The Protection of "At The Waterhole" by John Bulun Bulun – Aboriginal art and the recognition of private and communal rights

By Colin Golvan SC

Introduction

John Bulun Bulun is an Aboriginal artist who lives in the area of Maningrida, an Aboriginal township about 600 kms. east of Darwin in central Arnhem land.

When I first met him in 1988, he lived in an outstation, known as Garmedi,with a population of about 20 people. Bulun Bulun was one of a group of three highly successful bark painters living at the outstation, with the other artists being Jack Wun Wun and his son Michael. These artists painted on bark, using traditional ochres (applying the ochres mixed with water using both traditional and Western brushes). They would also use glue to give a sheen to the surface of the bark on which they were painting. Their work was often very elaborate, combining complex tribal imagery with detailed cross-hatching.

At the time, Jack held the distinction of having received more than any other bark painter for a single work - being $10,000, paid by the Australian National Gallery for the painting known as Banumbirr, the Morning Star in 1987.

One of Bulun Bulun's paintings had been sold in 1988 for $5,000. Today his leading works would sell for many multiples of this 1988 price. In 2007, Sothebys recorded a record price for the sale of an Aboriginal artwork (an oil painting) of $2.4m. The market for Aboriginal art has blossomed since 1988.

Bulun Bulun has been amongst the best known bark painters in Australia over a period of many years, and his work is widely admired by western art critics and curators of the major Aboriginal art collections. His work is represented in most major public collections of bark painting.

In 1987, a T-shirt manufacturer reproduced one of Bulun Bulun's paintings, known as "At the Waterhole", on T-shirts without his permission. Subsequently, a revised version of the T-shirt was created, which drew on another of Bulun Bulun's paintings, known as "Sacred Waterholes Surrounded by Totemic Animals of the Artist's Clan" (painted in 1981) as well as "At the Waterhole". Again, no permission was sought. The T-shirt manufacturer also reproduced some artworks of other artists on T-shirts, but the main activity concerned reproduction of Bulun Bulun's paintings.

There were a number of significant markings on the T-shirts. The name "At the Waterhole" was printed on the T-shirts. The T-shirts also included the label "The Aboriginals" and bore a swing ticket with the following script:

"AT THE WATERHOLE - a design originated from Central Arnhemland. The art depicts

magpie geese and waterlilies around a central waterhole with tortoises also shown. It's characterized by excellent draughtsmanship, curved flowing lines and close intertwining forms. The motifs create an overall curvilinear pattern on a plain black background. The aboriginals painted these designs on large pieces of bark often treated with a layer of brown or red ochre. The design is built up using red, yellow, black and white ochres, applied with a hair or chewed twig "brush". Modern day artists are beginning to take advantage of modern materials like masonite board, acrylic paints and conventional artists' brushes. However, the subject-matter and traditional styles are still retained."

An early version of the T-shirt bore the notation Flash Screenprinters ©.

In 1989, Bulun Bulun, and the other artists concerned, took the unprecedented step of bringing an action for infringement of copyright and breaches of the Trade Practices Act 1974 in the Federal Court in Darwin, arising from these unauthorised reproductions.

The manufacturers and two Darwin tourist shops which sold the T-shirts gave undertakings to the Court agreeing to cease manufacturing and selling the T-shirts, and to deliver up all remaining stocks of the T-shirts.

The outcome was described by the co-ordinator of the Association of Northern and Central Australian Aboriginal Artists, Martin Hardie, as a "landmark' for Aboriginal artists as it showed that the interests of Aboriginal artists could be protected through reliance on the Copyright Act and associated protection under the
Trade Practices Act. Mr Hardie said that the case would be recalled as the occasion on which the rights of Aboriginal bark painters in their works have been formally recognised by means of undertakings given to a Court.

The case was the first occasion on which Aboriginal artists had successfully litigated to protect their imagery from unauthorized reproduction, and provided a foundation for later authority in which the Federal Court confirmed the copyright foundations for the protection of Aboriginal artistry from illegal copying (see, in particular, *Milpurrurru v. Indofurn Pty. Ltd.* (1994) 30 IPR 209). It was also a first occasion on which Aboriginal artists asserted a private right of ownership of artworks under copyright in a Court proceeding, a step which was met with a degree of criticism concerning the claim of private, rather than communal, rights in traditional works of tribal imagery.

In fact the case, was subsequently settled (there being no judgment published by the Court), with a substantial payment being made to the artists in question and the offending T-shirts being withdrawn and delivered up to the artists.

The case

The evidence prepared in the proceeding was of interest as it was the first attempt to document the copyright foundations of a claim of the kind under consideration.

This following sets out key passages of the evidence, outlining the factual and opinion

underpinnings for this seminal claim.

