

Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions

The Carpets Case: M*, Payunka, Marika & Others v Indofurn

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The views and opinions expressed in the Case Study are those of the author, Ms. Terri Janke, and not necessarily those of the World Intellectual Property Organization (WIPO) or its Member States

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Introduction

In 1993, imported carpets reproducing copyright works of Indigenous artists were found to be infringements of each Indigenous artist's works. The artistic works embodied pre-existing cultural clan images that were, in some instances, altered by the carpet manufacturer, thereby distorting the cultural message of the works. The artists instituted a copyright action against the company which had imported the carpets,

Indofurn Pty Ltd (“Indofurn”), successfully winning their case. This case resulted in the landmark Federal Court decision *M*(deceased) v Indofurn*,¹ representing an accommodation of copyright law to protect Indigenous art and cultural expression.

Banduk Marika is an Aboriginal artist from Yirrkala. Of the artists that initiated the case, she is the only artist who is still living. Her work *Djanda and the Sacred Waterhole* was copied directly from an educational portfolio produced by the National Australian Gallery. This study will examine the case with reference to Banduk Marika’s work and the underlying traditional knowledge of her people, the Rirratingu clan.

The original work of Banduk Marika and the reproduction of Indofurn are contained in Appendix 3.

Summary of the Facts

Carpets reproducing the works of several prominent Indigenous artists were discovered by the National Indigenous Arts Advocacy Association (NIAAA).

Three artists, George M* (now deceased), Kumantjayi Tjapangati (now deceased) and Banduk Marika, together with the Public Trustee of the Northern Territory on behalf of deceased artists,² brought an action against Indofurn³, a Perth-based import company. The company imported the carpets from Vietnam, a country that is not a signatory to the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the “Berne Convention”). Copyright was protected in Vietnam first by way of an Ordinance on Copyright (1994). The Ordinance was subsequently replaced by the Civil Code, which came into effect from July 1, 1996.⁴

NIAAA became aware of the carpets when they were contacted by a salesperson from a Sydney carpet store. The salesperson was interested in knowing whether the “Aboriginal carpets” for sale in the carpets store were authentic. When staff at NIAAA saw the carpets they identified them as copying the original works of several well-known Aboriginal artists.

The artists were all very prominent. George M* had been the first Aboriginal artist to have a solo exhibition at the National Australian Gallery. His work *Goose Egg Hunt*, which was reproduced on the carpets, is owned and displayed by the National Gallery of Australia. It was reproduced on the 85-cent stamp issued in 1993 to celebrate the International Year of World’s Indigenous Peoples.

Banduk Marika is herself an internationally acclaimed artist. She is the first Aboriginal to be appointed to the Board of the National Gallery of Australia. She is a board member of the Museum and Art Gallery of Northern Territory. She is also

¹ *M*, Payunka, Marika & Others v Indofurn Pty Ltd* 30 IPR 209 at 210

² See Appendix 1 for full list of artists and the relevant artistic works.

³ At the time the importations occurred the company was known as Beechrow.

⁴ Part IV, Chapter 1 of the *Vietnamese Civil Code* (Articles 745-779)

Chairperson of Yirrkala Landcare and takes an active role in cultural environment issues.

Banduk's work was reproduced from an education portfolio of Aboriginal artwork produced by the Gallery in 1988. One of the main purposes of the portfolio was to educate teachers and students about the importance of Indigenous cultures. According to evidence given to the Court, the portfolio was at the carpet factory in Vietnam when a director of Indofurn first visited it.

In June 1992, after production and importation of the carpets had commenced, Indofurn sought advice on copyright permission from the Aboriginal Legal Service of Western Australia. A letter was written to the Aboriginal Arts Management Association (AAMA, later called NIAAA) informing them of the reproduction of their paintings and the importation of the carpets. The letter enclosed photographs of the carpets and details of the artists together with a cheque for \$750.⁵ The cheque was claimed by the respondents to represent 8% of the landed costs of \$180 per carpet. This letter was addressed incorrectly and was never received by NIAAA.⁶

In November, Indofurn sent a copy of the letter to NIAAA. Staff at NIAAA contacted the artists to let them know of the carpets. The artists expressed outrage at the use of their works in this way. They refused permission and sought assistance from NIAAA to take action against the illegal importations. NIAAA returned the cheque and commenced action.

