

## AUSTRALIA

Response to Question 1: There have been a number of cases which demonstrate the ability of the existing Australian intellectual property regime to protect traditional knowledge.

In *Foster v Mountford* (1976) 29 FLR 233 the Court used the common law doctrine of confidential information to prevent the publication of a book containing culturally sensitive information. The case concerned an anthropologist, Dr. Mountford, who undertook an expedition to the Northern Territory outback in 1940. Local Aboriginal people revealed to him tribal sites and objects possessing deep religious and cultural significance for them. The defendant recorded this information some of which he published in a book in 1976. The plaintiff successfully sought an interlocutory injunction restraining the publication of the book on the basis of breach of confidence. (The plaintiff could not bring an action for copyright infringement because the work in question - i.e. the book - had not been written by them and they had not acquired the copyright in it). The Court held that the publication of the book could disclose information of deep religious and cultural significance to the Aborigines that had been supplied to the defendant in confidence and the revelation of such information amounted to a breach of confidence.

*Milpurrruv Indofurn Pty Ltd* (1995) 30 IPR 209 ('carpets case') highlighted the Courts' capacity to award damages for infringement in a culturally appropriate manner. The case involved the importation of carpets manufactured in Vietnam which reproduced either all or part of well-known works, based on creation stories, created by Indigenous artists. At no stage did the artists give permission for their artwork to be reproduced on the carpets, nor for the carpets bearing the artwork to be imported into Australia. The artists successfully claimed infringement of copyright (by reason of the unauthorized importation of carpets). The artists were also successful in a trade practices action in respect of the labels attached to the carpets which claimed that the carpets had been designed by Aboriginal artists and that royalties were paid to the artists on every carpet sold.

The judgment recognizes the concepts of 'cultural harm' and 'aggregated damages'. The Court noted in its judgment that "The statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as used in the artwork of the present applicants". The applicants were awarded a collective sum of damages, with the proceeds of the action to be distributed to "those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist". The Court made an award of exemplary damages, in the sum of \$70,000 for cultural harm and which took into account the calculated and flagrant nature of the infringement.

In *Bulun Bulun & Milpurrruv R & T Textiles Pty Ltd* (1998) 41 IPR 513 the Court found that an Indigenous person had a fiduciary duty to his community. The court found that the relationship between Mr. Bulun Bulun (the artist) and his community in regard to the creation of the painting was one of mutual trust and confidence which was found to be sufficient, under Australian law, for a fiduciary relationship between Mr. Bulun Bulun and his community to arise.

The judge found that, on the evidence of the customary law of the Ganalbingu people, Mr. Bulun Bulun owed two fiduciary obligations to his community. First, he was not to exploit the painting in a manner contrary to his community's customary law. Secondly, in the event of infringement by a third party, he was to take a reasonable and appropriate action to restrain and remedy infringement of the copyright in the painting.

The court recognized two instances in which equitable relief in favor of a tribal community might be granted, in a court's discretion, in circumstances where copyright is infringed in a work embodying ritual knowledge: first, if the copyright owner fails or refuses to take appropriate action to enforce the copyright; and second, if the copyright owner cannot be identified or found.

In a further case called *Bulun Bulun v Flash Screenprinters* [see discussion in (1989) EIPR Vol 2, pp. 346-355], Mr. Bulun Bulun brought a copyright infringement action in relation to the unauthorized reproduction of his artistic works on t-shirts by Flash Screenprinters. This was a clear-cut case of copyright infringement and the case was settled out of court. The successful resolution of this matter suggests that protection under the Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists.

Further information regarding these and other cases can be located at: <http://www.austlii.edu.au>

Australia does not have specific provisions in its patents, trademarks and design legislation to protect traditional knowledge. However, certification trademarks have been used recently as a mechanism to help protect the interests of indigenous and traditional knowledge owners through identifying or authenticating products or services provided by indigenous owners or in collaboration with indigenous owners. The trademark system has also been used by, for example, arts centers as a mechanism to promote the arts and crafts of indigenous people. The design system has been used by traditional knowledge owners to protect indigenous designs.

Response to Question 26: Although Australia has not introduced any special legislative measures, the recent moral rights amendments will assist Indigenous artists to protect their work. The *Copyright Amendment (Moral Rights) Act 2000*, which commenced on 21 December 2000, incorporates the moral rights of integrity and attribution into the Copyright Act. Indigenous artists will benefit, as the right of integrity in particular gives indigenous artists greater control over the use of their works and consequently assists them in protecting the cultural integrity of their work.

The National Association for the Visual Arts (NAVA) this year released indigenous visual arts protocols entitled *Valuing Art, Respecting Culture*. The protocols provide substantial cultural and other information regarding the range of artistic practice and cultural diversity within the indigenous arts environment, providing practical and flexible protocols that will be a useful guide for those involved in the sector. The protocols also provide a description of the legal framework provided under IP laws.

In the field of trademark law, the Australian Government, through ATSI and the Australia Council, has funded the National Indigenous Arts Advocacy Association (NIAAA) to develop a National Label of Authenticity. The Label of Authenticity is intended to assist

consumers make informed choices when they purchase goods and artworks claiming to be Indigenous, and to help raise general public awareness of Indigenous intellectual property issues and concerns.

In 1997, IP Australia and the Commonwealth Attorney-General's Department developed two videos for Indigenous communities to explain how they may be able to utilize the industrial property and copyright system to meet their needs.

Response to Question 27 : The existing legal framework in Australia provides Indigenous artists and creators with strong legal protection through which they can exert their control, exclude the use by others and reap financial gain for their efforts, including in international markets should they choose to do so. The cases referred to in Question 1 confirm those protections.

The Australian Government is aware however that Indigenous communities remain concerned about the protection of their culture. For example the present regime does not recognize communal interest in the arts and cultural expressions of Indigenous creators. The Government is committed to addressing such concerns.

The WIPO cases studies on the use of the IP system in Australia by Indigenous people raises the issue, which will be considered further, of the ability of the existing system to protect traditional knowledge trademarks.