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# Australian Icons: Authenticity Marks and Identity Politics

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# Australian Icons:

## Authenticity Marks and Identity Politics

MATTHEW RIMMER\*

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*This article evaluates the adoption and implementation of an Indigenous certification trademark system in Australia. Section II considers the use of copyright law, moral rights provisions and consumer protection laws to protect Indigenous cultural property in Australia. It suggests that there needs to be additional protection under trademark law—especially to deal with problems*

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concerning communal ownership, material form and duration of protection. Section III evaluates the efficacy of the scheme for marks of authenticity established by the National Indigenous Arts Advocacy Association in November 1999. It contends that there were practical problems with the implementation of the scheme and symbolic concerns about the definition of "authenticity" applied under the regime. Section IV engages in a comparative analysis of other jurisdictions—such as New Zealand, Canada and the United States. It demonstrates that an Indigenous certification mark can be successful, given sufficient support and assistance. The article concludes that there needs to be a sui generis system to protect traditional knowledge at an international level.

## I INTRODUCTION

The development and implementation of authenticity marks has a long and rich history in Australia.

A proposal was first raised in the 1980s to develop a national Indigenous "authenticity trade mark."<sup>1</sup> The idea was that an authentication mark would be reproduced on labels attached to authentically produced Indigenous arts and cultural products. However, there was a lack of political support for the concept at that particular time.

In the 1994 discussion paper *Stopping the Rip-Offs*, the Attorney General's Department considered a range of policy options available to protect the intellectual property of Indigenous Australians. Among the issues, it noted proposals to develop an authentication mark: "This type of mark would be designed to help consumers distinguish authentic Aboriginal and Torres Strait Islander works from fake items."<sup>2</sup> This discussion paper led to further consultations with Indigenous communities.

The National Indigenous Arts Advocacy Association ("NIAAA")<sup>3</sup> advocated for the Australian government to implement a scheme for the label of authenticity to coincide with the Year of the Dreaming in 1997, and the Cultural Olympiad thereafter.<sup>4</sup> It was thought that the project would constitute a significant step towards greater cultural and legal protection for Indigenous artists, and lead the way to more comprehensive reforms in Indigenous intellectual property. This proposal received qualified support from the Australian federal government.

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1. Terri Janke, *Our Culture, Our Future: Indigenous Cultural and Intellectual Property Rights* (Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999) at 197, online: <<http://www.icip.lawnet.com.au/>> [hereinafter *Our Culture*].
  2. Attorney General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (Canberra: The Attorney General's Department, 1994) at 32-33 [hereinafter *Stopping the Rip-Offs*].
  3. The NIAAA is a national Indigenous arts and cultural service and advocacy association which advocates for the continued and increased recognition and protection of the rights of Indigenous artists.
  4. Marianna Annas, "The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin" (1997) 3:90 *Aboriginal Law Bulletin* 6.

In the 1998 *Our Culture* report, Terri Janke<sup>5</sup> proposed that the Australian federal government should implement a “*sui generis*” legislative scheme to protect traditional knowledge.<sup>6</sup> Thus, she ideally preferred that the government pass special legislation to deal with Indigenous cultural property because of its uniqueness. In the alternative, Janke advised that there should be a number of reforms to existing regimes of intellectual property—including copyright law, trademark law and patent law. The consultant made a number of recommendations in relation to the establishment of an authenticity mark scheme.<sup>7</sup> She maintained that “support should be given to establishing a national certification mark and labelling system which allows local, regional and State decision-making on who may use the label.”<sup>8</sup> She also advised, “The mark—and a series of derivative marks which allow for local, regional and State differences—should be registered under the *Trade Marks Act*.”<sup>9</sup> Janke recommended that “the registered owner of the mark should be a newly-established Indigenous authority which has the power to license use of the label to local and regional organisations.”<sup>10</sup> She also suggested that “a marketing strategy needs to be developed to coincide with implementation of the mark.”<sup>11</sup>

In 1999, the federal government provided funding to the NIAAA to establish a national authenticity label through the Aboriginal and Torres Strait Islander Commission (“ATSIC”)<sup>12</sup> and the Australia Council.<sup>13</sup> In November of that year, the NIAAA launched, with much fanfare, the marks of authenticity. It was hoped that certification trademarks would help protect Indigenous artists and their artwork from forgery and piracy. There were a number of competing goals behind the Indigenous certification mark. The ostensible purpose behind the scheme was to promote products made by Indigenous people, and increase fair and equitable returns to Indigenous producers. It was meant to assist Indigenous artists—such as Rover Thomas, Emily Kame Kngwarreye and Clifford Possum

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5. Terri Janke is an Indigenous solicitor. She is a descendant of the Meriam people of the Torres Strait Islands and the Wuthathi clan of Cape York Peninsula. She has written a number of policy papers on Indigenous cultural property that can be found online: Terri Janke and Co. <<http://www.terrijanke.com.au/>>.

6. “*Sui generis*” is a Latin phrase meaning “of its own kind.” In intellectual property, “*sui generis*” legislation refers to legal regimes developed to deal with specific subject matter—such as plant breeder’s rights, circuit layout protection, database protection and traditional knowledge. “*Sui generis*” legislation could be contrasted with legal regimes designed to deal with a wide array of technology—such as copyright law, trademark law and patent law.

7. *Our Culture*, *supra* note 1 at 197-207.

8. *Ibid.*

9. *Ibid.*

10. *Ibid.*

11. *Ibid.*

12. The Aboriginal and Torres Strait Islander Commission was established by the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), and began operations on 5 March 1990 as a means to involve Indigenous people in the decision-making processes of the Australian government: see <<http://www.atsic.gov.au/>>. The conservative federal government has proposed the abolition of the Commission in 2004.

13. The Australia Council is the principal arts funding body in Australia: See their website at <<http://www.ozco.gov.au/>>.

Tjapaltjarri.<sup>14</sup> The scheme also served to denote the authenticity and quality of Indigenous cultural products. It was designed to signify that works of art and craft were genuine because of the authorship of Indigenous artists. However, the dominant intent of the scheme was to help consumers by identifying authentic Indigenous cultural products and indicating that the sale of an item was authorized by the community. The government initiative sought to allay the anxieties of consumers—especially those of international tourists visiting Australia for the Sydney Olympic Games in 2000.

This article evaluates what regimes of intellectual property provide the most effective protection against the misappropriation of Indigenous art and cultural expression. It considers the strengths and limitations of legal regimes—including copyright law, consumer protection law and trademark law. This article takes a comparative approach—drawing contrasts between Australian law and developments in New Zealand, Canada and the United States. Section II considers the use of copyright law and consumer protection laws to protect Indigenous people from the unauthorized exploitation of traditional knowledge in Australia. A number of key Federal Court decisions have provided limited recognition of communal ownership of Indigenous art in respect of economic rights. The introduction of *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth) may also provide redress for Indigenous communities in respect of breaches of moral rights. The *Trade Practices Act 1974* (Cth) can also be used to address fake Indigenous art. Section III evaluates the efficacy of the scheme for marks of authenticity established by the National Indigenous Arts Advocacy Association in November 1999. It argues that there were symbolic concerns about the definition of “authenticity” applied under the scheme and practical problems with the implementation of the system. Section IV considers such developments in trademark law and traditional knowledge in a number of jurisdictions—including New Zealand, Canada and the United States. It evaluates proposals arising from the United Nations Conference on Trade and Development (“UNCTAD”) about the development of a global Indigenous brand—like the Fairtrade label. The article concludes that the development of a *sui generis* system to protect traditional knowledge remains the best means to provide comprehensive protection of Indigenous artists.

## II CRACKING DOWN ON COPYCATS: COPYRIGHT LAW AND CONSUMER PROTECTION

In Australia, Indigenous communities have relied upon a number of forms of intellectual property to protect traditional knowledge—such as economic rights under copyright law, and moral rights under copyright law and trade practices law. First, there have been a number of legal actions brought on behalf of Indigenous communities for breach of economic rights in copyright vested in

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14. Sally Neighbour, “Dot for Dollar” on *Four Corners*, Australian Broadcasting Corporation (31 May 1999); and Vivien Johnson, “The ‘Aboriginal Art Scandals’ Scandal” (2000) 20:1 Artlink at 32-35.

artwork. Most famous are the *Carpets* case<sup>15</sup> and the *Bulun Bulun* case.<sup>16</sup> There has also been litigation over a number of national icons—including the Australian currency, the Aboriginal flag and the Coat of Arms. Second, there could be greater potential for Indigenous artists and, potentially, communities to bring actions for infringement of moral rights in Australia. The importance of moral rights can be illustrated by a recent legal action by Indigenous artists against the International Olympic Committee in Switzerland. Finally, there is scope for relying upon the *Trade Practices Act 1974* (Cth) to deal with forgeries of Aboriginal art. Justice von Doussa discussed the relevance of such laws in dealing with misleading and deceptive conduct in the context of the *Carpets* case.<sup>17</sup> A recent lawsuit brought by the Australian Competition and Consumer Commission against Australian Icon Products Pty Ltd. also highlights the utility of this approach.

### Economic Rights

As a result of judicial innovation, there has been a gradual expansion of the copyright protection of the economic rights of Indigenous artists over the past two decades. This jurisprudence has developed out of a number of legal controversies—including litigation over national insignia such as currency, flags and coats of arms, and commercial products such as carpets.

The constitutional decision of *Davis v. Australia* highlights the potential for conflict between intellectual property and freedom of speech.<sup>18</sup> Commonwealth legislation made it a criminal offence for a person without the consent of the Australian Bicentennial Authority to exploit certain words and expressions connected with the Bicentennial celebrations. The Indigenous plaintiff, Lou Davis, was refused permission to market Bicentennial t-shirts bearing messages such as “200 years of suppression and depression.”<sup>19</sup> The High Court found that the legislation was invalid because it impinged on freedom of expression by creating a statutory monopoly over the use of common expressions and by making unauthorized use a criminal offence. It condemned the “attempt to establish a Commonwealth licensing system for common words in the English language which have no necessary connection with the activities of the Authority or any intended use of the words by the Authority as a distinguishing characteristic.”<sup>20</sup>

In *Yumbulul v. Reserve Bank of Australia*, the Federal Court considered a claim by an Indigenous artist that the Morning Poles design was used on a

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15. *Milpurrruru v. Indofurn Pty Ltd.* (1994), 30 I.P.R. 209 (F.C. Aus.) [hereinafter “*Carpets* case”].

16. *Bulun Bulun and Milpurrruru v. R & T Textiles* (1998), 41 I.P.R. 513 (F.C. Aus.) [hereinafter *Bulun Bulun*].

17. *Carpets* case, *supra* note 15.

18. *Davis v. Australia* (1988), 166 C.L.R. 79 (H.C. Aus.).

19. *Ibid.*

20. *Ibid.*

special \$10 note for the Australian Bicentennial without his permission.<sup>21</sup> Justice French noted that “Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.”<sup>22</sup> However, the judge emphasized that it was not the responsibility of the judiciary to be the catalyst of reform in this matter. His Honour found that “the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.”<sup>23</sup>

The decision of the Federal Court in *Milpurrruru v. Indofurn Pty Ltd.*, the so-called *Carpets* case, signals a shift in judicial attitudes.<sup>24</sup> In this matter, the Federal Court considered a claim that carpets with Indigenous designs amounted to copyright infringement. Justice von Doussa emphasized 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 that used in the artworks of the present applicants.”<sup>25</sup> However, his Honour displayed a certain amount of judicial creativity. Justice von Doussa made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom. His Honour was willing to give informal recognition of communal ownership of Indigenous art and cultural expression, although he was not prepared to offer formal acknowledgment. The finding by Justice von Doussa that the company directors were also liable for copyright infringement was overturned on appeal.<sup>26</sup> The award of damages against the company stood.

In *Bulun Bulun and Milpurrruru v. R & T Textiles Pty Ltd.*, the solicitor Martin Hardie and the barrister Colin Golvan sought to protect the communal ownership of Indigenous cultural works in the Federal Court.<sup>27</sup> The matter concerned the importation and sale in Australia of printed clothing fabric which infringed the copyright in the artistic work known as “Magpie Geese and Water Lilies at the Waterhole.” The defendants were bankrupt and made no appearance in the case. The federal government and the Northern Territory government intervened as *amicus curiae*—friends of the court.