In the course of proceedings it was discovered that Indofurn imported approximately 200 carpets totalling about 850 square metres of carpets. Some of the carpets were for sale for over \$4,000 each.

The Traditional Knowledge

Banduk's work is central to the cultural heritage of her people, the Rirratingu clan. The original work is a six colour linocut, ink on paper. She created the work in 1986. By drawing original art onto plates, she made a small number of prints. The work was made under commission for the Australian National University for the Bicentenary celebrated in Australia in 1988. One of the prints was purchased by the National Gallery of Australia and another one was purchased by Jennifer Isaacs who reproduced the print with the artist's permission in her book, *Aboriginality*.⁷ According to Banduk, she allowed Ms Isaacs to reproduce "because I knew that she would do so in a respectful and appropriate way and not in a commercial way. The technique which I adopted of making my artwork directly in a form for printing was, I believe, the first time this technique has been used by an Aboriginal artist."⁸

⁵ References to monetary amounts are to Australian Dollars.

⁶ *M*, Payunka, Marika & Others v Indofurn Pty Ltd* 30 IPR 209 at 210

⁷ Jennifer Isaacs, *Aboriginality*, University of Queensland Press, St Lucia, Qld, Australia, 1989

⁸ Banduk Marika, Affidavit, 1994

In the Australian National Gallery portfolio, Banduk's name and clan were printed alongside the work. Her consent to reproduce the work in the portfolio was obtained by the Gallery subject to formal approval and royalty agreements with the artist or her representatives.

Banduk explains the significance of the painting:-

“The image in question relates to a site on Rirratjingu clan land where our creation ancestors, the Djangkawu, visited on their journey across Arnhem Land. The Djangkawu were the original ancestors of the people of the Dhuwa moiety.

The image is associated with a place on Rirratjingu land called Yalangbara (which is at Port Bradshaw south of Yirrkala) and represents the events associated with the Djangkawu that took place there. My rights to use this image arise by virtue of my membership of the land owning group. The right to use the image is one of the incidents arising out of land ownership.

When the Djangkawu handed over this land to the Rirratjingu they did so on the condition that we continued to perform the ceremonies, produce the paintings and the ceremonial objects that commemorate their acts and journeys. Yolngu guard their rights in paintings and the land equally. Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is an assertion of the rights that are held in the land.

The place, Yalangbara, and the particular story of the Djangkawu associated with it do not exist in isolation. They are part of a complex or "dreaming track" stretching from the sea off the east coast of Arnhem Land through Yalangbara, across the land to the west of Ramingining and Milingimbi.”⁹

Djanda is the sand goanna and the image relates to information about that country on a number of levels. Djanda is part of a bigger story, the nature of which cannot be disclosed generally.¹⁰

Communal Ownership

The underlying knowledge of the artwork and the image itself belong to the Rirratingu clan communally. Banduk notes: -

⁹ Banduk Marika, Affidavit, 1994

¹⁰ Not for women to know, according to Mawalan (2) and Marika Banduk, (Interview, Nhulunbuy, 31 July 2000).

“My artwork which has been reproduced on carpets by the respondents herein is known as the "Djanda Sacred Waterhole." The image is an image which belongs to my clan, the Rirratjingu, and forms part of the mythology of the Djangkawu creation story. The image is of great importance to my clan and also has importance to clans in neighbouring areas, which have rights in this image.”¹¹

Banduk is the daughter of Mawalan (1), leader of the Rirratjingu clan of northeast Arnhem Land until his death in 1967. Mawalan (2) is now the senior representative of the clan. Mawalan has given permission to Banduk to depict the image. Mawalan is responsible for the land and associated clan designs. He has *manala*, meaning he has “deep knowledge” about the area Yalangbara - north of Port Bradshaw in Arnhemland. Mawalan was given the responsibility over land and culture by his father Wandjuk Marika.¹² According to Mawalan, Banduk is also not allowed to know the deep knowledge of the area. There are some places women are not permitted to see or to visit.

Mawalan refers to the story, art, place and entirety of Yalangbara as “his backbone.”¹³ In 2001, Mawalan took action against another man who was digging in Yalangbara for the well water. Mawalan says, “He was digging up my backbone.” The action was taken in respect of land and the sacredness of the land. Mawalan won the case and was able to stop the digging of the waterhole.