One of the chief deponents for Bulun Bulun was Margaret West, the curator of Aboriginal Art and Material Culture at the Northern Territory Museum of Arts and Sciences. The Museum had one of the largest collections of bark paintings in Australia, including the work known as At the Waterhole, painted by Bulun
Bulun in 1978.

West deposed that:

"…bark painting was one of a number of mediums used for ceremonial purposes amongst Aboriginal communities in central and northern Australia, as is body painting and rock painting. Bark painting tends to take its origins from body painting, and has been actively pursued in recent years arising from a growing interest in acquiring Aboriginal art among art collectors in Australia and around the world."

West deposed:

"The technique involved in producing a bark painting involves the following steps. First, bark is stripped from stringybark eucalyptus trees during the wet season. The bark is dried and compressed, and the inner surface is then smoothed. A range of colours are used - mostly red, brown, yellow, black and white. The colours are obtained from grinding coloured rocks, which are obtained in the artist's area or exchanged between tribes. Some artists mix their colours with glue for a shiny effect, and some artists use orchid juice for the same purpose. The painters do not mix colours, and deliberately strive to reproduce the natural colours in their works. A variety of brushes are used, including a thin strip of bark which is chewed and used for broad lines and a brush made of human hair used for fine lines, as well as thin sticks softened at
one end. Artists are also using western style brushes."

West also deposed that:

"While many bark paintings represent traditional designs, it nevertheless remains that particular artists have their own distinctive ways of expressing the traditional designs. Tribal groupings will have the right to depict particular designs by virtue of Aboriginal custom. Members of a tribal group will be entitled to depict particular designs in their artwork, with some inheriting the right to depict a complete version of a design by virtue of their proficiency and skill as artists. The artists will have the right to deal with the works as they consider appropriate, including the right to sell the works."

West said that most artworks have religious significance to the artists and their communities, and added that the artists would not deal in their works in such a way as to undermine the dignity and significance of their work.

She continued:

"There is no separate class of artists as such in Aboriginal society. Rather, all adults are expected to participate in the process of remembering and recording the dreaming rituals of their tribe. Nevertheless, some painters have come to establish special reputations by virtue of their proficiency and popularity in the western art market. Despite this commercial influence, the creation of a painting is regarded as an act in itself which conjures the spirit power of a tribe. The paintings are also used to educate members of a tribe in the tribe's rituals and dreaming, and may be studied by younger tribe members, under the supervision of an artist, in order that the rituals of the tribe are properly imparted. This is done sometimes before an artwork is released for sale. In traditional Aboriginal society, the designs of a tribe are amongst the most important possessions of the members of the tribe. When an artwork is sold, it is never considered that the title to the design has passed. This always remains with the artist who is permitted by his tribe to depict the design in question. It is an unspoken understanding, on the part of the artists, that the purchasers will properly look after the artworks."

West said that she was aware of one particular artist, who was deceased, and who stopped painting for an extended period of time, at least five years, because of the anger and anguish he felt at seeing one of his art works reproduced on a tea towel, which is regarded as an act of theft, in both a material and spiritual sense.

In an affidavit, Bulun Bulun deposed that he was the author of the two works in question, and that they were original works. He deposed that he had:

"… never approved of the reproduction of any of my artworks on T-shirts, and never approved the mass reproduction of any of my artworks, other than the reproduction of photos of my works in art books. None of the respondents have ever spoken to me, or attempted to speak to me, about the matter. Had they sought my permission, I would not have given it."

Bulun Bulun said that he had been impeded from carrying out his activities and duties as an artist because of the unauthorised reproduction of his artworks.

"This reproduction has caused me great embarrassment and shame, and I strongly feel that I have been the victim of the theft of an important birthright. I have not painted since I learned about the reproduction of my artworks, and attribute my inactivity as an artist directly to my annoyance and frustration with the actions of the respondents in this matter. My interest in painting has been rekindled by the efforts being made on my behalf to resolve this problem, and I am just starting to paint again, although I am doing so in anticipation that this problem will be resolved in the near future. If it is not resolved satisfactorily, I have considered never painting again."

Bulun Bulun deposed that:

" … my work is very closely associated with an affinity for the land. This affinity is at the essence of my religious beliefs. The unauthorized reproduction of artworks is a very

sensitive issue in all Aboriginal communities. The impetus for the creation of works remains their importance in ceremony, and the creation of artworks is an important step in the preservation of important traditional customs. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe. It is also the main source of income for my people, both in my tribe and for the people of many other tribes, and I am very concerned about the financial well-being of my family should I decide that I cannot go on painting."

Bulun Bulun was trained as a painter by his father, who was himself a painter.