Apologetically, Justice von Doussa conceded that statutory remedies under the *Copyright Act 1968* (Cth) were inadequate in protecting communal ownership. His Honour acknowledged that s. 35(2) of the *Copyright Act 1968* provided that the author of an artistic work was the owner of the copyright. However, his Honour regretted that this provision effectively precluded any notion of group ownership in an artistic work, unless the artistic work is a “work of joint ownership” within the meaning of s. 10(1) of the *Copyright Act 1968* (Cth).

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21. *Yumbulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481 (F.C. Aus.).

22. *Ibid.*

23. *Ibid.* at 492.

24. *Carpets* case, *supra* note 15.

25. *Ibid.*

26. *King v. Milpurrruru* (1996), 34 I.P.R. 11 (F.C. Aus., Full Ct.).

27. *Bulun Bulun*, *supra* note 16.



Nonetheless, Justice von Doussa was willing to apply equitable principles to supplement copyright law. His Honour found that the relationship between Bulun Bulun and the Ganalbingu people was a “transaction” which gave rise to fiduciary obligations. These obligations imposed a duty on the Bulun Bulun to not exploit artistic works in a way that was contrary to the laws and custom 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. Justice von Doussa concluded that “if the copyright owner of an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remedial action through the courts by the clan.”<sup>28</sup>

The significance of Justice von Doussa’s decision in the *Bulun Bulun* decision has been contested in glosses and commentary on the case. The lawyers involved in the legal action perceive the decision in pragmatic terms of a legal victory, which provides some further incremental gain.<sup>29</sup> Some commentators have hailed the decision of Justice von Doussa as a radical breakthrough because it supplied the first recognition of communal ownership under copyright law since the *Statute of Anne* was codified in 1710.<sup>30</sup> Others have noted the limitations of the judgment in *Bulun Bulun*.<sup>31</sup> These critics have stressed that, under Justice von Doussa’s formula, communal ownership would only be recognized in exceptional circumstances. They suggest that such an approach still reflects a commitment to established liberal values.

In *Thomas v. Brown*, the Federal Court considered the ownership of copyright in the artistic work known as the Aboriginal flag.<sup>32</sup> The dispute was triggered by a proclamation made by the Commonwealth under s. 5 of the *Flags Act 1953* (Cth) that recognized the artistic work as the flag of Aboriginal peoples of Australia and as a flag of significance to the Australian nation generally. An Indigenous artist, Harold Thomas, sought a declaration from the Federal Court that he could claim ownership of copyright in the flag. His claims were contested by an Indigenous man, David Brown, and an art student, James Tennant, who each asserted on the basis of disputed factual evidence to be the true author and owner of copyright in the flag. The Court granted the declaration sought by

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28. *Bulun Bulun*, *supra* note 16.

29. Colin Golvan, “Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments” (1999) 21:11 *European Intellectual Property Rev.* 599; and Damien Carrick, “Baby Evelyn”; Bulun Bulun; The Market for Stolen/Fraudulent Art” on *The Law Report*, Radio National, Australian Broadcasting Corporation (15 September 1998), online: <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/lr980915.htm>>.

30. Andrew Kenyon, “Copyright, Heritage and Aboriginal Art” (2000) 9 *Griffith L. Rev.* 303. The *Statute of Anne* is the first modern piece of copyright legislation. It turned copyright law from being a product of the common law to a creature of statute.

31. Kathy Bowrey, “The Outer Limits of Copyright Law: Where Law Meets Philosophy and Culture” (2001) 12:1 *Law and Critique* 1.

32. (1997), 37 I.P.R. 207. The case provides some support for Elizabeth Coleman’s suggestive contention that Aboriginal art should be conceived of as a form of insignia. Elizabeth Coleman, “Aboriginal Painting: Identity and Authenticity” (2001) 59:4 *J. of Aesthetics and Art Criticism* 385.

Thomas. The federal government has since agreed to a monetary settlement with Thomas for authorizing the reproduction of the Aboriginal Flag.

After establishing his ownership of the Aboriginal flag, Thomas and his exclusive licensee, Flags 2000 Pty Ltd., brought a legal action against businessman David Smith for copyright infringement.<sup>33</sup> In the Federal Court, Justice Goldberg recognized that Thomas was the creator, designer and author of the Aboriginal flag, and Flags 2000 was the exclusive licensee of the copyright in the flag. His Honour held that Smith had infringed copyright in the Aboriginal flag by his unauthorized display and sale of the flag. Justice Goldberg ordered that Smith be restrained from infringing copyright in the Aboriginal flag, deliver up all infringing copies and pay damages of \$1,320, as well as costs. His Honour observed: "Although the total amount recovered by the applicants is less than \$100,000, I consider that the proceeding was properly brought and continued in the Federal Court."<sup>34</sup>

Finally, a claim lodged by the representatives of the Aboriginal Tent Embassy in 2002 demonstrates the limits of copyright law.<sup>35</sup> The Embassy lodged a writ against the Commonwealth in the High Court, seeking to reclaim ownership of the native animals on the coat of arms:

We have now reclaimed our sacred Emu and Kangaroo, from the "coat-of-arms" of the colonisers. We now reclaim what is rightfully ours, our culture, our sacred symbols, our spirituality, our right to practise our ancient religion and be governed by our laws.<sup>36</sup>

The Aboriginal Tent Embassy stressed that "under the defendant's own copyright law, copyright can only be transferred in writing."<sup>37</sup> They claimed that the Commonwealth had no document evidencing "the transfer of any copyright or other intellectual property rights, moral rights and cultural rights in the kangaroo and the emu—and their graphical representation—to the defendant." Furthermore, the Embassy noted that "the defendant's own Constitution Act provides that any compulsory acquisition of property must be on just terms—and implicitly provides that any purported compulsory acquisition with no terms at all (as in this present case) is constitutionally invalid."<sup>38</sup>

However, this claim did not proceed any further because it was poorly constructed in terms of copyright law. It would be difficult to overcome basic threshold questions in relation to copyright subsistence—most notably, the requirement that an expressive work be fixed in material form. Although copyright law might protect particular artistic expressions of kangaroos and emus, it would not cover all representations of such iconic animals. This claim

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33. *Flags 2000 Pty Ltd. v. Smith*, [2003] FCA 1067, online: Australasian Legal Information Institute <[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2003/1067.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1067.html)>.

34. *Ibid.*

35. *Wadjularbinna Nulyarimma ex rel. Aboriginal Tent Embassy v. Commonwealth* (2002) High Court writ.

36. *Ibid.*

37. *Ibid.*

38. *Ibid.*

was also misconceived on constitutional grounds. In a previous case, the High Court has ruled that the constitutional provision dealing with “acquisition of property on just terms” does not extend to intellectual property.<sup>39</sup>

### Moral Rights

The federal government introduced the *Copyright Amendment (Moral Rights) Act 2000* (Cth) to establish a scheme for the recognition of the moral rights of authors.<sup>40</sup> The *Act* established three important rights. First, the legislation recognized the moral right of attribution, which is the right of the author to be identified as the author of the work. Second, the statute acknowledged the moral right of the author to object to false attribution of authorship in a work. Third, the legislation recognized the moral right of integrity, that is, the right of an author to object to derogatory treatment of a work, which detrimentally affects the author’s honour or reputation.

Senator Aden Ridgeway of the Australian Democrats<sup>41</sup> was concerned that the legislation provided that moral rights should subsist in individual creators, not communities.<sup>42</sup> He proposed an amendment in 2000, which provided: “Moral rights in relation to an Australian [I]ndigenous cultural work created by an [I]ndigenous author, under the direction of an [I]ndigenous cultural group, may be held and asserted by a custodian nominated by the relevant [I]ndigenous cultural group as its representative for this Part.”<sup>43</sup> The Australian Labor Party refused to support this amendment, protesting that there was insufficient consultation. The federal government deferred consideration of moral rights in relation to Indigenous communities until 2003.

Between 2000 and 2003, matters of moral rights came to the fore because of litigation launched in Switzerland by three Indigenous artists. The artists alleged that the International Olympic Committee (“IOC”) breached their copyright by using their paintings on an official website before and during the Sydney

39. In *Nintendo Co. v. Centronics Systems* (1994), 181 C.L.R. 134, the High Court considered the operation of the *Circuit Layouts Act 1989* (Cth) in its application to silicon chips used in computer games. Centronics argued that the impact of this legislation on their previous commercial operations amounted to an “acquisition of property” entitling them to “just terms.” The High Court held that the grant of legislative power contained in the intellectual property power under the *Constitution* manifested an intention that precluded the operation of the acquisition of property on just terms clause.

40. Elizabeth Adeney, “Defining the Shape of Australia’s Moral Rights: A Review of the New Laws” (2001) 4 *Intellectual Property Quarterly* 291; Patricia Loughlan, “The Ravages of Public Use”: Aboriginal Art and Moral Rights” (2002) 7 *Media and Arts L. Rev.* 17; and Maree Sainsbury, *Moral Rights and Their Application in Australia* (Sydney: Federation Press, 2003).

41. Senator Aden Ridgeway is the only Indigenous member of the Australian Federal Parliament, and is a Gumbaynggir man from the Nambucca Valley in New South Wales: See his home page, online: <<http://www.adenridgeway.com/>>.

42. Senator Aden Ridgeway, “Second Reading of the *Copyright Amendment (Moral Rights) Bill 1999*” *Senate Hansard* (7 December 2000) at 21062.

43. S. 190A of the *Copyright Amendment (Moral Rights) Bill 2000* (Cth).

Olympic Games.<sup>44</sup> The works of artists Sam Tjampitjin and Richard Tax Tjupurulla, from Balgo in Western Australia, and Mary Kemarre, from Utopia in the Northern Territory, were included in an exhibition at the Olympic Museum in Lausanne. The IOC also displayed the works on the Olympic Museum website and encouraged visitors to download the sacred artworks—Kulkun near Lake McKay in the Great Sandy Desert, Tiddal in the Great Sandy Desert and Bush Flowers—as wallpaper for computer screens. The works had been sold by the artists to a private collector, who then passed them on to the museum without their knowledge.

The three artists were outraged that their artworks had been reproduced by the International Olympic Museum on its website without their permission. Sam Tjampitjin told *The Age* through an interpreter: “My story, they can’t take it, not for anyone, just me .... Wrong way.”<sup>45</sup> On behalf of the artists, solicitor Terri Janke mounted a legal case against the IOC. She said: “Sam and Richard are quite senior members of their communities and really need to be involved in the authorisation process.”<sup>46</sup> Janke argued that the IOC had violated the artists’ economic rights in relation to the reproduction of the artwork and its communication to the public. She also maintained that the IOC had breached Swiss moral rights laws, which recognize the right of integrity in art, including culturally sensitive art. On behalf of the Indigenous artists, a Swiss law firm was instructed to negotiate with the IOC, seek compensation for the breach of economic and moral rights, and obtain private and public apologies.

The case was particularly disgraceful given the wide publicity about the need to respect Indigenous cultural property during the Olympic Games. The IOC had been zealous about guarding its own intellectual property. The federal government minted special *sui generis* legislation in the *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth) to protect Olympic sponsors against ambush marketing.<sup>47</sup> It showed no such inclination, though, to pass special legislation to protect Indigenous cultural property. The Sydney Organising Committee for the Olympic Games brought a number of legal actions to defend its intellectual property against what it perceived to be free riders.<sup>48</sup> However, the IOC was obviously not as sensitive to the importance of Indigenous cultural property. It ignored the very codes of ethics promulgated by the Sydney Organising Committee for the Olympic Games to address Indigenous cultural property.<sup>49</sup>

44. Antony Balmain, “Black Artists Sue IOC Over Copyright” *The Age* (19 June 2001), online: <<http://www.theage.com.au/news/national/2001/06/19/FFXS4QO43OC.html>>.

45. *Ibid.*

46. Elizabeth Colman, “Olympic Apology to Artists” *The Australian* (17 February 2003).

47. Jane Sebel & Dominic Gygell, “Protecting Olympic Gold: Ambush Marketing and Other Threats to Olympic Symbols and Indicia” (1999) 22:3 *University of New South Wales L.J.* at 691.

48. *Australian Olympic Committee v. Baxter and Co.* (1997), 36 I.P.R. 621 (T.M.O. Aus.); *Sydney Organising Committee for the Olympic Games v. Pam Clark*, [1998] FCA 792; *Australian Olympic Committee v. The Big Fights Inc.*, [1999] FCA 1042; and *Australian Olympic Committee v. Alan Archibald Carter*, [2000] A.T.M.O. 35.