Yalangbara was registered as a sacred site-complex with the Aboriginal Areas Protection Authority in 1983. A detailed Heritage Assessment of the area, prepared recently by Geoffrey Bagshaw and Banduk Marika,¹⁴ outlined the cultural significance of the work, and included an inventory of artistic works depicting the site.

Most of the Yalangbara area is traditionally owned by the Rirratjingu *baparru*, a Yolngu estate-owning group recruited mainly through the father.¹⁵

Both the estate (*yirralka*) and the membership (*mala*) of the Rirratjingu are affiliated with the Dhuwa moiety, which is one of the two main categories in which the entirety of the Yolngu cosmos is divided - the Dhuwa and the Yirritja. Like the moieties, each *bapurru* must marry outside the group. For Rirratjingu people, this is a fundamental rule of social organization. There is a connection with land as offspring of mothers from moieties. Djanda is a facet of that *bapurru*.¹⁶

¹¹ Banduk Marika, Affidavit, 1994

¹² Wandjuk was one of the first advocates for copyright protection. Wandjuk is Banduk’s eldest brother. He was a very important man within their clan but also in terms of Australian Indigenous arts - he was the Chairman of the Aboriginal Arts Board from 1971 - 78.

¹³ Interview with Mawalan (2) Marika, Nhulunbuy, 31 July 2000

¹⁴ *Yalangbara: A Heritage Assessment Report to the Australian Heritage Commission*, Geoffrey Bagshaw & Banduk Marika, Prepared for and on behalf of the Landcare Department, Yirrkala Dhanbul Community Association Inc, June 2000

¹⁵ Bagshaw and Marika note that the Rirratjingu *bapurru* also includes a small number of individuals whose membership is based on paternal adoption. Bagshaw and Marika, *Ibid*, page 44

¹⁶ This word is used similarly to “totem”.

Timmy Burarrwanga, Gumatj clan, explained the significance of Yalangbara as the parliament of the Yolngu - it is where the Mawalan Mace originated.¹⁷ It is very important. Timmy's family has a responsibility to keep Banduk's knowledge strong.

Under customary laws of the Yolngu people, any decisions pertaining to their estate require the direct input of Rirratjingu traditional owners (*nayi watangu* - "country belonging to") and/or persons designated as ritual and territorial guardians (*djungaya*).¹⁸

Commercialisation of Traditional Knowledge

The traditional custodians and the artists consent to reproduction of artistic works of significance where the reproduction is in a prestigious publication for the purposes of educating members of the non-Indigenous community about Aboriginal culture.¹⁹

Although Banduk has the right to depict the image, she must be cautious of its reproduction, and in particular, any commercial exploitation. She notes: -

"I have always been concerned not to engage in the commercial exploitation of imagery which is of importance to my clan such as the waterhole image herein. The reproduction of the image on carpet has caused me great distress because I believe it desecrates the story which is partly told by the imagery in waterhole artwork."²⁰

Banduk had created the work for culturally appropriate display in a reputable art gallery. The reproduction of the artwork on carpets, where it would be walked on, is totally opposed to the cultural use of the central imagery and underlying knowledge in her work.

Impact of Infringement on Artist and Culture

The reproduction of the image on carpets caused Banduk great stress and anxiety. She was worried that other Yolngu may see or learn about the carpets and question her involvement in the manufacture. Further, she was concerned that continued right to use the image would be revoked.

She noted: -

"Even though I know that I am not responsible for the reproduction I am still concerned about the ramifications for me and my work within Yolngu society, and I greatly fear a loss of reputation arising from Yolngu associating me with the reproduction. I fear that my family and others may accuse me of giving permission for the reproduction behind their backs without consulting and seeking permission in the manner required by our

¹⁷ Meeting with Timmy Burrawarrnga, Yirrkala, 2 August 2000.

¹⁸ Djungaya explained in *Bulun Bulun*, See Bagshaw & Marika, *Op Cit*, at page 44

¹⁹ *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659 at 662.

²⁰ Banduk Marika, Affidavit, 1994

law and culture. I fear that this could result in my family and others deciding that I cannot be trusted to use important images such as this one any more.

This would not only threaten my artistic and economic livelihood but also my ability to participate fully in Yolngu society and cultural practice.”²¹

Customary Laws and Regimes

Under Aboriginal law, the right to create artworks depicting creation and dreaming stories, and to use pre-existing designs and totems of the clan, resides with the traditional owners as custodians of the images. The traditional owners have the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, by whom it may be published, and the terms, if any, on which the artwork may be reproduced. The extent to which an artwork bearing a pre-existing design can be reproduced will depend upon the subject matter of the work. For instance, an artwork that is associated with a public story or ceremony might have fewer restrictions than an artwork that embodies a dreaming or creation story.