"My father lived at a mission settlement at Milingimbi where he sold works to the mission. He painted the dreaming stories of our tribe, the Gunilbingu, including waterhole scenes. He painted such scenes in his own way. I do not have any of his works, and have never tried to copy any of them. His teaching was of importance in imparting to me the traditional techniques of bark painting, and the dreaming traditions and images of our tribe. I am training my own son in the same manner."

Bulun Bulun said that he had particular responsibilities as a ceremonial manager to ensure that ceremonies and traditions were observed correctly, and that his painting was a significant part of this duty:

"Many of my paintings feature "waterhole' settings, and these are an important part of my dreaming, and all the animals in these paintings are part of that dreaming. Many of the paintings include the long-necked turtle, called barnda, the magpie goose, or gumang, the file snake, or bipuan, and water lily, or yarrman. The bands of cross-hatching or rarrk represent a marrawurrurr yiritdja site.

"The story being told in my waterhole works concerns the passage to Garmedi from my traditional land, and illustrates different ways of interpreting the same aspects of the story. The story is generally concerned with the travel of the long-necked turtle to Garmedi, and, by tradition I am allowed to paint the part of the story concerning the travel of the turtle to Garmedi. According to tradition, the long-necked turtle continued its journey, and other artists paint the onward journey. The many different versions of the waterhole story, as illustrated in the photos of my work exhibited to the Affidavit of Margaret West, are indicative of the range of possibilities in telling the traditional story. I also paint other stories in my work, such as the story of the Morning Star ceremony, and another series concerning the story of two sisters who released maternal milk into a waterhole."

Originality

One of the principal issues in the case was that of whether the works were original for the purposes of copyright protection (as required under s. 32 (2) of the Copyright Act 1968 (Cth) ("the Copyright Act").

Originality in copyright has been likened to an act of authorship, in the sense that a work claimed to be “original” may not be a copy of another work.

In *Walter v Lane*, a decision of the House of Lords, Lord James of Hereford stated (at 554):

“Whilst the Act supplies no definition of the word ‘author', and whilst it may be difficult for any judicial authority to give a positive definition of that word, certain considerations controlling the meaning of it seem to be established. A mere copyist of written matter is not an ‘author', within the Act, but a translator from one language to another would be so ... an ‘author' may come into existence without producing any original matter of his own. Many instances of the claim to authorship without the production of original matter have been given at the bar. The compilation of a street directory, the reports of proceedings in courts of law, and the tables of the times of running of certain railway trains have been held to bring the producers within the word ‘author'; and yet in one sense no original matter can be found in such publications. Still there was something apart from originality on the one hand and mere mechanical transcribing on the other which entitled those who gave these works to the world to be regarded as their authors.”

Thus, it was held that newspaper reports prepared from speeches were capable of protection as original works.

Other similar such cases involve copyright protection being granted to the chronological list of football fixtures (*Football League Ltd v Littlewoods Pools Ltd* [1959] 1 Ch 637); a catalogue of books available at a book shop (*Hotten v Arthur* (1863) 11 WR 934), and directories of traders, businesses and professional services(*Lamb v Evans* [1892] 3 Ch 462).

Peterson J in *University of London Press Ltd v University Tutorial Press Ltd* ([1916] 2 Ch 602 at 608 to 610) stated:

“Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and, in the case of "literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author.”

In *Apple Computer Inc. v Computer Edge Pty Ltd* (1986) 161 CLR 171), Gibbs CJ adopted this dicta, and stated:

“The expression "original' in that section (section 32) does not mean that the work must be the expression of original or inventive thought.”

Gibbs CJ went on to state that:

“Originality is a matter of degree, depending on the amount of skill, judgment or labour that has been involved in making the work.”

As regards the adaptation of works which are common property, *Hatton v Keane* (1859) 7 CB 268 involved an adaptation of one of Shakespeare's plays, with alterations in the text, original music, scenic effects, and other accessories. It was held that the production as a whole was a proper subject of copyright protection, although the play itself was, in its original form, common property.

In *Robertson v Lewis* ([1976] RPC 169, it was held that copyright in a traditional air had been acquired by virtue of writing it down, to the extent that anyone who was proved to have made a copy directly or indirectly from the version so written infringed that copyright.

The key originality issue in the Bulun Bulun case was whether a contemporary depiction of ancient tribal imagery was entitled to be claimed as “original” for the purposes of copyright protection. The evidence in the proceeding put the issue beyond doubt, but at the time there was a divergence of opinion on the issue, in particular as expressed in the report of an enquiry into the issue.