49. Matthew Rimmer, “Bangarra Dance Theatre: Copyright Law and Indigenous Culture” (2000) 9:2 *Griffith L. Rev.* at 300.

Senator Ridgeway argued that the case demonstrated the need for comprehensive protection of Indigenous cultural property in Australia—especially in terms of communal ownership of moral rights:

The clear message from this example is that many people, both in Australia and overseas, continue to regard [I]ndigenous cultural expression as a resource that is open to use by anyone. If these things were to happen here, our laws would be inadequate. There is no protection. However, in this case [I]ndigenous people are able to go offshore and use Swiss laws to at least try to assert the protection of their rights.<sup>50</sup>

It took until 2003 for the IOC to apologize to Aboriginal artists for using their work without permission during the Sydney Games.<sup>51</sup> It requested “any person who downloaded the artistic works as wallpaper, or in any digital form, to please delete it immediately from their screens and computer hard drives.”<sup>52</sup> The claim was settled with the apology as well as an undisclosed, but substantial, sum in damages.

At the prompting of Senator Ridgeway, the federal government has since announced the introduction of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth).<sup>53</sup> The legislation would introduce Indigenous communal moral rights in relation to a work (including an artistic work) or film based on an agreement between the author/artist and the Indigenous community. These rights could be independently exercised by the community and would mirror the nature and scope of authors’ moral rights as far as possible. The press release states:

Indigenous communities will be able to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material under new legislation proposed by the Government. Amendments to the Copyright Act, to be introduced into Parliament later this year, will give Indigenous communities legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom.<sup>54</sup>

However, negotiations are still continuing over the final form of the bill. The press release promises further consultation: “The legislation will provide a simple, workable and practical scheme for Indigenous communities, artists, galleries and the public. However, the Government will continue to consult in fine-tuning the new provisions.”<sup>55</sup>

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50. Senator Aden Ridgeway, “*Copyright Amendment (Moral Rights) Bill 1999*: In Committee” *Senate Hansard* (7 December 2000) at 21071.

51. Colman, *supra* note 46.

52. *Ibid.*

53. Senator Richard Alston, the Hon. Daryl Williams & the Hon. Philip Ruddock, News Release, “Indigenous Communities to get New Protection for Creative Works” (Department of Communications, Information Technology, and the Arts, 19 May 2003), online: <[http://www.dcita.gov.au/Article/0,,0\\_1-2\\_15-4\\_114525,00.html](http://www.dcita.gov.au/Article/0,,0_1-2_15-4_114525,00.html)>.

54. *Ibid.*

55. *Ibid.*

The draft version of the bill was circulated to key stakeholders in December 2003. The Attorney-General, Philip Ruddock, was positive about the legislative initiative:

The Government is also currently working on amendments to the Copyright Act which will give effect to "Indigenous communal moral rights." These rights will assist in protecting the integrity and sanctity of Indigenous culture. I understand there have been a good number of responses and generally positive feedback.<sup>56</sup>

Despite the government's action, Senator Ridgeway has been critical of the proposed legislation, fearing that it may prove unworkable in practice. He commented: "Any changes to the Copyright Act to recognise Indigenous communal moral rights must be based on existing principles emerging from case law and on Indigenous protocols."<sup>57</sup> Senator Ridgeway was also concerned that Indigenous communities would find it difficult to access the proposed legislative scheme without significant assistance from qualified lawyers: "The onus on Indigenous people to prove this right must not be greater than that which already exists in the current individual moral rights regime."<sup>58</sup> There remains concern that the legislative changes will be only of symbolic value.<sup>59</sup>

### **The Trade Practices Act**

The *Trade Practices Act 1974* (Cth) may provide protection for consumers against misleading or deceptive conduct in relation to Indigenous art.

In the *Carpets* case, Justice von Doussa considered a claim for relief in respect of sections 52, 53 and 55 of the *Trade Practices Act 1974* (Cth), which prohibit misleading or deceptive conduct, false or misleading representations, and misleading conduct in relation to goods to which the Industrial Property Convention applies, respectively.<sup>60</sup> Justice von Doussa noted that the Beela Art swing tag attached to the carpets from early 1993 was relevant to the contravention of all of these sections. The swing tag declared that the carpets were "proudly designed in Australia by Australian Aboriginals made in Vietnam." It also carried the following surreal endorsements:

These unique wall hangings and rugs have been designed by Aboriginal artists from areas throughout Australia. These artists are paid royalties on every carpet sold. Most of the designs used have significant meaning for the artist. Their art expresses

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56. Hon. Philip Ruddock, "Copyright: Unlucky for Some" (Australian Centre for Intellectual Property and Agriculture Conference, Brisbane, Australia, 13 February 2004), online: The Attorney-General: Philip Ruddock MP <<http://www.ag.gov.au/www/MinisterRuddockHome.nsf/AllDocs/RWP21E60A98ACC4ECE2CA256E3B0080AA84>>.

57. Senator Aden Ridgeway, News Release, "Copyright Act Still Fails Indigenous People" (13 February 2004), online: Australian Democrats News Releases <[http://www.democrats.org.au/news/index.htm?press\\_id=3282&display=1](http://www.democrats.org.au/news/index.htm?press_id=3282&display=1)>.

58. *Ibid.*

59. Jane Anderson, "Indigenous Communal Moral Rights: The Utility of an Ineffective Law" (2004) 5:30 *Indigenous Law Bulletin* at 8-10.

60. *Carpets* case, *supra* note 15.

the origins of life and the landscape. Aboriginal art has developed over thousands of years and is a very meaningful part of their social and cultural life. As carpet weaving is not a tradition of the Aboriginal people, the rugs are produced in Vietnam where we can combine the artistic skills of the Aboriginal people with the weaving traditions of the Vietnamese.<sup>61</sup>

Justice von Doussa held: "It is false to say that the artists are paid royalties. In the course of evidence it has been disclosed that the swing tags have also been attached to other carpets which have no Aboriginal association whatsoever, and the swing tags make false and misleading statements about those carpets."<sup>62</sup> His Honour concluded that the contraventions of the *Trade Practices Act 1974* (Cth) had been established.

The Australian Competition and Consumer Commission ("ACCC") commissioned the Centre for Aboriginal Economic Policy Research to undertake research on the implications of the *Trade Practices Act 1974* (Cth) for Indigenous communities. Jon Altman and his collaborators observe:

Sections 52 and 53 of the *Trade Practices Act 1974* (Cth) may be particularly relevant to the Indigenous arts industry. For example, one of the key problems for art centres in dealing with the commercial sector is the promulgation by the latter of false and misleading information about artists and/or their products. There are many unpublished examples of galleries presenting art works with deceptive or misleading information relating to materials, traditional use and the significance of the objects. There is potential for the manufacturers of an authentically licensed product to misrepresent the extent to which it is the work of an Indigenous artist if, for example, the artwork was only partly produced by Indigenous artists or it was created by Indigenous artists who did not have the customary authority to produce a particular style.<sup>63</sup>

However, the researchers noted that in relation to false claims about authorship, awareness of the complex nature of collaborations between Indigenous artists is important. They observed: "The issue of authorship has been problematic for dealers, art centres and the market because Indigenous artists and their communities have a different concept of 'ownership' of designs to those held by the encapsulating culture."<sup>64</sup>

In 2003, the ACCC brought legal action against Australian Icon Products Pty Ltd., one of the largest manufacturers of Aboriginal-style souvenirs in Australia. It alleged that Australian Icon was misleading when it represented some of its hand painted Aboriginal-style souvenirs as "authentic," "certified authentic" and "Australian Aboriginal art." The majority of the pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent. It was further alleged

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61. *Ibid.*

62. *Ibid.*

63. Jon Altman *et al.*, "Some Competition and Consumer Issues in the Indigenous Visual Arts Industry" Technical Report Discussion Paper no. 235 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2002), online: Australian National University EPrints Repository <<http://eprints.anu.edu.au/archive/00001127/>> [hereinafter "Competition and Consumer Issues"].

64. *Ibid.* at 31.

that a statement by Australian Icon on its website that the pool of artists who painted these souvenirs were “Australian, Aboriginal by descent or Aboriginal” was in itself misleading.

The ACCC obtained interim orders in April 2003 in the Federal Court restraining Australian Icon Products Pty Ltd. until trial from describing its range of Indigenous oriented souvenirs as Aboriginal art or “authentic.”<sup>65</sup> However, before trial, Australian Icon went into liquidation. The directors of the company, Henry de Jonge and Bruce Read, set up the new corporate entity, Australian Aboriginal Art Pty Ltd., which was also involved in the sale of Aboriginal souvenirs. In 2003, the new company undertook to the ACCC that it would send letters to retailers requesting they relabel its products. Australian Aboriginal Art Pty Ltd. also corrected its website, but did not admit it had contravened the *Trade Practices Act 1974* (Cth).

In May 2004, Justice Cooper gave default judgment against Australian Icon Products Pty Ltd.<sup>66</sup> The court declared that, in the case of products painted by artists not of Aboriginal descent, such representations were likely to mislead or deceive consumers, in contravention of the *Trade Practices Act 1974* (Cth). Even though the company was in liquidation, Justice Cooper decided to make the declarations against it to fairly reflect the totality of the conduct. The court also made orders, by consent, restraining Australian Aboriginal Art Pty Ltd. directors, de Jonge and Read from making similar representations about their products in the future unless the works were, to their knowledge, produced by persons of Aboriginal descent. The court also ordered, by consent, that de Jonge and Read attend a trade practices compliance seminar and pay the ACCC’s costs.

ATSIC welcomed the Federal Court action by the ACCC against the Brisbane souvenir manufacturer accused of falsely labelling products as authentic Aboriginal art.<sup>67</sup> However, it must be recognized that Indigenous communities may find it difficult to access such consumer protection laws. Marianna Annas refers to access and equity issues that confront rural and remote Indigenous communities: “Although Indigenous artists may use these provisions to protect their forms of artistic and cultural expression, the process is not readily available to artists in remote communities or those unable to access proper representation.”<sup>68</sup> As a result, she wondered whether Indigenous communities would be better served by an Indigenous certification mark rather than merely the consumer protection provisions of the *Trade Practices Act 1974* (Cth).

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65. Australian Competition and Consumer Commission, “ACCC Obtains Interim Orders Against Aboriginal-Style Souvenir Dealer” (4 April 2003), online: <<http://www.accc.gov.au/content/index.php/itemId/348042/fromItemId/378016>>; and Lisa Allen, “Block on Art Company” *Australian Financial Review* (7 April 2003) at 4.

66. Australian Competition and Consumer Commission, News Release, “ACCC Concludes Aboriginal-Style Souvenir Proceedings” (6 May 2004), online: <<http://www.accc.gov.au/content/index.php/itemId/503636/fromItemId/2332>>.

67. Kristen Smith, “Restraining Order on Souvenirs” *Courier-Mail* (10 April 2003) 5.

68. Annas, *supra* note 4.



### Summary

Over the past two decades, Australian courts have employed a combination of copyright law and consumer protection law to protect Indigenous people from the misappropriation of traditional knowledge. In jurisprudence, judges have shown an increasing willingness and enthusiasm to protect the economic rights of Indigenous artists. Nonetheless, there remain a number of limitations associated with the use of copyright law to protect Indigenous cultural property—most notably, the difficulty in dealing with communal ownership, problems with fixing material form, the lack of protection for artistic styles<sup>69</sup> and the temporal limitations of duration. As Michael Thomas comments:

Interest in the protection of signs and symbols is an expression of the continuing search for ways to shore up what are, from the [I]ndigenous rights perspective, key weaknesses of copyright: its time-limited quality and its inability to effect absolute control over the use of protected work.<sup>70</sup>

There has been a push for recognition that Indigenous artists and communities can exercise moral rights in respect of cultural works. The federal government has drafted the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth). However, concern remains over whether such legislation will be sufficiently developed to provide meaningful and effective protection. The *Trade Practices Act 1974* (Cth) has some utility in providing protection against misleading or deceptive conduct, and false representations in relation to Indigenous cultural works. This regime, though, has no registration system to provide accreditation or authentication of Indigenous art.

### III STOPPING THE RIP-OFFS: AUTHENTICITY MARKS

In 1999, the Australian federal government proposed the use of certification trademarks to provide stronger protection for consumers of Indigenous art and culture. Such a policy initiative represented a shift in emphasis from the protection of Indigenous creators under copyright law to the protection of consumers under trademark law.