Aboriginal artwork will often depict secret parts of a dreaming that will only be recognised and understood by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story. It is therefore important that any reproduction is accurate in every respect and done with full, proper permission of the artist and community so as not to offend the traditional owners.

Decision-Making and Consent

Banduk first heard about the carpets when she was contacted by the then Executive Officer of the Aboriginal Arts Management Association (now NIAAA).

Banduk says she was hurt when she found out about the carpets. “They didn’t understand the importance of the art - art is my culture - my identity.”²²

²¹ Banduk Marika, Affidavit, 1994

²² Interview with Banduk Marika, Yirrkala, 1 August 2000

Banduk also put it like this:

“It’s like the Queen and the monarchy. They have their symbols and uniforms and it’s passed down through one line of the family. It doesn’t go anywhere else. That is what Aboriginal art is about.”²³

Banduk had to conceal the infringement from members of her clan whilst she began action against Indofurn. If it had become widely known in her community, Banduk believes that her family could have told her to stop producing artwork or restricted her participating in ceremonies. The clan might have also made her an outcast and sought recompense from her.²⁴

Knowledge of Copyright

Before taking the case, Banduk had little knowledge of copyright law. Six years since the case was brought, Banduk now has a very good knowledge of copyright law. She is a leading advocate for Indigenous artists asserting their rights under copyright and has presented at many conferences regarding copyright.

Unauthorised Reproduction under Customary Law

If a story or design is reproduced without the permission of the traditional custodians, it is the responsibility of the traditional custodians (or owners) to take steps to preserve the dreaming and to punish those responsible for the breach. The court noted: -

“If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is 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 no knowledge of what occurred.”²⁵

There are severe consequences for misuse of artwork without permission. According to Banduk Marika, in the past the offender could be put to death. However now there are other forms of punishment including taking away the rights to participate in ceremonies, the removal of the right to reproduce designs of that or any other story of the clan, being outcast from the community, or being required to pay money. Other evidence in the case noted being speared as another possible consequence.²⁶

²³ Banduk Marika quoted by Debra Jopson, “Poor Fellow, my Culture”, *Sydney Morning Herald*, 22 September 1999.

²⁴ *M* and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659 at 663-4.

²⁵ *M* and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659 at 663.

²⁶ *M* and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659 at 663.

Intellectual Property Protection

Copyright in Artworks

Copyright protects artistic works that are original and in material form. Copyright continues to subsist until 50 years after the end of the calendar year in which the author dies.²⁷ After this period, works are considered to be in the public domain. Once in the public domain, works are free to be used by others without having to get the consent of the copyright owner.

Although four of the artists were deceased, they were not deceased for more than fifty years. Hence, copyright still subsisted in their works. The Public Trustee of Northern Territory on behalf of the deceased artists' families and representatives brought the action.²⁸

The Artists' Rights

The copyright owner of an artistic work has the exclusive right to do all or any of the following acts:

- (i) to reproduce the work in a material form;
- (ii) to publish the work;
- (iii) to communicate the work to the public.²⁹

Importation of Artworks

It is an infringement of copyright to import copies of artistic works without the license of the copyright owner for the purposes of sale, distribution or trade, if the importer knew, or ought reasonably to have known, that the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright.³⁰ The relevant section of the Copyright Act is set out in Appendix 2.

For a claim of infringement under the importation provisions to be made out, it must be established that the importer knew or ought reasonably to have known that the carpets would, if made in Australia by the importer, have constituted an infringement of copyright. For the purposes of section 37, the court noted that “(k)nowledge refers to notice of facts such as would suggest to a reasonable person having the ordinary understanding expected of persons in the particular line of business that a breach of copyright was being committed.”³¹ The court considered that it was not necessary to

²⁷ Section 32(2) *Copyright Act 1968*. See also Berne Convention.

²⁸ The artists died without a will: intestacy estate management is conducted by the Public Trustee of the Northern Territory.

²⁹ Section 31(1)(b), *Copyright Act 1968 (Cth)*

³⁰ Section 37, *Copyright Act 1968 (Cth)*.