A working party set up in 1975 by the Commonwealth Government to Investigate the Protection of Aboriginal Folklore noted in its 1981 Report that there was concern as to the ability of Aboriginal artists to satisfy the threshold requirement of originality in order to claim copyright protection. The view was expressed that the artists draw upon tradition and pre-existing works, and that although the level of independent contribution required to establish originality is not great, it could be argued that the derived nature of many works of Aboriginal artists could deprive those works of copyright protection. This statement of opinion was a matter of much controversy which was ultimately debunked in cases involving the protection of Aboriginal copyright.

On the originality issue, Margaret West deposed that while the settings in the two works may have been painted on numerous occasions by Bulun Bulun himself and his forebears, it remained:

“That the works are clearly products of considerable skill, and reflect facets of the Applicant's distinctive style. I note, for example, the fineness and detail of the cross-hatching, which is one of the most important features in any Aboriginal bark painting. I also note the particular depiction of the figures and composition, which are unique to the Applicant. For example, I am not aware of any other artist who depicts magpie geese, long-necked turtle and water snake at waterholes in the fashion of the Applicant. I would describe the works as very decorative, very busy and very nicely composed. I note that they share a number of important features in common, such as the rarrk, or cross-hatching, the placement of the figures relative to the waterholes, the depiction of large footprints, the depiction of the waterholes, the striping on the magpie geese figures, the depiction of the geese figures in a red ochre, the depiction of the snake figures and the use of leaves. These are all distinctive features of the Applicant's work. I would

rate the Applicant as amongst the best exponents in his artform just as one might rate a particular Western artist as a leading exponent in his particular artform of, say, sculpture or water-colour painting. The Applicant's standing as an artist is recognised by those in the market for Aboriginal artworks, with his works fetching substantial sums at galleries in Sydney and Melbourne."

Peter Cooke was an art adviser in Maningrida for many years. He deposed that:

"Bark paintings of the size and complexity which the Applicant usually produces are invariably very time-consuming works to produce. The bark may take up to a month to prepare in the first place. The painting time will then involve approximately a week's full-time work, although the production process will be slowed down by ceremonial commitments and time spent hunting. The very fine cross-hatching in the Applicant's work requires an immense amount of precision. People who produce this kind of work often complain of back ache from sitting over a painting, as well as eyestrain. "The quality of the cross-hatching work is often the feature which appeals most readily to art buyers. Few artists are able to produce cross-hatching of the fineness and precision of the Applicant."

Charles Godjuwa worked as an art adviser at Maningrida.

In his Affidavit he deposed that:

"There are about 20 artists actively selling works in the region, and each one produces their own individually styled work. These works are not copies of other works, but are all distinctive in their own ways, which is why I am able to command reasonable prices for the artworks."

Godjuwa said that individual items sold at the Maningrida Art and Craft Centre ranged in price from tens of dollars to ten thousand dollars.

He deposed that he has: - "… known the Applicant for nearly 11 years. He is a very important artist, and he commands tremendous respect from his peers. He plays a significant role in the management of the ceremonies of his tribe."

Godjuwa said that Bulun Bulun's painting style was:

"… distinctive in particular ways. He adopts a particularly distinctive approach to the depiction of magpie geese. I know of no other artist who paints these birds as the Applicant does. As it happens, magpie geese are a prized food in the Applicant's area, and the emphasis on the bird by the Applicant is of significance to the area. Included amongst other prominent figures in his work are depictions of the long-necked turtle, flying fox and water snake. I know of no other artist who paints these figures in the manner of the Applicant. I note the particular prominence these figures assume in his work, and, of course, the Applicant's distinctive cross-hatching style.

“Because of the Applicant's detailed personal knowledge of the country of his tribe, through his hunting and ceremonial experience, he has an intimate understanding of the manner of these creatures, all of which are common to the Applicant's tribal land, as well as of the significance of them as totems in his tribe's dreaming practices. This understanding guides the Applicant in his attention to detail, for which his works are much sought after. He is amongst a small group of artists in the Maningrida area entitled by tribal custom to depict designs in very precise detail, with this entitlement following from the skill he has demonstrated in understanding the dreaming customs of his tribe and by virtue of his particular gifts as an artist.”

These views were confirmed by Affidavits in the proceeding from a Sydney Gallery operator, Kerry Steinberg, and the curator of Aboriginal Art at the Australian National Gallery, Wally Caruana.

Kerry Steinberg deposed that she rated Bulun Bulun as one of the top bark painters in the Maningrida area.

“His work sells for between $600 and $5,000. There are few living Aboriginal bark painters who can command fees of over $5,000 for their work.”

She said that Bulun Bulun had a very special painting style.

“In particular, I note the detail of his work and the strong story content. His work is also not readily available. In a review of the 1987 exhibition at the Hogarth Gallery in Sydney, the critic of the "Sydney Morning Herald', Bronwyn Watson, wrote in that newspaper on 18 September 1987 that the Applicant was "one of the most eminent exponents of bark painting'. Ms Watson said the exhibition showed the development of his work from "his early style (depicting animal and plant forms) to a more complex style of his dreamtime paintings'.