This shift in priority is best exemplified by the Hon. Senator Richard Alston's response to a question from a Liberal colleague during legislative debate in 1999.<sup>71</sup> As the owner of a "modest collection of Aboriginal art," Senator Alston was particularly concerned about what he described as "re-working," in which "a very well known artist might have relatives who do the first so-called draft and then the artist himself comes in, basically signs off on the

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69. See, for instance, *Cummins v. Vella*, [2002] FCAFC 218.

70. Michael Brown, *Who Owns Native Culture?* (Cambridge, Mass.: Harvard University Press, 2003) at 84, 71-72 [hereinafter *Who Owns Native Culture*].

71. Senator Richard Alston was the Minister for Communications, Information Technology and the Arts, and a member of the conservative Liberal Party currently in power.

work and then it is passed off as a work of that artist.”<sup>72</sup> Informing the Senate of the steps taken to address the serious allegations made by artists and dealers concerning the faking of Aboriginal art, the Minister noted:

I hope that what will emerge from these very constructive efforts within the industry is a practice that will ensure that people do feel confident when they go and buy works of art, that they do know what they are buying, that they are not misled or find that works have been misrepresented and that they do have the sense of pride that I think all Australians derive from seeing the success of people like Emily Kame Kngwarreye and many other leading Australian Aboriginal artists.<sup>73</sup>

The Minister acknowledged to an interjector from the Labor Party Opposition benches that it was possible to have community contribution into works of art and collaboration on works. Nonetheless, the Minister declaimed: “Those who purchase it in good faith have been misled and that sort of passing off action should not be tolerated. I have no doubt that all responsible dealers and people involved in the industry will want to ensure that these sorts of practices do not continue.”<sup>74</sup>

After the NIAAA received funding from the Australia Council and ATSIC in 1999 to implement the authenticity marks scheme, the organization registered two certification marks: the label of authenticity and the collaboration mark.<sup>75</sup> A label of authenticity would be applied to “products or services that are derived from a work of art created by, and reproduced or produced and manufactured by Aboriginal and Torres Strait Islander people who satisfy the definition of ‘authenticity.’” The second, a collaboration mark, would be applied where non-Indigenous people used designs created by an Indigenous person.

The NIAAA hoped that certification trademarks would help protect Indigenous artists and their artwork from piracy. It believed that there would be benefits for Aboriginal and Torres Strait Islander artists, the art community and

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72. Senator Richard Alston, “Question Without Notice: Aboriginal Art and Authenticity” *Senate Hansard* (28 April 1999) at 4457.

73. *Ibid.*

74. *Ibid.*

75. The NIAAA sought to register the label and collaboration mark as normal trademarks and then as certified trademarks.

The NIAAA experienced delays in obtaining the registration of the trademarks. At the examination phase, the Trade Marks Office considered that there were grounds that might preclude the application from being registered. The most significant ground was that the trademark was considered to be substantially identical with, or deceptively similar to, that of Nike®. An adverse report was given to the NIAAA asking them to clarify the situation. While the Registrar of Trade Marks accepted the Label of Authenticity for registration, it did so with an endorsement on the use of the mark which limited use to “the colors black, red and yellow with a black border surrounding the triangular device, which border is in turn surrounded by a black border.”

The trademarks for the label and the collaboration mark were approved by IP Australia on 20 May 1999, numbered respectively 772563 and 772564. The label of authenticity certified trademark was approved on 25 November 1999. The NIAAA sought to amend these rules and the amendments were accepted and given approval in July 2001. The collaboration trademark and rules were lodged on 8 September 1998. This was trademark number 772564. The Australian Competition and Consumer Commission issued four adverse reports on this application. The NIAAA withdrew the rules so as to amend them; but as yet has not provided the Commission with new rules.

the tourism industry: "For Indigenous people, the introduction of such a system within Australia will secure fundamental benefits such as preventing 'rip-offs,' empowerment and marketing."<sup>76</sup> The NIAAA had a number of objectives in launching the authenticity marks scheme:

1. To maintain the cultural integrity of Aboriginal and Torres Strait Islander art;
2. To ensure a fair and equitable return to Aboriginal and Torres Strait Islander communities and artists for their cultural produce;
3. To maximise for consumers certainty as to the authenticity of Aboriginal and Torres Strait Islander-derived works/products;
4. To maximise multiplicity and diversity of Aboriginal and Torres Strait Islander art; and
5. To promote an understanding both nationally and internationally of Aboriginal and Torres Strait Islander cultural heritage and art.<sup>77</sup>

The labelling system would be administered under the control of the NIAAA and in accordance with the rules for use. It is worth evaluating the practical implementation and the symbolic significance of the scheme.

Optimistic that the authenticity marks scheme would be ready in time for the beginning of the Sydney Olympics, the NIAAA promised to embark on a national and international marketing campaign to target consumers who wanted to purchase Indigenous Australian art and cultural products and services. It planned to screen advertisements on incoming Qantas flights to alert tourists to the authenticity labels. The NIAAA commented upon the need to protect the cultural and economic interests of Indigenous communities: "Tourists do not want to fly all the way to Australia just to be deceived."<sup>78</sup> However, the NIAAA did not meet the deadlines that were set for the implementation of the authenticity marks. As a result, the Australian Customs Service issued information to people entering Australia during the 2000 Olympics stating that unless an artwork had a label on it, the product was not genuine.<sup>79</sup> Such advice was premature because the authenticity marks scheme had not yet been introduced.

In late 1999, Senator Alston was asked to detail what the federal government had done to support the label of authenticity and protect Indigenous artists from appropriation of their work and culture. He expressed misgivings about the implementation of the label of authenticity by the NIAAA:

We do support the introduction of an authenticity label in principle. However, concerns have been raised by various stakeholders and the government have in turn raised these with NIAAA, and we are hopeful that those discussions will result in a model that everyone can have confidence in. But I do stress that it is not just a matter of calling a press conference and saying that you are in favour of authenticity labels. It is a matter of actually getting it right, doing the homework; not just frittering

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76. National Indigenous Arts Advocacy Association, "The Label of Authenticity" (1999), online: <<http://www.niaaa.com.au/label.html>> [hereinafter "Label of Authenticity"].

77. *Ibid.*

78. *Ibid.*

79. *Ibid.*

money away on so-called awareness raising projects. I think the much more important element is to actually have a formula that will give everyone in the industry confidence that the works are what they purport to be.<sup>80</sup>

The Senator also expressed his continued alarm with the problem of fake Aboriginal art, noting: "There are quite clearly attempts to defraud customers."<sup>81</sup> He cited a story in the newspapers about the artist Ginger Riley who was concerned that other people had been putting his signature on works that he had not authored. The Senator affirmed the need to implement the authenticity label in an expeditious fashion: "I think it is important that we do achieve an authenticity label as quickly as possible, and certainly ahead of the Olympic Games."<sup>82</sup>

In 2000, there were further concerns regarding the speed of implementation of the authenticity marks scheme, which were aired in a national newspaper.<sup>83</sup> *The Australian* journalist Jennifer Sexton reported:

The introduction of a label guaranteeing the authenticity of Aboriginal art is running six months behind schedule and the label will not begin appearing in galleries and shops until the end of this month. With just 30 of the estimated 7000 Aboriginal artists across the country so far approved to use the label on their work, its initial visibility will be limited and the system will barely have time to establish itself before the Olympics in September.<sup>84</sup>

The executive director of the NIAAA, Kevin Francis, stated that the delay was in part due to a further refinement of the system, including the addition of more information on the label's bar code for added efficiency at the policing stage. Francis defended the scheme: "There will always be people for and against projects. We have what we consider to be a huge majority of the stakeholders behind the project and the label."<sup>85</sup> Despite his optimism, Francis admitted that the strict registration process had meant more than 75 per cent of applications were not supported with sufficient documentation. To successfully register, the applicant's Aboriginality had to be supported in writing under the common seal of two Indigenous organizations. Out of 200 applicants, 150 had not met the minimum criteria. The Australia Council estimated the number of Aboriginal artists at 7000, but the NIAAA said that 20,000 Aboriginal people earned income from art.<sup>86</sup> Francis hoped that at least half of the Aboriginal artists would register to carry the label.

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80. Senator Richard Alston, "Question Without Notice: Aboriginal Art and Authenticity Labels" *Senate Hansard* (6 December 1999) at 11178.

81. *Ibid.*

82. *Ibid.*

83. Jennifer Sexton, "Signs Say Label has Late Message" *The Australian* (5 July 2000) 14.

84. *Ibid.*

85. *Ibid.*

86. *Ibid.*

The authenticity label continued to have some influential supporters, including Senator Ridgeway.<sup>87</sup> Another supporter was John Morse, Managing Director of the Australian Tourist Commission, who argued that research showed that Indigenous art was a key attraction for overseas tourists. He wanted an extensive awareness campaign against fake Aboriginal art, including “educating visitors who come to Australia to look out for authenticity labels.”<sup>88</sup> Melbourne Aboriginal artist Tiriki Onus called on the government to support both the authenticity label and laws providing greater protection for Indigenous art: “This is one of these wonderful opportunities for this really practical reconciliation and to take an interest in ... the wrong doings of greater society.”<sup>89</sup>

### Authenticity

There were particular concerns about the definition of authenticity that was operative in the scheme. The NIAAA stressed:

NIAAA will not determine who is an Aboriginal or Torres Strait Islander person as it would be both culturally and legally unacceptable. It will be up to the individual applicant to prove whether they are Aboriginal or Torres Strait Islander descent. The definition of an Aboriginal and Torres Strait Islander person is in line with the Commonwealth Government’s definition.<sup>90</sup>

Consultant Kathryn Wells sought to obtain feedback from individuals and Indigenous communities as to what “authorship” and “origin” meant to them and their works of art, with a view to arrive at a definition of “authenticity” for the NIAAA.<sup>91</sup> She concluded that “authenticity” was a declaration by Indigenous Australian artists of identity with, belonging to, knowledge about, respect for and responsibility towards the works of art they create. Wells stressed that “authenticity” should not be confused with what is considered modern or “traditional” or “real” in Indigenous culture.

Arguably, the original conception of the authenticity marks scheme was flawed from the very beginning. With foresight, Queensland academic Leanne Wiseman made a number of caveats about the implementation of the certification marks scheme, noting:

It is clear that the Authenticity Labels have the potential to control the trade in non-authentic Indigenous arts and culture and to strengthen the position of Indigenous artists .... Ultimately, however, the success of the labels will depend upon the level

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87. Antony Balmain, “Artists’ Olympian Struggle to Get Justice for Brushstrokes” *The Age* (19 June 2001).

88. *Ibid.*

89. *Ibid.*

90. “Label of Authenticity”, *supra* note 76.

91. Annas, *supra* note 4.

of acceptance and take-up rates within Indigenous communities—and this still remains to be ascertained.<sup>92</sup>

Wiseman also expressed doubts about the symbolic value of the label of authenticity:

While the introduction of the Labels of Authenticity is seen by some as an important step forward in the struggle for better protection for Indigenous art and culture in Australia, for others there is concern that the Label may have the unintended consequence of introducing divisiveness within the Indigenous artistic and cultural community by institutionalising “Indigenous art” into authentic and non-authentic Indigenous art.<sup>93</sup>

She emphasized that the Labels of Authenticity would only provide limited protection to Indigenous artists: “It is unlikely that, by themselves, the Labels would be able to stop the production, importation or export of forgeries.”<sup>94</sup>

The authenticity marks were registered in respect of a number of classes of goods, mainly dealing with art and craft. Commenting on the scheme, Jon Altman said, “a problem that it faces from the outset is its failure to distinguish fine art from manufactured tourist art.”<sup>95</sup> He observed that “those operating in the fine art arena have been reluctant to register for the national label, believing that their own signature, label or document of authenticity should be enough to verify the authenticity of their work in the national or international arts arena.”<sup>96</sup> Altman elaborates upon this failure to demarcate between high culture and popular culture, stating that “it is debatable whether tourists would be willing to pay more for ‘authentic’ tourist art and feedback from retailers strongly indicates that price is often more important than provenance to souvenir hunters.”<sup>97</sup>

There were other significant concerns about the definition of “authenticity” in respect of the mark. In a submission to the Myer report,<sup>98</sup> Norman Wilson was concerned that the label conflated the issue of Indigenous authorship with that of authenticity. He comments that the authenticity label erroneously suggested a homogeneous, “Pan-Aboriginal identity”:

The industry, particularly Indigenous organisations need to face this reality and recognise that the Pan-Aboriginal identity does not extend to a homogenised Indigenous culture .... Part of the [registration] process would require the artists

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92. Leanne Wiseman, “The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity” (2001) 22:1 *European Intellectual Property Rev.* at 14 [hereinafter “Protection of Indigenous Art”]; see also Leanne Wiseman, “Regulating Authenticity?” (2000) 9:2 *Griffith L. Rev.* 249-273.