³¹ *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 53 ALR 225

establish actual knowledge and constructive knowledge was sufficient.³² “It is sufficient that there be actual or constructive knowledge that intellectual property rights would be infringed, without knowing the precise nature of those rights.”³³

Justice Von Doussa was satisfied that the company, via its active director, had constructive knowledge of the infringement. That is, he had knowledge of facts that would suggest to a reasonable person, particularly one about to engage in the business of distributing carpets in Australia, that a breach of copyright law would be committed if the carpets were to be made in Australia.

Infringement

Did copyright subsist in the Indigenous artworks?

At the beginning of the trial, Indofurn disputed that copyright subsisted in the works. The issue before the court was whether a work incorporating pre-existing traditional designs and images was original and therefore subject to copyright protection. By the end of the trial the respondents admitted copyright ownership of the artists. The judge was of the opinion:

“Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality.”³⁴

Were the carpets infringing copies of the Indigenous artworks?

It is an infringement of copyright to authorise or to do any of the acts controlled by the copyright owner without permission of the copyright owner.³⁵ It is also an infringement of copyright to do any of those acts in relation to a substantial part of an artistic work. These acts are outlined above.³⁶ Indofurn’s carpet was a direct copy of the original work. Hence, the judge found that the carpets were a copyright infringement of *Djanda and the Sacred Waterhole*. The other carpets which reproduced the works of George M*, Wamut and Ngaritj were direct copies and were found to be copyright infringements of the original works.

Under the *Copyright Act*, it is not necessary for an artwork to be an exact copy. It is also an infringement to copy a substantial part of an artistic work. A substantial part of an artistic work does not necessarily refer to a large part of the work, quantitatively measured. A range of issues are relevant including the quality of the part taken. Generally, to consider this issue, the Court will look at the striking similarities between

³² *M* and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659 at 674.

³³ *Applied in Raben Footwear Pty Ltd v Polygram Records Inc & Anor* [1997] 370 FCA (16 May 1997)

³⁴ *M* and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659 at 665.

³⁵ Section 36, *Copyright Act 1968*

³⁶ See above.

the original artwork and the infringing copy. Quality is more important than quantity and depends largely on the nature of the parts taken from the original artwork.

Justice Von Doussa noted that the altered images on the carpets, although not identical to the artworks, reproduced parts of the original artworks that were centrally important to that particular artwork. For instance, in considering whether the Green Centre Carpet of Indofurn infringed Tim Payunka Tjapangati's artwork "Kangaroo and Shield People Dreaming", the judge noted that the part reproduced was an important part of the overall work which depicted a sacred men's story.³⁷ This factor was significant in leading the Court to conclude that copyright had been infringed.³⁸

Further, the judge considered that "*animus furandi*" was amongst the most important considerations in establishing substantial reproduction. That is, it was the intention on the part of the designers to take from the artworks for the purpose of saving themselves labour.³⁹ This consideration was satisfied in the opinion of the judge given that the original works were at the factory and a director of Indofurn had given instructions to produce the carpets in designs that were less complicated.⁴⁰

According to Colin Golvan, the determination of substantial copying in the works that were altered is a significant aspect of the case.⁴¹

³⁷ Evidence given by the artist. *M* and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659 at 678.

³⁸ at 229 - 230

³⁹ *M* and Others v Indofurn Pty Ltd and Others* (1994) 30 ALR 659 at 677

⁴⁰ *M* and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659 at 667

⁴¹ See Colin Golvan, "Aboriginal Art and Copyright - An Overview and Commentary Concerning Recent Developments", Vol 1, *Media and Arts Law Review*, page 153

Remedies under Intellectual Property Law

A copyright owner of an artistic work has the following remedies available against infringers: -

1. Injunction

An injunction is a court order prohibiting the other party from continuing to infringe the other parties' rights.⁴²

2. Delivery Up

Delivery up is the power of the court in equity to order the defendant to deliver up articles which have been made in contravention of the plaintiff's proprietary rights.⁴³ An infringing article is not regarded as the plaintiff's property.⁴⁴ On delivery up, the infringing articles are generally destroyed by the plaintiff or the court. If the infringer is unable to deliver up, conversion damages may be payable.⁴⁵

3. Account of Profits

Payment of profits the infringer made in exploiting the infringing articles.⁴⁶

4. Damages

Payment of compensation⁴⁷ for lost income from exploitation can be claimed as an alternative to account of profits. In some circumstances additional damages may be available if the infringement is flagrant.⁴⁸