Steinberg said that:

“The Applicant is particularly well known for his depiction of "waterhole' settings. These settings are of special importance to him because they are key parts of the dreaming of his yiritdja moiety. His depiction of the "waterhole' setting is quite distinctive, particularly as regards the detail and style of the internal cross-hatching.”

Caruana deposed that the Australian National Gallery collection of Aboriginal works contained eight works by Bulun Bulun, including three bark paintings, three colour screen prints and two lithographs.

“I regard the Applicant as one of the most important artists in Australia. He is a particularly able bark painter, with an established exhibition record and artistic reputation.”

In addition to the Northern Territory and Australian National Galleries, Bulun Bulun's

work was also exhibited at the Department of Defence building in Canberra, where a large mural was on display illustrating all of his tribe's main totems. His work had also been displayed at the Sydney Opera House, and was included in the National Ethnographic Collection.

In July 1986 Bulun Bulun's work was exhibited at Osaka as part of an exhibition of Australian Aboriginal art, and he travelled to Japan as a guest of the museum in question. His work had also been exhibited in New York, again as part of an exhibition of Australian Aboriginal art. He had two exhibitions at the Hogarth Gallery in Sydney in 1981 and 1987.

While Bulun Bulun painted in a genre which dates back over a long period, it was nevertheless clear that he was an artist of highly respected skill. In the absence of any evidence of copying, this evidence concerning his skill was an issue of particular note in the satisfaction of the tests for originality.

Direct infringement and copying

The rights of a copyright owner are set out in section 32 of the Copyright Act. Under section 14(1)(a), a reference to an act comprised in the copyright in a work is to be read as a reference to the doing of an act in relation to a substantial part of the work.

"Substantiality' has been interpreted as referring to the quality rather than quantity of a reproduction (*Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] 1 Ch 593 and *LB (Plastics) Ltd v Swish Products Ltd* [1979] FSR 145).

In the *Hawkes* case, referred to in the previous footnote, it was held that the musical work "Colonel Bogey' was infringed by the use of 28 bars, or half a minute, out of total playing time of the song of about four minutes. The Court regarded this part as "substantial' as it contained the principal air of the "Colonel Bogey' march.

In *Bauman v Fussell* ([1978] RPC 485), the Court was concerned with the alleged infringement of a photograph by a later painting. The test for substantiality was stated as follows: "Has this picture reproduced the original in its essential features, looking at it as a whole?' In this case the photographer was required to rely on the "positioning' of the features in the photograph as being the essence of the work capable of copyright protection.

The Court did not regard this positioning as having sufficient originality for the purposes of subsistence of copyright, although Somervell LJ indicated that it was possible to envisage a case where a photographer had "made an original arrangement of the objects animate and inanimate which he photographs in order to create a harmonious design'. In the view of Somervell LJ, such arrangement would constitute a substantial part of the work capable of protection in its own right.

In *Brooks v Religious Tract Society* ((1897) 45 WR 476), the plaintiff was the owner of

copyright in a painting which represented a collie dog seated on his haunches on a stone floor looking down at the upturned face of a child. There was a cat in the background. The defendant reproduced the painting, but replaced the child with a tortoise and two cats. An injunction was granted in the case prohibiting what was regarded as a substantial reproduction.

In *Lerose Ltd v Hawick Jersey International Ltd* ([1973] FSR 15), the plaintiff owned the copyright in a painted called Nature's Mirror, which portrayed the draped figure of a "psyche' with wings, kneeling on a rock, and looking into a pool of water. There was a background to the picture. The picture was reproduced without the wings and the background, and significantly reduced. The reproduction was held to be an infringement.

In *Hanfstaengl v Empire Palace* ([1894) 3 Ch 109), relief was refused by the Court of Appeal where the defendant's sketches gave only a "rough idea' of the plaintiff's work. The degree of resemblance was taken to be the test, with the value and essential qualities of the original work having to be reproduced. The approach was confirmed by the House of Lords ([1895] AC 20), although it should be noted that Court was interpreting the Fine Arts Copyright Act 1862, which arguably extended to the protection of ideas, and not just form of expression.

In the *Hanfstaengl* case, it was noted that intention is irrelevant in relation to establishing infringement. A defendant will be guilty of infringement, even though he acted quite innocently and without knowledge of the plaintiff's rights.

In the Bulun Bulun case, the question of substantiality was relevant to the particular T-shirt which used an image which copied aspects of two artworks of Bulun Bulun.