93. “Protection of Indigenous Art”, *ibid.*

94. *Ibid.*

95. Jon Altman, “The Indigenous Visual Arts Industry: Issues and Prospects for the Next Decade” (2000) 20:1 *Artlink* 86 at 92.

96. “Competition and Consumer Issues”, *supra* note 63 at 17.

97. *Ibid.*

98. Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry* (Canberra: Department of Communications, Information Technology and the Arts, 2002).

applying to use the label ... to demonstrate their rights to use the subjects they paint and the appropriateness of style used.<sup>99</sup>

Wilson was also critical of the authenticity label because it provided no safeguard against the appropriation of region-specific art styles, a question of particular concern to artists from central and northern Australia.<sup>100</sup> He noted that “a number of remote communities suggested at community consultations that the Western desert ‘dot painting’ style, and other Northern Territory symbols and motifs, taken up by many artists from eastern Australia needed to be addressed.”<sup>101</sup> Jon Altman also made this observation, arguing that the scheme was flawed because it implied that Aboriginality guarantees authenticity when the work of one Indigenous group can be copied by another: “It is quite possible for an [I]ndigenous artist to produce an item that is not authentic.”<sup>102</sup>

The Indigenous artist and curator Brenda Croft recognized that there was a need to address the serious problem of cultural appropriation: “I totally support halting the rip-offs and outing the rogues operating in the midst—not just the edges—of this industry.”<sup>103</sup> Nonetheless, she was not persuaded by the value of the authenticity label. Croft observed:

I am unconvinced of the capacity of a “Label of Authenticity” to achieve this aim outside the merchandising end of the industry. A number of my colleagues ... have expressed concern at the suggestion that all Indigenous artists should be encouraged, or even placed under obligation to purchase the Label, which is being promoted as some kind of panacea for all the industry’s problems.<sup>104</sup>

Croft points out that in her view the primary need is for public education, so that the buyers of art and craft works have a better appreciation of the complexities of contemporary Indigenous cultural expression.<sup>105</sup> She concludes: “Instead of *Caveat Emptor* (*Buyer Beware*), it should be *Buyer Be Aware*.”<sup>106</sup>

There was widespread concern that the authenticity marks scheme would serve to typecast Indigenous artists in a narrow and rigid fashion. The artist Gordon Bennett resisted being labelled and categorized as an Indigenous artist. Indeed, his 1999 painting, “(Ab)original,” could indeed be read as a critique of the authenticity label system. Ian McLean comments of his recent exhibition *Camouflage*:

The apparent shift in Bennett’s work is partly due to a long expressed frustration at being pigeon-holed as an Indigenous artist. Not only did this elicit a burden of representation that he was unwilling and unable to bear, but it limited and indeed

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99. Norman Wilson, “Submission to the Contemporary Visual Arts and Crafts Inquiry” (Canberra: Department of Communications, Information Technology, and the Arts, 2001) at 8.

100. *Ibid.*

101. *Ibid.*

102. “Competition and Consumer Issues”, *supra* note 63 at 17.

103. Brenda Croft, “Labelled - Buyer Be Aware” (2000) 20:1 Artlink 84 at 85.

104. *Ibid.*

105. *Ibid.*

106. *Ibid.*

reduced the meaning and range of his art .... Bennett's refusal to participate in this game of representation by rejecting the label of "Aboriginal" is not due to an antipathy towards Indigenous issues, but to his focus on the very language systems that deny Aborigines a place in the constitution of Australian identity.<sup>107</sup>

Indigenous artist Robert Bell raises similar points in his provocative manifesto entitled, *Bell's Theorem: Aboriginal Art, It's a White Thing*.<sup>108</sup> He argued that Aboriginal art existed solely in order to feed a Western art market, and, as a result, Aboriginal artists were exploited: "Aboriginal Art is bought, sold and promoted from within the system, that is, Western Art consigns it to 'Pigeon-holing' within that system."<sup>109</sup>

In setting up the authenticity marks scheme, the NIAAA failed to adequately address questions of Indigenous identity and authenticity.<sup>110</sup> As a result, the national authenticity label lacked widespread community acceptance and support—particularly amongst rural and regional Indigenous communities. A related point is that the authenticity marks scheme seems to be focused, almost exclusively, upon art and craft. The presumption is that the art market is where the majority of cultural appropriation takes place. However, it should not be forgotten that such problems are rife in other cultural forms.<sup>111</sup> It is doubtful whether the scheme would be as useful in relation to combating the appropriation of other forms of cultural production—such as Indigenous literature, storytelling, music, dance and theatre.

### The Australia Council Review

In 2002, *Sydney Morning Herald* journalist Debra Jopson broke the story that the Australia Council had suspended funding to the NIAAA.<sup>112</sup> After only a few years, the authenticity mark scheme was rendered practically defunct. Jopson observed:

The Sydney-based National Indigenous Arts Advocacy Association (NIAAA), which issues the label and polices its use, has had annual federal funding of more than \$500,000 stopped because its chief executive officer, Phillip Hall, refused to assist planned reviews of the organisation's performance. The Australia Council, which paid the association \$1 million over three years, and the Aboriginal and Torres Strait Islander Commission (ATSIC), which has given NIAAA more than \$1.2 million over eight years, have both halted payments. They say that NIAAA ... failed to be accountable.<sup>113</sup>

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107. Ian McLean, *Camouflage* (Sydney: Sherman Galleries, 2003).

108. (November 2002), online: <<http://www.kooriweb.org/foley/news/bell.html>>.

109. *Ibid.*

110. For a discussion of wider debates about Indigenous identity, see John McCorquodale, "Aboriginal Identity: Legislative, Judicial and Administrative Definitions" (1997) 22 *Australian Aboriginal Studies* 24.

111. Rimmer, *supra* note 49 at 275-302.

112. Debra Jopson, "Aboriginal Seal of Approval Loses its Seal of Approval" *Sydney Morning Herald* (14-15 December 2002) 7.

113. *Ibid.*



The journalist recorded the reaction of a former board member of the NIAAA, Mundara Koorang: "He had become alarmed when the organisation's office at The Rocks was closed and its phone disconnected while it continued to receive money, at 9 cents a label, through its Parramatta post office box."<sup>114</sup>

The Aboriginal and Torres Strait Islander Arts Board of the Australia Council commissioned a review of the NIAAA in 2002.<sup>115</sup> The report relied upon several sources including information held by the Australia Council, public information produced by the NIAAA, consultations with stakeholders, and a questionnaire sent to 150 industry organizations and art and craft associations. It was highly critical of the governance and management of the NIAAA, the implementation of the national certification scheme and the NIAAA's wider advocacy role.

Particularly worrisome were the governance and management of the NIAAA. The report's authors found that the leadership of the organization was highly volatile and unstable:

A common issue that was raised about NIAAA's governance was the frequent occurrence of what a number of people described as "palace coups." It was reported that there had been several instances where there had been acrimonious and major changes of Board members. This involved a situation where one group that was totally opposed to the other took power. There would soon follow a change in key staff and NIAAA would undergo a period of inactivity.<sup>116</sup>

Furthermore, the report noted the claims of some stakeholders that the organization was focused on Sydney. It maintained that the NIAAA needed to establish a process whereby its governing committee was composed of representatives from various regions.<sup>117</sup>

There were also symbolic concerns about the scheme's definition of "authenticity" and practical problems with the implementation of the system. The NIAAA failed to win stakeholders' support, including creative artists, Indigenous communities and regional art centres. The report found that there was widespread resistance to the use of authenticity marks amongst art and craft centres:

A number of art and craft centres in the Northern Territory indicated that most galleries did not want the label attached for two reasons. Firstly, they saw the inclusion of pictures and stories as a more valuable means of authentication. Secondly, outlets considered that having labels on some products may lead consumers to believe that only some products were clearly genuine. Outlets in other states confirmed that products they purchased from the Northern Territory generally

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114. *Ibid.*

115. Australia Council, *Final Report of the Review of the National Indigenous Arts Advocacy Association* (Sydney: The Australia Council, December 2002). Obtained under a Freedom of Information application. On file with the author [hereinafter *Final Report*].

116. *Ibid.* at 4.

117. To be fair, the other copyright advocacy organizations funded by the Australia Council have suffered similar problems in terms of funding, personnel and resources.

did not have labels attached. This means that a major part of the Aboriginal art market is unwilling or unable to participate in the system that has developed.<sup>118</sup>

Moreover, the authenticity mark lacked support in urban galleries. For instance, Sydney's Coo-ee Gallery owner Adrian Newstead argued that retailers and dealers, rather than artists, should be responsible for establishing the product's authenticity.<sup>119</sup> The report sought to determine the market penetration of the authenticity mark. It was estimated that there were only around 200 artists registered under the scheme, despite there being anywhere from 7000 to 20,000 Aboriginal people earning a living from art in Australia. In addition, there were only nine retail outlets licenced as stockers of authentic work and ten licence arrangements to use the collaboration mark.

Australian federal government ministers sought reassurance from the NIAAA that it would launch and implement the authenticity mark in time for the Sydney Olympics in 2000. They were concerned about the failure of the organization to meet deadlines to implement a comprehensive authentication system. As one Minister stated in a letter to the NIAAA in 1999:

[T]o succeed the label must have the support of all industry sectors including creative artists, Indigenous communities, agents, retailers and domestic and international consumers .... I would feel more certain of the capacity of NIAAA to progress this project if it was able to elicit support from each of these sectors and demonstrate its capacity to work more cooperatively with all who share an interest in its success.<sup>120</sup>

Many of the stakeholders became disillusioned with the authenticity mark and the NIAAA because of its failure to implement the scheme in time for the Olympic Games. The report concluded: "In our experience it is rare to find such a large amount of anger about the implementation of a project as it applies to NIAAA's implementation of the label."<sup>121</sup>

Critical of the NIAAA's advocacy role in relation to intellectual property issues, the report's authors consulted a range of stakeholders about the performance of the organization in relation to intellectual property issues. The inquiry sought feedback about the knowledge of stakeholders about the NIAAA's involvement in education, research, test cases and advocacy. It was surprised by the uniform nature of responses from art and craft centres, other organizations and government agencies: "Without exception they reported that they had little or no contact with NIAAA for the last two or three years."<sup>122</sup> The report concluded:

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118. *Final Report*, *supra* note 115 at 19.

119. Adrian Newstead, "Intellectual Property and Aboriginal Art" (Art Crime: Protecting Art, Protecting Artists and Protecting Consumers Conference, Australian Institute of Criminology, 2-3 December 1999) [unpublished].

120. *Final Report*, *supra* note 115 at 21.

121. *Ibid.* at 19.

122. *Ibid.* at 42.

NIAAA has undertaken few of the core functions of an intellectual property and promotion agency operating at a national level. It has few links with other non-profit organisations and undertakes little advocacy work with government agencies. Its means of communicating with members is undeveloped. Finally, NIAAA has clearly failed to meet a number of specific undertakings that form part of its funding agreement with the Australia Council.<sup>123</sup>

The report is perhaps a little harsh in its assessment of the NIAAA's role in relation to test cases when it states: "We are aware that NIAAA has been involved in high profile cases, but this was some years ago."<sup>124</sup> The NIAAA has played an important role in the past in terms of copyright advocacy and education. It should not be forgotten that the organization did play a significant role in a number of copyright test cases—including the *Carpets* case<sup>125</sup> and the *Bulun Bulun* case.<sup>126</sup> It also helped provide advice about a number of controversies that did not go trial, but were nonetheless of public importance. The NIAAA was instrumental in the debate over seeking protection for Indigenous cultural property—most notably during the *Stopping the Rip-Offs* debate,<sup>127</sup> the moral rights discussions and the *Cracking Down on Copycats* parliamentary inquiry.<sup>128</sup> It did help publicize important education projects, such as the House of Aboriginality run by Vivien Johnson<sup>129</sup> and the Survival Day cultural festival.