In some circumstances, there may be criminal liability for copyright infringement, as in the case of large-scale piracy, and orders for seizure and delivery up can be made.⁴⁹

⁴² Section 115(2), *Copyright Act 1968 (Cth)*

⁴³ *Prince Albert v Strange* (1849) 2 DeG & Sm 652

⁴⁴ Section 116, *Copyright Act 1968 (Cth)*

⁴⁵ Section 116, *Copyright Act 1968 (Cth)*

⁴⁶ Section 115(2), *Copyright Act 1968 (Cth)*

⁴⁷ Section 115(2), *Copyright Act 1968 (Cth)*

⁴⁸ Section 115(4), *Copyright Act 1968 (Cth)*

⁴⁹ Sections 132, 133 *Copyright Act 1968 (Cth)*

The court found copyright existed in the works and that the carpets had infringed the copyright in the works. The artists were able to establish that 246 carpets were made from their designs and imported between December 1991 and September 1994. The only offer ever made to the artists was around \$14 per carpet. However, the carpets themselves sold for between \$500 and \$4,000 each.

The court ordered:-

- Delivery up of the unsold carpets;
- Damages of approximately \$188,640.

Delivery Up of Unsold Carpets

Indofurn was required to hand over the unsold carpets to the artists and their representatives. The total area of carpets returned was 366.59m².⁵⁰ The artists dealt with the carpets in varying ways. Banduk Marika's first reaction was to burn the carpets in a private ceremony. However, one of the carpets has been put on display in the Buku-Larrnggay Mulka Museum to serve as a reminder of the case and the importance of maintaining the integrity of the artwork.

Damages

The court awarded conversion damages based on an agreed sum for landed cost on importation of \$190 per square metre. The conversion damages amounted to approximately \$90,000 of the total award. General damages by way of depreciation in the copyright were also awarded at \$12,000.⁵¹

The Court made a collective award to the artists rather than individual awards so the artists could distribute it according to their cultural practices.⁵² At a meeting in 1997, the artists and their representatives agreed to share the damages equally regardless of the actual number of carpets per artist that was made.⁵³

Flagrancy Damages

The court awarded additional damages for flagrant conduct under section 115(4) of the *Copyright Act 1968*. Justice von Doussa considered the copyright infringements to be "plainly deliberate and calculated." He noted that from the beginning the source of the imagery on the carpets was known to Indofurn and they had been put on notice of this by

⁵⁰ *M* and Others v Indofurn Pty Ltd and Others* 30 IPR 209 at 241.

⁵¹ Colin Golvan, *Op Cit*, page 153

⁵² *M* and Others v Indofurn Pty Ltd and Others* 30 IPR 209 at 239.

⁵³ It should be noted that no award of damages has been made to their artists or their representatives because Indofurn was wound up and the active director has been declared bankrupt. Further, the two non-executive directors appealed successfully against their part of the award.

Mr Horrocks, a staff member of the Aboriginal Legal Services from whom Indofurn initially sought copyright advice, and later by AAMA.

Damages for Culturally-Based Harm

Part of the award was given in consideration of the personal hurt and cultural harm. The judge considered that the misuse of the artwork caused great upset and cultural harm to the artists. The court noted that the standing of the artist within his or her community could have been affected given the nature of the reproduction and the fact that the prior consent of the group was not sought or given. This was because, regardless of whether the artists authorised the reproduction of their artworks on carpets, they were responsible under Indigenous law for the transgression that had occurred. They were also liable to be punished for this transgression.

Non-Executive Directors

A percentage of the overall award was personally awarded against two other nominal directors of the Carpet Company. At trial, Justice von Doussa considered that they had allowed the importation of the carpets after the commencement of proceedings and therefore should personally pay \$43,222 towards the full judgment award. The two directors were held liable only for importations which occurred after they were put on notice by the service of proceedings, and who had had time, had they chosen to do so, to react to that notice.⁵⁴

The Appeal Case

The decision concerning the non-executive directors was appealed to the Full Federal Court in 1995.⁵⁵ On appeal of this issue only, the Full Court held that the inaction of the directors to act or stop the importation of the carpets did not amount to authorisation or permission by them for the continued importation of the carpets by the company.⁵⁶ On appeal, the directors argued that there was insufficient evidence against them to derive the finding of personal liability.