Margaret West identified the following elements of copying from the two art works in question of Bulun Bulun with respect to the revised T-shirt design:
(a) The waterholes have been copied in the manner of the multi-coloured cross-hatching in black, white and red, and using the same cross-hatching style.
(b) The colouring of the cross-hatching of the Applicant's magpie geese.
(c) The striping on the necks of the magpie geese.
(d) The striping on the snakes.
(e) The use of black for some of the magpie geese and the colouring of the cross-hatching inside these black magpie geese.
(f) The bird footprints.
(g) The placement of the magpie geese in relation to the waterholes.
(h) The depiction of geese eggs.
(i) The use of white dots and the presentation of leaves and the colouring of the leaves.
(j) The use of yellow and red colouring for the magpie geese.
(k) The depiction of the legs of the magpie geese.
(l) The placement of the long snake figure on the left of the design, and the particular manner of the placing of the heads of the various animal figures in or close to the waterhole.

(m) The style of snakes, but for the alteration of the tail of the smaller snakes.
(n) The border cross-hatching, including the black, white and red colours of the cross-hatching and the angle of the lines of the cross-hatching adopted by the Applicant, but reversed in the other direction.

Margaret West said that the only aspects of the T-shirt design which she could not recognise as copied were the lizard and crayfish figures and the diamond shapes inside the turtle:

"The diamond cross-hatching inside the turtle is definitely not a feature of the Applicant's work. Used as it is amongst an array of features that would be known, by those who follow Aboriginal bark painting, as features common to the work of the Applicant, there may be some confusion as to whether the Applicant
himself has attempted to imitate another form of cross-hatching which is not characteristic of his work, but which belongs to another artist. I note that both of the relevant works of the Applicant are shown at page of the book Arts of the Dreaming - Australia's Living Heritage by Jennifer Isaacs and page 22 of the
book Australian Aboriginal Art by Wally Caruana. If one turns to page 203 of the firstmentioned book and page 27 of the secondmentioned book, there are examples of diamond cross-hatching, with the secondmentioned reproduction showing diamond cross-hatching inside a turtle figure. I would suggest that the maker of the design on the artwork may well have turned a couple of pages of the books to pick up a
design feature which was not an obvious design feature of the Applicant. Similarly, the crayfish figure is used in the design at page 27 of the secondmentioned work"

West deposed that:

"… the T-shirt design could not have been made without detailed reference to the form of artistic expression of the artistic works of the Applicant to which I have been referring. In my opinion, there is virtually nothing original about the T-shirt designs. I also note the indebtedness of the T-shirts' designers to the Applicant through their adoption of the At The Waterhole title. The Applicant enjoys a particular reputation for his "waterhole'-based work.

Trade Practices issues

There were two aspects to the substantive Trade Practices claims in the action (based on breaches of ss. 52 and 52 of the *Trade Practices Act (Cth)* 1974) - the first turning on Bulun Bulun's reputation in the paintings themselves and the second as to matters of association or sponsorship arising from the markings on the T-shirts.

As to the first matter, a reputation may exist in an artist's name or his work, where the artist has a public reputation and where the work itself is the subject of some reputation (associated with the artist), and the artist is thus presumed to have approved or endorsed the reproduction of his artwork on T-shirts. This approach has was endorsed in two

decisions, at the time, involving the protection of the character "Crocodile Dundee' and aspects of the films based on the character, in *Paul Hogan v Koala Dundee Pty Ltd* and *Paul Hogan v Pacific Dunlop Ltd.* (1988) 12 IPR 508 and (1988) 12 IPR 225 (and on appeal at (1989) 14 IPR 398).

In the Bulun Bulun matter, a number of deponents had sworn that they could identify Bulun Bulun's work, and furthermore believed that Bulun Bulun and other artists may be profiting from the sale of the shirts such as to indicate a common endeavour. The use of "The Aboriginals" name and the text on the tag was also suggestive of commendation.

There was additional evidence of false and misleading conduct from purchasers of the T-shirts. Lynn Hall, a Melbourne medical practitioner, deposed that in June 1988 she attended the World Expo in Brisbane with her family:

"I visited a souvenir shop at the Expo and purchased a T-shirt marked with the name The Aboriginals on the label of the T-shirt and on a tag attached to the T-shirt and bearing the words "At The Waterhole' on the T-shirt."

She deposed that:

""I bought the T-shirt because I liked the design, but furthermore I believed that I was supporting the artist who created the design on the T-shirt. I considered, at the time I purchased the T-shirt, that it was a good idea that Aborigines were promoting their artworks at the Expo through the sale of such T-shirts. I was influenced in holding these beliefs by the use of The Aboriginals name in association with the T-shirt, and the text on the tag, which made the T-shirt seem authentic, and at the very least approved by the artist, if not manufactured by the artist or people associated with the artist. While I discarded the tag shortly after the purchase of the T-shirt, I recall it contained some text about the origins of the design shown on the T-shirt."