Finally, the funding agencies involved were culpable of failing to properly supervise the authenticity marks scheme. The report comments:

The funding agencies have treated NIAAA very generously for many years. This seems to have been because many players believed, and still believe, that there is a critical need for the services that NIAAA should be providing. This generosity involves substantial levels of funding for the label and other projects, but it also involves a tolerance of poor financial and performance monitoring and reporting. For many years NIAAA has been permitted to provide only general statements about its objectives. This has been followed by extremely "woolly" performance reporting. Yet on the few times that NIAAA or the funding agencies set specific targets these were invariably not met.<sup>130</sup>

Responsibility must ultimately go back to the federal government, which set up the scheme in the first place. In hindsight, it was a poor decision to imbue the NIAAA with the responsibility to administer the authenticity marks scheme. For

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123. *Ibid.* at 45.

124. *Ibid.*

125. *Supra* note 15.

126. *Supra* note 16.

127. *Supra* note 2.

128. Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats: Enforcement of Copyright in Australia*. NIAAA submission no. 46 to Federal Parliament (November 2000) at 15, 70-71.

129. Vivien Johnson, *Copyrites: Aboriginal Art in an Age of Reproductive Technologies* (Sydney: National Indigenous Arts Advocacy Association and Macquarie University, 1996); and The House of Aboriginality, online: <[http://www.mq.edu.au/house\\_of\\_aboriginality/](http://www.mq.edu.au/house_of_aboriginality/)>.

130. *Final Report*, *supra* note 115 at v.

financial reasons, the government ignored at its own peril the recommendation of Terri Janke that a new, independent body should have been set up to administer the scheme.<sup>131</sup> The report concluded that the implementation of the scheme would have been better driven in the first instance by a government agency.<sup>132</sup> It recommended that the Australia Council, the Department of Communications, Information Technology and the Arts, and the National Arts Policy Centre of ATSIC consider the development of a national authentication policy.

### The Future of the Authenticity Mark

After funding was withdrawn, Cathy Craigie, the Director of the Australia Council's Indigenous arts board, said she was "very saddened" that the NIAAA had failed to look after Aboriginal artists' cultural rights.<sup>133</sup> There had been complaints for some time about a lack of quality control, which meant "anyone could put anything in" and obtain the label.<sup>134</sup> Phillipa McDermott, ATSIC's NSW Public Affairs manager, said: "ATSIC is very distressed that the situation has come to this. We have put an enormous amount of time, money, commitment and faith into this process to assist our people and their cultural rights."<sup>135</sup>

The Australia Council report is unclear about the future of the national authentication scheme. It holds out some hope that the scheme could be resurrected in some form:

In relation to the label of authenticity, we believe that it is important to return to the original aims, which were to establish a national and comprehensive system of authentication that has the support of all the key players. That will require a strategy of inclusion, not the processes of exclusion that have been followed to date.<sup>136</sup>

Nonetheless, it would be difficult to salvage the authenticity marks scheme. Such a system would require the agreement of the NIAAA as they remain the owners of the trademarks. The report is optimistic that the scheme could be revived even without the cooperation of the NIAAA: "Should NIAAA choose not to be part of a new system that would not make a new system unworkable."<sup>137</sup> However, some drastic measures would have to be taken for the government to regain ownership of the authenticity marks.

A board member of the NIAAA, Wayne Peckham, said he wanted to save the current label, a stylized boomerang in the Aboriginal red, black and yellow tricolour:

We have lovely people who come to this country. They say the main things they want to do are to see Aboriginal art and to visit the reef and the rock. It is terrible

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131. *Our Culture*, *supra* note 1.

132. *Final Report*, *supra* note 115 at 23.

133. Jopson, *supra* note 112 at 7.

134. *Ibid.*

135. *Ibid.*

136. *Final Report*, *supra* note 115 at 5.

137. *Ibid.* at 23.

that we can't give them something which is beautiful with a sticker on it to show it is authentic.<sup>138</sup>

The Director of the NIAAA, Mr. Hall, told the *Herald* that the Association continued to produce the label, but he said it was under threat.<sup>139</sup> He was prepared to allow a review by ATSIC but not through federal government bureaucrats, whom he called "hired help."<sup>140</sup> He would attempt to negotiate with the newly elected ATSIC Sydney Regional Council to restore funding.

Instead of concentrating on a national label of authenticity, it might be more productive to develop regional and local trademarks for Indigenous artistic centres and communities. The development of certification marks for regional centres might help empower local communities. Norman Wilson argues:

The implementation of the National Label of Authenticity does not appear to have the support of rural and remote artists. The viability of this project should be reviewed as unless national support is obtained current outcomes can not justify further support as this money could be directed to assisting the establishment of five new art centres and the development of a regional labelling system that would go some way towards ameliorating ... overseas buyers' concerns about ethical as well as authenticity issues.<sup>141</sup>

However, there would still be a need for proper legal and administrative infrastructure to ensure that the regional bodies could deliver such services in an effective fashion.

The Indigenous Arts Network is facilitated by arts centres that promote the creation, distribution and sale of Indigenous visual arts and craft throughout Australia. Desart is a regional advocacy body representing Aboriginal arts and craft centres in the Northern Territory, South Australia and West Australia. The organization registered a certification mark—the Desart mark—in several classes relating to the sale of Indigenous arts. A number of other art centres also use trademarks in the course of their business. However, there are admittedly a number of limitations to the use of trademark law to protect Indigenous designs and words. As Terri Janke comments:

Although there is use of the trade marks system, there is evidence to suggest that Indigenous people need to know much more about the system, namely: how to apply and overcome descriptiveness of marks and other issues raised in adverse reports; and how to oppose trade marks.<sup>142</sup>

It is difficult for Indigenous communities to have communal ownership of a trademark—unless it is a collective mark or a certification mark. The requirement

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138. Jopson, *supra* note 112 at 7.

139. *Ibid.*

140. *Ibid.*

141. Wilson, *supra* note 99 at 8.

142. Terri Janke, "Case Study Number Two: Use of Trade Marks to Protect Traditional Cultural Expressions" in *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions* (World Intellectual Property Organization, 2002) at 10, online: <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html#1>>.

that trademarks have to be used in the course of trade may not be appropriate for general protection. It may also be hard to obtain registration in respect of Indigenous words, if they are purely descriptive. Indigenous communities may also find it difficult to strategically use the registration system for several reasons. First, it might not protect their own designs, and second, they may have difficulty opposing the use of Indigenous icons by non-Indigenous businesses and corporations. Finally, it must be noted that trademark law could also be used in an attempt to censor political criticism and comment by Indigenous people.

#### IV *SUI GENERIS* PROTECTION: INTERNATIONAL LAW AND TRADITIONAL KNOWLEDGE

The administrative scheme set up to deal with authenticity marks in Australia should be evaluated within an international context. This section will deal with three comparative examples. First, the adequacy of the authenticity marks scheme regime is contrasted with another model, the Māori-made mark, Toi Iho. The discussion reveals important characteristics of a successful administrative scheme. Second, the experience of the Indigenous certification trademark in Australia is compared to developments in North America. In Canada, there has been a longstanding Igloo Tag Trademark Program. That country's Snuneymuxw First Nation has also secured protection under the *Trade-marks Act*<sup>143</sup> for 10 petroglyph images. The United States Patent and Trademark Office has established a database of tribal insignia. It has refused registration to some trademark applications that are derogatory to Native Americans. Finally, UNCTAD has sought to develop a model for a *sui generis* system for the preservation of traditional knowledge, innovations and practices. It has mooted the idea that there should be a global brand for Indigenous insignia—much like the Fairtrade brand. Such examples highlight the need for a scheme for the protection of Indigenous insignia to protect Indigenous communities, and not just retailers and consumers.

#### The Mataatua Declaration

In 1993, the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa/New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples.<sup>144</sup> Over 150 delegates from fourteen countries attended, including Indigenous representatives from Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, the U.S., Japan and Aotearoa/New Zealand. The delegates signed the Mataatua

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143. R.S.C. 1985, c. T-13.

144. Commission on Human Rights, Sub-Commission of Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* (19-30 July 1993). Online: <<http://aotearoa.wellington.net.nz/imp/mata.htm>>.

Declaration. This document affirmed that, on the development of policies and practices, states, national and international agencies must recognize that Indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge. Although it has not been formally adopted, the Mataatua Declaration has nonetheless been an important inspiration for law reform.

In 2001, Te Waka Toi, the Māori arts board of Creative New Zealand, introduced a New Zealand Māori-made mark called Toi Iho, in consultation with Māori artists. Toi Iho is a registered trademark used to promote and sell authentic, quality Māori arts and crafts. Toi Iho has also been designed to authenticate exhibitions and performances of Māori arts by Māori artists. The Toi Iho mark is accompanied by two companion marks known as the mainly Māori mark and the Māori co-production mark.

Arguably, Māori mark has been a qualified success.<sup>145</sup> Artists have been positive about the introduction of the Toi Iho mark. Julie Kipa observed: “We gained Toi Iho in the inaugural year so it has only been going for a year and we thought it was really important not just for our own practise but really to send the message that Maori Art deserves a certain type of status and that’s not with the cheap tourist kind of icons.”<sup>146</sup> Her partner, Rangi Kipa, emphasized that the Toi Iho mark was helpful in educating “an investor or a potential art buyer from overseas who really has very little knowledge about Maori art.”<sup>147</sup>

Peter Shand, an art curator and academic, comments that a distinctive feature of the Toi Iho mark is that it is a quality mark:

A regulating body of experts in different fields will have the mandate to determine whether or not an applicant’s product is up to the mark, as it were. This qualitative assessment factor has been one of the most controversial aspects of the consultative meetings that Te Waka Toi engaged in to promote the idea of the Maori Made Mark. To place a quality mark on cultural expression, however, is not to avoid imputations of value-judgements being made. Moreover, it seems to posit a more difficult and controversial question in that in this context it asks the members of the registration board to determine what is a quality Maori cultural product.<sup>148</sup>

Such hedging aside, it is arguable that the Toi Iho Mark has been a successful venture in both material and symbolic terms. As opposed to Australia’s scheme, the New Zealand government allocated funds to a government agency with a clear mandate to develop a comprehensive and workable scheme. Furthermore, the process set up by Creative New Zealand involved accrediting a work to a certain standard by a panel of Indigenous experts—a feature which was not attempted or considered in the Australian regime. As such, the Toi Iho Mark

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145. Online: Toi Iho <<http://www.toiio.com>>.

146. *Korero*, Episode 9, 12 on Business Class (October 2003), online: <<http://www.businessclass.co.nz/episode9/korero-transcript.html>>.

147. *Ibid.*

148. Peter Shand, “Scenes From the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion” (2002) 3 *Cultural Analysis* 47 at 78.

would be a good model for any future Australian certification trademark for Indigenous people.<sup>149</sup>

Significantly, the New Zealand government has passed legislative reforms to the trademark law which support and reinforce the Toi Iho scheme.<sup>150</sup> In 1997, the New Zealand Ministry of Commerce convened a focus group to help encourage discussion amongst Māori about issues concerning the registration, as trademarks, of Māori words, symbols, sounds or smells.<sup>151</sup> The Focus Group recommended that the registration of Māori trademarks could assist in the recognition of Māori culture and provide an opportunity to redress inappropriate uses of cultural expression. It suggested that there should be legislation to enable the Commissioner to refuse registration for a trademark if it caused offence to a significant section of the community.

There was parliamentary debate about such proposals regarding registration of Māori symbols. The Commerce Committee of the New Zealand Parliament considered a number of submissions about Māori concerns in its deliberations over trademark reform.<sup>152</sup> The Committee developed the following formulation of a provision to prevent registration of a trademark that would cause offence to Māori people:

The words “likely to offend a significant section of the community, including Maori” in clause 17(1)(b)(ii) replace the words “scandalous” and “contrary to morality” in the Act. This change is seen as best meeting the needs of a modern New Zealand society. The phrase “likely to offend” avoids the risk associated with including more prescriptive criteria that would become outdated and inflexible as a basis for assessing the appropriateness of particular trade marks. The same comments apply to the phrase “significant section of the community.” This wording allows for changes in New Zealand’s social and demographic patterns, and shifts in the mix and “significance” of identifiable groups, values and beliefs to be recognised over time. This provision attempts to balance the interest of Maori (and other significant sections of the community) and persons seeking to register a trade mark.<sup>153</sup>

Drawing upon such recommendations, the *Trademark Act 2002* (NZ) requires the Commissioner to establish an Advisory Committee to provide advice on the registration of trademarks which contain Māori signs, such as text or imagery. Section 17(1)(b) provides that an absolute ground for refusing registration of a

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149. The review of the Authenticity Marks scheme praised the New Zealand model of the Toi Iho mark. *Final Report*, *supra* note 115 at 23.