The Full Court found that they did not have the necessary mental element to authorise the company to continue importation, and therefore the judgment debt of \$43,222 against them personally was overturned.

The artists sought to apply for special leave to appeal to the High Court but the appeal avenue was not pursued because a settlement was reached.

⁵⁴ *M* and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659 at 687.

⁵⁵ (1996)AIPC 91-219

⁵⁶ *Jenkinson and Beazley JJ* (with Lee J in minority)

Post-Case Infringements

After the case, NIAAA found another carpet produced by Indofurn which was very similar to Banduk Marika's work, *Djanda and the Sacred Waterhole*. The carpet was an "oriental" version of the first carpet. Instead of the goannas, the carpet depicted a dragon. The same colour and background remained. Ceramic umbrella stands were also discovered with reproductions of *Djanda and the Sacred Waterhole*.⁵⁷

Trade Practices

A further issue before the court was whether the carpets infringed the *Trade Practices Act 1974* (Cth). The Trade Practice Act 1974 makes it illegal for a corporation, in trade or commerce, to engage in conduct that is misleading or deceptive or is likely to mislead or deceive.⁵⁸

Justice Von Doussa found that the labelling which stated that "Royalties are paid to Aboriginal Artists" was misleading. The labelling had also been attached to other carpets which had no Aboriginal association at all. By using such labelling, the court considered that Indofurn had misled the consumer to believe that the copyright in the artworks belonged to the company, or was licensed to it, or the carpets were approved or made under the licence and approval of the Aboriginal artists. In Justice Von Doussa's opinion, such conduct was false and misleading.⁵⁹

Financial Questions

The Aboriginal Arts Management Association (now the National Indigenous Arts Advocacy Association) coordinated the case. NIAAA receives funding for operating costs from the Aboriginal and Torres Strait Islander Arts Board of the Australia Council.

The action was jointly funded by the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Aboriginal and Torres Strait Islander Arts Board of the Australia Council.⁶⁰

The Northern Aboriginal Legal Aid Services acted as solicitors for the case. Colin Golvan, a barrister specialising in intellectual property, acted as counsel for the case.

⁵⁷ See House of Aboriginality Website, <http://www.mq.edu.au/hoa/stand.htm>

⁵⁸ Section 52, *Trade Practices Act 1974* (Cth)

⁵⁹ Section 52 and 53, *Trade Practices Act 1974* (Cth)

⁶⁰ Communication with ATSIC Chairman Geoff Clark, 26 March 2001

Moral rights

Since the case, moral rights have been introduced into the *Copyright Act* by the *Copyright Amendment (Moral Rights) Act 2000*.⁶¹ The new moral rights laws give creators the right to protect the integrity of their works, the right to have their works attributed to them and the right not to have someone else's work falsely attributed to them. The new law aims to implement Australia's obligations under the *Berne Convention*. Moral rights are recognised in a number of jurisdictions including France, the United Kingdom, Switzerland, Canada and New Zealand.

If moral rights laws had been in existence at the time the Carpets Case was heard, the artists may have had additional claims for infringement of moral rights including:-

- Infringement of the right of attribution of authorship

The author of a work has a right to be identified as the author of his or her work.⁶² The author is entitled to be attributed where his or her work has been used in a certain way. For example, the author of an artistic work is entitled to be attributed where his or her work is reproduced in material form, published, exhibited or transmitted.⁶³ The failure of Indofurn to place a reasonable prominent credit for the artist would most likely have been argued as an infringement of the right of attribution.

- Infringement of the right of integrity of authorship in respect of the work.⁶⁴

This right provides that an artist may bring an action if the work is subjected to derogatory treatment. "Derogatory treatment" in respect of an artistic work includes "the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or material alteration to, the work that is prejudicial to the author's honour or reputation;" or "an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs."⁶⁵

The right of integrity is important for Indigenous artists. Preserving the overall integrity of the work and the underlying story or ritual knowledge is extremely important to proper representation of Indigenous art and film. For instance, under the new laws, the artists could have argued an additional claim against the respondents for infringement of the right of integrity in that reproduction in such a manner was derogatory, and that the alteration of the works was derogatory treatment.

⁶¹ These laws came into effect on 21 December 2000.