Issues Arising – collective protection

While the outcome of the proceedings (by a comprehensive settlement), and the analysis of the matters before the Court, effectively confirmed that copyright protection was available to protect Aboriginal artists in the situation of Bulun Bulun, with any general rejection of the availability of copyright protection for Aboriginal designs accordingly being dismissed, the case also indicated some concerns about copyright protection.

Most importantly, the notion of individual ownership was not consistent with tribal customs which emphasise communal ownership, even though the tests for ownership under the Copyright Act are still satisfied. The notion of communal ownership of copyright is not consistent with the Copyright Act, nor the Berne Convention under which the Copyright Act was adopted.

At the time, the concept of tribal ownership of confidential ideas was recognised in

Foster v Mountford ((1977) 14 ALR 71), in which the Federal Court accepted that representatives of the tribal leadership of a particular tribe could bring an action in breach of confidence to restrain the use by an archaeologist of the tribe's secrets, imparted to him in confidence.

The issue came to be considered in a copyright setting in the case of *Bulun Bulun v. R & T Textiles* (1998) 41 IPR 513.

This proceeding involved claims by Bulun Bulun, and his clan group, in respect of copyright infringement – a subsequent infringement, but again involving the artwork "At the Waterhole". There was no defence to the claims of copyright infringement brought in that proceeding by Bulun Bulun.

Nevertheless, the action proceeded on behalf of the clan owners of rights in the artwork in question (through their representative), on the basis of the proposition that they were equitable owners of copyright in the artwork or otherwise entitled to seek the protection of the Court as beneficial owners of the artwork (created by Bulun Bulun as a fiduciary). They asserted such right on the basis that they, in effect, controlled the copyright in the artwork, and that they were the beneficiaries of the creation of the artwork by the artist acting as trustee on their behalf. Accordingly, they claimed to be entitled to a form of collective right with respect to the copyright in the work over and above any issue as to authorship.

The case provided an opportunity for the Court to give consideration to the nature of relationships between clan groups and artists with respect to the creation of traditional artworks. In so doing, the Court had an opportunity to give attention to the shortcoming of copyright protection addressing only private rights of ownership in artworks in a manner inconsistent with notions of communal ownership which corresponded with perceptions of ownership held by artists and their communities.

In other words, it was sought to bridge an obvious gap in the treatment of the problem of infringement as between western and communal law.

The evidence expanded on the tribal issues involved in Bulun Bulun undertaking the making of the artwork.

Bulun Bulun described the artwork as depicting a place which he described as his "soul", being the location where the creator ancestor of the Ganalbingu, Barnda (or long-necked turtle) emerged from inside the earth. According to Ganalbingu custom, it was Barnda that shaped the natural features of Ganalbingu land, including the waterhole depicted in the artwork, known as Djulibinyamurr. Barnda also is believed to have created the Ganalbingu people and given them their ceremonies and customs. The importance of the site was such that desecration of the site was believed to result in punishment to the Ganalbingu – such desecration may include inappropriate depiction of images of the site.

Bulun Bulun gave evidence to the effect that he was responsible for the proper conduct of ceremony concerning Djulibinyamurr. He posed as follows:

"I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such works, as part of my traditional Aboriginal land ownership obligation. A painting such as this is not separate from my rights in my land."

He said that the artwork had encoded messages of a secret and sacred nature which only an initiate can understand. He said that "unauthorized reproduction of "At the Waterhole" threatens the whole system and ways that underpin the stability and continuance" of his society."

"It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threatens our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations."

While von Doussa J held that there was no need for any order as such in favour of the clan owners of the claimed rights, he considered that the clan group was nevertheless entitled to maintain claims to protect the copyright in the artwork. In doing so, the Court gave detailed attention to the customary law pertaining to the relationship between the artist and clan group of the kind noted above. Some of the evidence was taken from clan leaders in Ramingining in Arnhem Land, rather than in Court in Darwin, and the Court also carried out an inspection of the Djulibinyamurr site at the request of the tribal owners of the site.

Of particular interest, the respondent in the proceeding did not take any role in the case brought by the clan group, but rather the claims made by the clan group were challenged by the Federal Minister for Aboriginal and Torres Strait Island Affairs and the Attorney-General for the Northern Territory, both of whom sought to intervene in the proceeding. Much of this intervention was concerned with the separate issue of claims of native title and rights attaching to native title in land, but in the case of the Federal Minister extended to the issue of the remedies available to the clan group.