150. Megan Richardson, “The Haka, Vintage Cheese and Buzzy Bee: Trade Mark Law the New Zealand Way” (2001) 23:4 *European Intellectual Property Rev.* at 207-210; and Susy Frankel & Geoff McLay, *Intellectual Property in New Zealand* (Wellington: Lexis Nexis Butterworths, 2002).

151. Ministry of Commerce, *Māori and Trade Marks: A Discussion Paper* (Wellington: Ministry of Commerce, 1997).

152. Commerce Committee, “Trade Marks Bill” New Zealand Parliament Comment on *Trade Marks Bill* (1 March 2002), online: <<http://www.clerk.parliament.govt.nz/content/643/142bar2.pdf>>.

153. *Ibid.* at 3.



trademark is that it would be likely to offend a significant section of the community, including Māori.<sup>154</sup>

Māori groups have also enjoyed some success in seeking to protect Indigenous imagery in overseas jurisdictions—most notably against the toy manufacturer, Lego. The controversy started in 2002 when Lego launched Bionicle, a new range of action figures. Bionicle involves a group of imaginary inhabitants of the island of Mata Nui, who are under the power of an evil beast called Makuta. Six heroes called the Toa are sworn to liberate the island's inhabitants. In this story line, Lego used a mix of Polynesian words, including some Māori words.

New Zealand lawyer Maui Solomon wrote to Lego on behalf of three Māori tribes objecting to the use of the Māori words:

It was an unauthorized use of traditional names and language, and it was an inappropriate use. There had been no consultation, no prior informed consent. And it's a trivialization, especially when you are using names like Tohunga (Māori for priest). So there are cultural and moral issues.<sup>155</sup>

In response, Lego sent a representative to New Zealand to meet with the Māori groups. After the meeting, Lego apologized for its conduct and promised to show greater cultural sensitivity in the future: "Future launches of Bionicle sets will not incorporate names from any original culture."<sup>156</sup> However, Lego's decision marked only a partial victory, as current versions of the game were not withdrawn.

The creative developments in trademark and traditional knowledge in New Zealand contrast with the relative inertia of the Australian government. First, the Toi Iho™ Māori-made mark has been well-administered and obtained wide community support. Second, the administrative scheme set up by the New Zealand government was complemented by legislative reforms. The reforms contained in the *Trademark Act 2002* (NZ) have no equivalent in Australia. Third, Māori groups have had the capacity to bring legal actions to protect traditional knowledge—most notably in the controversy over the Lego "Bionicle series." Nonetheless, it should be recognized that there remain outstanding issues in Aotorea. There is an ongoing case—known as the WAI 262 proceeding—under the *Treaty of Waitangi* in New Zealand, which concerns the relationship between land rights and intellectual property rights.<sup>157</sup> There is a similar

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154. Owen Morgan, "Protecting Indigenous Signs and Trade Marks: The New Zealand Experiment" (2004) 1 *Intellectual Property Quarterly* 58.

155. Kim Griggs, "Lego Site Irks Māori Sympathizer" *Wired News* (21 November 2002), online: <<http://www.wired.com/news/culture/0,1284,56451,00.html>>.

156. Andrew Osborn, "Māoris Win Lego Battle" *The Guardian* (31 October 2001).

157. Graeme Austin, "Re-Treating Intellectual Property Law: The WAI 262 Proceeding and the Heuristics of Intellectual Property Law" (2003) 11:2 *Cardozo J. of International and Comparative Law* 333.

reluctance in Australia to recognize that Native title rights include cultural knowledge.<sup>158</sup>

### North America

The certification trademark scheme in Australia could also be counterpointed with developments in North American jurisdictions—such as Canada and the United States.

In Canada, the Department of Indian and Northern Affairs developed the Igloo Tag Trademark Program in 1958 to support the development and marketing of Inuit artists. Six licencees were given the authority to utilize the official Igloo tags to identify Inuit art.<sup>159</sup> This pioneering scheme is significant because of its endurance and longevity.

Most recently, the Snuneymuxw First Nation of Canada announced in 2000 that it had secured protection under the *Trade-marks Act*<sup>160</sup> for 10 petroglyph images—ancient rock painting images—on Gabriola Island off the west coast of British Columbia. The images are protected under a provision that applies to “any badge, crest, emblem or mark adopted and used by any public authority.” Having registered the petroglyphs as official marks, the First Nation has the right to take action against unauthorized reproduction and commodification, which are considered to be contrary to the cultural interests of the community. Kathleen Johnson, the Land and Resources Coordinator for the Snuneymuxw First Nation Treaty Office, has stressed that the community hopes to use trademark law to protect the petroglyphs from commercial exploitation. She has observed:

In Canada we're expected to respect other cultures, their religions and ways of doing things. That's all we're asking, for people to respect our culture. We're not using the images for commercial purposes, and we're asking people to respect that. We use them for religious purposes. They are very sacred to us.<sup>161</sup>

Members of the Snuneymuxw First Nation have asked local merchants and commercial artisans to stop using the petroglyph images. They have also provided cultural education and background about intellectual property and traditional knowledge.<sup>162</sup>

Johnson comments that the scheme has thus far been a success in protecting the religious petroglyphs from unauthorized commercial exploitation. Nonetheless, she maintains that it would be preferable if there were national or, better still, international recognition of traditional knowledge:

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158. *Bulun Bulun*, *supra* note 16; *Western Australia v. Ward* (2002), 191 A.L.R. 1 (H.C. Aus.); and *Neowarra v. Western Australia*, [2003] FCA 1402.

159. For more information, see the website of the Inuit Art Foundation: <<http://www.inuitart.org>>.

160. *Supra* note 143.

161. *Who Owns Native Culture*, *supra* note 70 at 84.

162. *Ibid.* at 85.

If the federal government or the global community would provide a different kind of protection for Aboriginal cultures, then we'd use that. We did what we had to do given the resources that were available. If the global community would come together as effectively to protect our intellectual property rights as they've come together to protect Coca-Cola or Microsoft, we wouldn't use the trademark. We'd use something else. People justify their use of the petroglyphs by saying that they've been in public view for however long. My community is ten thousand years old, so seventy-five years is just a drop in the bucket. Our arguments and our rights go back much further than that.<sup>163</sup>

The Canadian government has been involved in a dialogue with Indigenous communities about the protection of traditional knowledge.<sup>164</sup> However, the development of *sui generis* legislation for traditional knowledge is still only a long-term policy priority.<sup>165</sup>

There could also be scope for constitutional protection of communal property rights over traditional knowledge.<sup>166</sup> Daniel Gervais from the University of Ottawa comments that the recognition of Indigenous rights in the *Constitution* may justify a government obligation to protect traditional knowledge:

If a property or other use control right was indeed shown to have existed (and the government failed to prove its extinguishment prior to 1982), then constitutionally the Canadian legal system could not simply abrogate this right. As a consequence, if free use of the sacred intangible concerned was not authorized under [A]boriginal practices and customs, courts would have a duty not to apply any inconsistent federal or provincial legislation and perhaps even to impose an appropriate remedy.<sup>167</sup>

However, the Canadian federal government has not emphasized such constitutional obligations in its consultations over the protection of Indigenous intellectual property.<sup>168</sup>

In contrast to Canada, there has been slower progress in the United States. Two important initiatives are worth noting, however. An important initial development was the passing of the *Indian Arts and Crafts Act*.<sup>169</sup> Congress expanded the powers of the Indian Arts and Crafts Board to address the growing misrepresentation of goods and products produced by American Indians. The

163. *Ibid.* at 86.

164. Industry Canada, *Traditional Knowledge*, online: <[http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwGeneratedInterE/h\\_ip00068e.html](http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwGeneratedInterE/h_ip00068e.html)>.

165. Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002) at 23 and 45, online: <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html>> [hereinafter *Supporting Culture*].

166. Marie Battiste & James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 201-215.

167. Daniel Gervais, "Spiritual but not Intellectual? The Protection of Sacred Intangible Traditional Knowledge" (2003) 11:2 *Cardozo J. of International and Comparative Law* 467 at 494.

168. *Supporting Culture*, *supra* note 165.

169. Pub. L. No. 101-644, 104 Stat. 4662. See also U.S. Department of the Interior, Indian Arts and Crafts Board, online: <<http://www.doi.gov/iacb/file.html>>; John Keith Parsley, "Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the *Indian Arts and Crafts Act* of 1990" (1993) 18:2 *American Indian L. Rev.* 487; and William J. Hapiuk, "Of Kitsch and Kachinas: A Critical Analysis of the *Indian Arts and Crafts Act* of 1990" (2001) 53:4 *Stanford L. Rev.* 1009.

legislation prohibits products from being marketed as Indian when they are not made by Indians. It provides for a range of possible remedies, including civil and criminal penalties. The legislation also empowers the Board to register trademarks of genuineness and quality on behalf of individual Indians and Indian tribes. There remain problems with the enforcement of the legislation.<sup>170</sup> The Board is dependent upon the Attorney-General of the United States to bring civil and criminal actions.

The second development occurred when the United States Patent and Trademark Office ("USPTO") held public hearings about the trademark status of tribal insignia in mid-1999.<sup>171</sup> Indigenous communities argued strongly that there needed to be greater protection of tribal insignia under trademark law. The director of the American Indian Movement, Fern Mathias, demanded that the USPTO protect American Indian religious symbols, tribal insignia, tribal names and Indian words. Similarly, Amadeo Shije, the Governor of Zia Pueblo in New Mexico argued that "the official insignia or symbols of the sovereign tribes should be protected as much as the symbol or insignia of municipalities, states, foreign states, and so forth."<sup>172</sup>

In 2000, the USPTO released its report on the Official Insignia of Native American Tribes.<sup>173</sup> The administrative agency was reluctant to recommend any substantive legal changes to the *Trademark Act*. The USPTO commented: "The Trademark Act already provides a basis to prohibit Federal registration of marks identical to the 'official insignia' of Native American tribes."<sup>174</sup> The agency can bar the registration of any mark that consists of or comprises matter which, with regard to persons, institutions, beliefs or national systems does any of the following: (1) disparages them; (2) falsely suggests a connection with them; (3) brings them into contempt; or (4) brings them into disrepute.<sup>175</sup> As such, the USPTO recommended that an accurate and comprehensive database containing the official insignia of all state and federally recognized Native American tribes should be created. Furthermore, it suggested that federal agencies work cooperatively to educate the public at large with respect to the rights surrounding official insignia of Native American tribes.

In 2001, the USPTO announced the establishment of a database to record the official insignia of federally and state-recognized Native American tribes. The scheme, though, was of limited legal effect. The Commissioner Todd Dickinson commented upon the legal significance of recordal:

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170. Chairperson of the Indian Arts and Crafts Board, Faith Roessel, "Senate Committee on Indian Affairs" (17 May 2000), online: <<http://www.doi.gov/iacb/pdf/iacbttestimony.pdf>>.

171. United States Patent and Trademark Office, *Public Hearings on Official Insignia of Native American Tribes* (1999), online: <<http://www.uspto.gov/web/offices/com/hearings/index.html#native>>.

172. *Who Owns Native Culture*, *supra* note 70 at 82.

173. United States Patent and Trademark Office, *Official Insignia of Native American Tribes: Statutorily Required Study* (Washington: Department of Commerce, 2000), online: <<http://www.uspto.gov/web/offices/com/sol/notices/insgstdy.pdf>>.

174. *Ibid.* at 34.

175. Section 2 (a) of the *Trademark Act*, 15 U.S.C. § 1052 (a) (1999).

The recordal of an official insignia of a Native American tribe at the USPTO will *not* be the equivalent of registering that insignia as a trademark .... Thus, including an insignia in the USPTO's database would not create any legal presumption of validity or priority, and none of the benefits of a trademark registration will accrue to a Native American tribe whose insignia may be recorded pursuant to this notice.<sup>176</sup>

The database of official insignia of Native American tribes will be used by the USPTO in the examination of certain applications for registration of information. This scheme provides an information function for administrative purposes, but does not provide new legal rights for Indigenous communities.