⁶² Section 193(1) *Copyright Act 1968 (Cth)*

⁶³ Section 194(2) *Copyright Act 1968 (Cth)*

⁶⁴ Section 195AI *Copyright Act 1968 (Cth)*

⁶⁵ Section 195AK *Copyright Act 1968 (Cth)*

Whilst the introduction of moral rights addresses certain moral-based claims of Indigenous artists, moral rights only vest in individual copyright owners.⁶⁶ The collective ownership of rights to traditional ritual knowledge is not adequately recognised. This requirement excludes Indigenous persons from exercising moral rights over works embodying traditional ritual knowledge.⁶⁷

Conclusion

The decision in *M* v Indofurn* is a significant development towards greater protection under copyright laws for Indigenous art and cultural expression. The case has gone far in bringing the message of copyright and Indigenous art to the public. Shortly after the case, an exhibition toured nationally showcasing the original works with the infringements.⁶⁸

It should be noted, however, that the artists did not receive the total awarded damages. Firstly, the two non-executive directors appealed successfully against their part of the award, and Indofurn was wound up and the active director was declared bankrupt. The artists got some monies from a sum paid into Court and also from the sales of some of the carpets organised by NIAAA for their benefit.

The importance of the judgment remains despite this. There is greater assertion on the part of artists as to copyright and the community responsibilities. For instance, Buku Larrnggay Mulka now have a practice of including the community on copyright notices of artistic works:-

“© Banduk Marika, 1998. This work and documentation is the copyright of the artist and may not be reproduced in any form without the permission of the artist and the clan concerned.”⁶⁹

Moreover, within the arts and the manufacturing industry, there is more awareness now that Indigenous artists are copyright owners of their works. This has resulted in licensing opportunities for artists, and some artists have even licensed works for production of carpets.

⁶⁶ Section 90 *Copyright Act 1968 (Cth)*

⁶⁷ Terri Janke, “A Moral Issue: Moral Rights and Indigenous People’s Cultural Rights”, *NIAAA News*, Autumn 2001, pp 2 – 3, at 3

⁶⁸ Dr Vivien Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, Touring Exhibition Catalogue, National Indigenous Arts Advocacy Association and Macquarie University, 1996

⁶⁹ Interview with Diane Blake, Buku-Larrnggay Mulka Arts Centre, Yirrkala, 31 July 2000.

The arts practice continues in Yirrkala in accordance with artists' customary laws and obligations. As Dundiwuy Mununggur of Buku Larrnggay notes:-

“In our art we tell the story, the background and knowledge of our clan, our thoughts and understanding, it goes deep, we get direction from the old people.

The balanda copyright protection is not considered, but with the copyright case of *Banduk's*, it has helped to open the eyes of the Yolngu. We do the art, not expecting it to be copied, just to be kept in museums, galleries and homes for people to enjoy.”⁷⁰

The case has also served to raise awareness within the legal system including the judiciary. Justice Kirby of the High Court of Australia has noted:

“Difficulties with extending Australia's intellectual property law to the styles and nuances of the artistic creations of Aboriginal and other indigenous people of Australia suggest that there may be a need to look specifically at the express adaptation of that law to the needs of indigenous peoples so that the law can respond to the problem and not simply impose its view of what the problem is upon all people uniformly.”⁷¹

Whilst the judgment is a precedent in the recognition of Indigenous rights within the copyright law framework, significant expressions of Indigenous cultures will not meet the requirements of copyright to benefit from these laws. For example, orally transmitted works will not meet the requirement of fixation and works of antiquity will not come within the period of protection.⁷² As Cathie Craigie, the Director of the Aboriginal and Torres Strait Islander Arts Board notes:-

“The judgment has served to discourage further infringements of Indigenous copyright though much more needs to be done to improve the protection of our culture by amendment of existing laws to recognise traditional, customary and collective ownership.”⁷³

⁷⁰ Dundiwuy/Mundul Mununggur, Associate Printmaker, Buku-Larrnggay Arts, Yirrkala, Northern Territory, Correspondence, February 2001.

⁷¹ The Hon Justice Michael Kirby AC CMG, “Protecting Cultural Rights - Some Developments”, United Nations Educational, Scientific and Cultural Organisation, The University of Waikato CNZJ, 12 - 13 October 1998, <http://www.hcourt.gov.au/speeches/kirbyj/culture2.htm>

⁷² See Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Company, under commission by Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1999, pp 52 – 60.

⁷³ Cathy Craigie, Director, Aboriginal and Torres Strait Islander Arts Board, Correspondence to Terri Janke dated 12 April 2000.