Von Doussa J accepted the view expressed on behalf of the applicant that there was no basis under common law to establish communal title in the copyright in the artwork, and that the issue of ownership was governed at law by the Copyright Act (note, in this regard, s 8). The judge noted that the High Court had clearly established that rights and interest of Aboriginal people were governed by the laws of the Commonwealth, the States and the common law (per *Coe v Commonwealth* (1993) 118 ALR 193 at 200), and that no separate or additional law was available by reference to the customary law and practices of the Ganalbingu clan.

Nevertheless, applying the common law principle of fiduciary duties, von Doussa J considered that a fiduciary relationship existed between the artist and the clan group and that the artist had a fiduciary duty towards his community accordingly. The fiduciary relationship was said to arise from the nature of the ownership of artistic works among the Ganalbingu people.

The judge noted that the categories of fiduciary relationships are not closed, and that a fiduciary relationship will be imputed to arise if a relationship of mutual trust and confidence can be said to exist. Referring to the fiduciary obligation of the Crown to indigenous people, Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 95 stated:

"It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed: Breen v Williams (1996) 186 CLR 71 at 82. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary."

The judge considered that the relationship between Bulun Bulun, as artist and owner of copyright, and his clan group was "unique", in particular in that he used "with permission" the tribal knowledge of the clan, which was permitted "in accordance with the law and customs of the Ganalbingu people". Such permission was "predicated on the trust and confidence which those granting permission have in the artist" (at 529).

Part of the relationship of trust was considered by the judge to involve a responsibility on the part of the artist to take appropriate steps to prevent misuse of the artwork – "The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge" (at 529).

The judge stated that it was not inconsistent with this obligation for the artist to pursue his own interests, such as by selling the artwork, "but the artist is not permitted to shed the overriding obligation to act to preserve the integrity of the Ganalbingu culture where action for that purpose is required" (at 530).

The judge concluded that Bulun Bulun was in a fiduciary relationship with his clan group, stating that this did not mean that Ganalbingu law and custom formed part of the law of Australia, but rather that such law and custom was "part of the factual matrix" which indicated the fiduciary relationship.

Thus, the judge held:

"I have no hesitation in holding that the interests of the Ganalbingu people in the protection of that ritual knowledge from exploitation which is contrary to their law and custom is deserving of the protection of the Australian legal system." (at 530-1)

The judge found that:

"[E]quity imposes on him [Bulun Bulun] obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work." (at 531)

The judge did not find that the fiduciary relationship extended to vest in the clan an equitable interest in the ownership of the copyright in the artistic work, but rather a "right in personam to bring action against the fiduciary to enforce the obligation" (at 531).

In the circumstances, the judge found that there was nothing further to be done as the relevant copyright rights had been enforced. He found though that, had the position been otherwise, equitable remedies would have been available to the clan group, including the imposition of a constructive trust on the legal owner of the copyright in favour of the beneficiaries, where it was necessary to do so "to achieve a just remedy and to prevent the fiduciary from retaining an unconscionable benefit" (at 531).

If Bulun Bulun had failed to enforce his rights, the judge considered that equity might allow the beneficiaries to bring an action in their own names against the infringer and the copyright owner, enabling the enforcement of copyright rights through mandatory orders against the copyright owner.

If Bulun Bulun denied the existence of the fiduciary relationship and refused to enforce his copyright rights, the Court might impose a remedial constructive trust on him "to strengthen the standing of the beneficiaries to bring proceeding to enforce the copyright" (at 531). This would also be appropriate where the copyright owner could not be identified or found and the beneficiaries were unable to join the legal owner.

A practical application of the principles enunciated by von Doussa J would involve a clan group being entitled to take steps to protect an artwork of a deceased artist where the trustee of the artist's estate failed or refused to take action appropriately required by the clan. This might apply where the Public Trustee, assuming that an artist has died intestate, refuses or fails to bring an action to protect the copyright in the artist's work.

The judgment is an important one in linking obligations under Aboriginal law into the Australian legal concept of fiduciary obligations, and giving recognition to the "standing" of the clan in certain circumstances – as required by equity. It also illustrates the flexibility of courts in adapting copyright and associated legal principles to the requirements of the protection of age-old cultural practices, reinforcing that the instinct to advocate more or new law is not necessarily appropriate in this context.

The judgment also recognises the relationship between artists and clan groups, recording the Court's understanding of the importance of the cultural and spiritual role of artists such as Bulun Bulun, and reinforcing the special place of such art in the broader national context – being work created in an environment of a close spiritual relationship with the community whose stories and culture it was depicting. The identification of this relationship assists in understanding the special role of the Aboriginal arts in the visual arts culture of Australia, and shows the flexibility of copyright and equity in protecting Aboriginal artworks from unauthorised reproduction.