriginal Art*, (Thames and Hudson, 1993).

Council for Aboriginal Reconciliation *Addressing the Key Issues for Reconciliation*, (AGPS, 1993).

Department of Aboriginal Affairs *The Aboriginal Arts and Crafts Industry*, Report of the Review Committee, (AGPS, 1989).

Department of Home Affairs & Environment *Report of the Working Party on the Protection of Aboriginal Folklore*, 1981.

Ficsor, Mihaly " Attempts to Establish International Protection for Folklore Through Intellectual Property Rights" presented at the National Symposium on the Protection of Expressions of Folklore, Beijing, 13-15 September 1993.

Golvan, Colin " Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) *Aboriginal Law Bulletin*, Vol12, No 56, pp 5-8.

Golvan, Colin "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun", [1989] 10 *EIPR* pp 346-353.

Puri, Kamal "Copyright Protection for Australian Aborigines in the Light of Mabo" in Stephenson MA and Ratnapala S (eds) *Mabo: A Judicial Revolution*, (University of Queensland Press, 1993).

Ricketson, Sam *The Berne Convention: 1886-1986*, University of London, 1987.

World Intellectual Property Organization *Guide to the Berne Convention* (1978).