There remains ongoing conflict over trademark law and tribal insignia. The USPTO has revoked the registration of the name and the logo of the Washington Redskins football team after concluding that the term "redskins" was disparaging to Native Americans.<sup>177</sup> Furthermore, the USPTO has refused registration of the name Zia and the Zia sun symbol to a software company and a maker of cocktail mixes, citing a false association with the Zia Pueblo of New Mexico and possible disparagement of the tribe.<sup>178</sup> Strikingly, Seth Big Crow has invoked the Rosebud Sioux Tribal legal process to oppose the marketing of a malt liquor named after his grandfather Tasunke Witko, or Crazy Horse.<sup>179</sup> The matter is still being disputed in the courts.<sup>180</sup> The series of litigation indicates that there needs to be substantive legislative reform in the United States trademark law to protect tribal insignia—not merely changes to administrative practice.

### ***Sui Generis* Protection of Traditional Knowledge**

There has been much debate about the desirability and feasibility of an international treaty to provide *sui generis* protection of traditional knowledge in a number of international forums—including the World Trade Organization,<sup>181</sup> the World Intellectual Property Organization,<sup>182</sup> the United Nations Conference on

176. Todd Dickinson, "Establishment of a Database Containing the Official Insignia of Federally Recognized Native American Tribes" (2001) 66:6 Federal Register 1649 at 1650.

177. Suzanne Milchan, "Whose Rights are These Anyway? A Rethinking of our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property" (2003/2004) 28 American Indian L. Rev. 157.

178. *Who Owns Native Culture*, *supra* note 70 at 77.

179. Nell Jessup Newton, "Memory and Misrepresentation: Representing Crazy Horse in Tribal Court" in Bruce Ziff & Pratima Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick: Rutgers University Press, 1997) 195.

180. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F. 3d 1087 (8th Cir. 1998).

181. Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) 33:2 Case Western Reserve J. of International Law 233.

182. World Intellectual Property Organization, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge 1998-1999* (Geneva: World Intellectual Property Organization, April 2001), online: WIPO <<http://www.wipo.int/globalissues/tk/report/final/index.html>>; Terri Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions* (World Intellectual Property Organization, 2002), online: WIPO <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html#1>>.

Trade and Development, the Convention on Biological Diversity,<sup>183</sup> the United Nations Permanent Forum on Indigenous Issues<sup>184</sup> and the Food and Agriculture Organization.<sup>185</sup> A full discussion of the international debate over traditional knowledge is beyond the scope of this paper. Nonetheless, it is worthwhile looking at the debate in one forum, the United Nations Conference on Trade and Development. More specifically, it is useful to evaluate the international proposals regarding trademark law and traditional knowledge.

UNCTAD held an “Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations, and Practices” in 2000.<sup>186</sup> The Expert Meeting found that “national *sui generis* systems by themselves will not be sufficient to protect traditional knowledge adequately.”<sup>187</sup> It concluded: “There is therefore a need to explore an international mechanism that might explore minimum standards of an international *sui generis* system for traditional knowledge protection.”<sup>188</sup> The head of the Global Issues section at the World Intellectual Property Organization, Antony Taubman, has observed:

It is suggested, with deep respect, that what is needed is not an unworkable melange of homogenized customary law, but an effective framework that sets broad norms and standards in line with core IP principles, and allows functional vectors of customary law, linked to the subject matter of protection, to pass from the original jurisdiction to foreign jurisdictions.<sup>189</sup>

There are two important dimensions to the international protection of traditional knowledge. First, there is a need to articulate the general norms or overarching principles to guide or bind states in protecting traditional knowledge through national laws and policy measures. Second, there is a desire to explore the creation of technical legal mechanisms that would trigger enforceable rights over traditional knowledge in foreign jurisdictions.

UNCTAD held a workshop in 2004 to “identify a menu of actions and policies which could be included in holistic national systems for the preservation

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183. Kerry ten Kate & Sarah Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing* (London: Earthscan, 1999); and Henrietta Fourmile, “Indigenous Interest in Biological Resources in Commonwealth Areas: A Synthesis of Submissions and Related Information” in J. Voumard, ed., *Commonwealth Public Inquiry into Access to Biological Resources in Commonwealth Areas* (Canberra: Environment Australia, 2000) Appendix 10, online: Australian Government, Department of the Environment and Heritage <<http://www.ea.gov.au/biodiversity/science/access/inquiry/index.html>>.

184. Erica Irene Daes, *Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous People Final Report*, UN ESCOR, 47<sup>th</sup> Sess., UN Doc. E/CN.4/Sub.2/1995/26 (1995).

185. Greg Rose, “International Law of Sustainable Agriculture in the 21<sup>st</sup> Century: The International Treaty on Plant Genetic Resources for Food and Agriculture” (2003) 15 *Georgetown International Environmental L. Rev.* 583.

186. (Geneva, Switzerland, 30 October - 1 November 2000). Papers from the meeting are available online: <[http://www.unctad.org/trade\\_env/index.htm](http://www.unctad.org/trade_env/index.htm)>.

187. UNCTAD, *Outcome of the Expert Meeting*, UN Doc. TD/B/COM.1/EM.13/L.1 (9 November 2000) at 7.

188. *Ibid.*

189. Antony Taubman, “Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge” (ACIPA Seminar, Canberra, 7 August 2003).

protection and promotion of traditional knowledge, innovations and practices.”<sup>190</sup> In particular, it sought to develop a “practical guide for countries wishing to develop holistic national *sui generis* systems.”<sup>191</sup> UNCTAD canvassed a number of models for *sui generis* protection of traditional knowledge. It suggested that such schemes could emphasize issues of cultural preservation, misappropriation, intellectual property, development, informed consent and benefit sharing. UNCTAD also sought to “explore options for an international framework for the protection of Traditional Knowledge.”<sup>192</sup> It canvassed a number of actions that could be taken in international forums—such as the World Trade Organization, the World Intellectual Property Organization, the Convention on Biological Diversity, and the Food and Agriculture Organization.

In a paper commissioned by UNCTAD, Peter Drahos maintains that an international treaty on traditional knowledge should encourage the use of trademarks and certification marks by Indigenous communities.<sup>193</sup> He observes: “One of the significant contributions that a treaty might make is to help develop an approach to a system of certification that could be used by [I]ndigenous groups around the world for the marketing of their products.”<sup>194</sup>

Drahos draws a comparison between the Australian Indigenous authenticity label and the international Fairtrade label established by the Fairtrade Labelling Organizations International (“FLO”). He comments: “The fair trade label example shows that labels linked to trade and development issues can become global brands if they are part of an overall commercial strategy in international markets.”<sup>195</sup> Drahos draws the following conclusion from the comparison of the authenticity mark and the Fairtrade label:

One preliminary conclusion that could be drawn is that it pays to think big. In a world of increasing trade, trademarks can work large-scale effects in wealthy consumer markets. In the case of FLO, these large-scale effects have been won through an extended period of co-ordination amongst the National Initiatives, the individual country organizations that make up FLO. Labelling initiatives that are poorly financed, that do not look to global markets and are isolated are likely, as in the case of the authenticity mark in Australia, to fail. Crucial also is the idea that producers should unite around a few or, as FLO plans, one highly visible certification mark.<sup>196</sup>

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190. United Nations Conference on Trade and Development, “Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework” (UNCTAD-Commonwealth Secretariat Workshop, Geneva, Switzerland, 4-6 February 2004), online: <[http://r0.unctad.org/trade\\_env/TK2.htm](http://r0.unctad.org/trade_env/TK2.htm)>.

191. *Ibid.*

192. *Ibid.*

193. Peter Drahos, “Towards an International Framework for the Protection of Traditional Group Knowledge and Practice” (UNCTAD-Commonwealth Secretariat Workshop, Geneva, Switzerland, 4-6 February 2004) [hereinafter “Protection of Traditional Group Knowledge”].

194. *Ibid.* at 32.

195. *Ibid.* at 33.

196. *Ibid.*

There are certainly advantages to Indigenous communities that develop a global brand. In Australia, for instance, “well-known” trademarks receive special protection.<sup>197</sup> However, there are also dangers involved in establishing a single, international sign of Indigenous identity. The authenticity marks scheme in Australia shows the difficulties of imposing a single, unitary, national mark upon multiple Indigenous communities within a single nation. There would inevitably be even greater tensions involved in a global brand that represents multiple Indigenous nations and communities. Thus, the experience of the authenticity marks scheme does not necessarily lend support to the conclusion of Drahos that there needs to be a global Indigenous brand or mark like the Fairtrade label.

Drahos argues that the members of a treaty on traditional knowledge should draw on the experience of the Fairtrade label and use the treaty as a means of developing a coordinated approach to labelling and certification. He maintains that Indigenous groups will need substantial assistance in administering such trademark systems:

Indigenous groups need more than just assistance with matters relating to the registration of marks .... Simply offering [I]ndigenous groups some assistance with registration and the payment of trade mark fees is more likely to produce failures along the lines of the Australian authenticity label than success stories like the fairtrade label. Governments should explore the role that they can play in creating an infrastructure that allows for the creation of some small group of highly visible certification marks for the benefit of [I]ndigenous groups.<sup>198</sup>

This point is a good one. The authenticity marks scheme shows the difficulties involved in administering a certification trademark scheme at a national level. The NIAAA failed in part for want of proper supervision and assistance. An effective certification trademark scheme will need significant government support and legal expertise.

Drahos goes on to enumerate the essential features of an international treaty on traditional knowledge.<sup>199</sup> He is hopeful that an international treaty for traditional knowledge will evolve over time:

There are many examples of treaties that begin as “vague and platitudinous” and end up as highly specific and with an enforcement regime. The Paris and Berne Conventions each represent a 100 or so years of intensive state negotiations and in essence started life as little more than framework agreements.<sup>200</sup>

Drahos observes that a practical approach should be taken to definitional issues surrounding traditional knowledge: “The time is probably right for a simple, open-ended and pragmatic approach to be taken.”<sup>201</sup> He suggests that an inclusive list be developed to encompass the diverse range of traditional knowledge of

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197. S. 120 (3) of the *Trade Marks Act 1995* (Cth).

198. “Protection of Traditional Group Knowledge”, *supra* note 193 at 33.

199. *Ibid.* at 30-42.

200. *Ibid.* at 24.

201. *Ibid.* at 31.



Indigenous groups, and maintains that an international treaty must recognize the linkage between cultural knowledge and land. He observes: "It is of crucial importance that the treaty contains a robust mechanism for tracking the link between traditional group knowledge and practice and territory."<sup>202</sup> Drahos believes that an international instrument should seek to encourage protocols on customary use in the short term and the recognition of customary law in the long term. He maintains that a treaty should address such issues as labelling, cultural knowledge and access to genetic resources. Drahos calls for greater capacity building and the establishment of a global bio-collecting society.<sup>203</sup> He emphasizes that it is imperative that a treaty has an international enforcement mechanism.

### Summary

The progress on the development of an international regime has been slow. There has, nonetheless, been a number of innovative developments in trademark law and traditional knowledge. In New Zealand, a successful Indigenous certification mark—the Toi Iho mark—has been established. The new *Trademark Act 2002* (NZ) reinforces the scheme by providing that a ground for refusing registration of a trademark is that it would be likely to offend a significant section of the community, including Māori people. In Canada, there has been a long-standing Igloo Tag Trademark program. Furthermore, the Snuneymuxw First Nation of Canada has been able to secure protection of petroglyph images under provisions in the Canadian *Trade-marks Act* dealing with official insignia. By contrast, there has been comparatively little progress in the United States. The USPTO held hearings into the protection of Indigenous designs and emblems. However, it has only been willing to introduce administrative changes to the practice of the USPTO. There is a lack of commitment in the United States to introduce comprehensive legislative reforms. At an international level, there has been much debate about the development of a treaty on traditional knowledge in a variety of forums. In work for UNCTAD, Peter Drahos contends that there should be a single global Indigenous trademark—much like the Fairtrade label. Arguably, though, an international treaty for traditional knowledge should not be so prescriptive, but should allow for a range of Indigenous certification trademarks to flourish. The development of a *sui generis* regime of protection for traditional knowledge remains a desirable goal to work towards.

## V CONCLUSION

In Australia, Indigenous communities have enjoyed some success in legal actions with respect to traditional knowledge. Most notably, the Federal Court has

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202. *Ibid.* at 31.

203. Peter Drahos, "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?" (2000) 22:6 *European Intellectual Property Rev.* 245.

recognized a limited form of Indigenous communal ownership of economic rights in copyright works in certain circumstances. The introduction of *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth) may also provide redress for Indigenous communities in respect of breaches of the right of attribution and the right of integrity. The potential of this regime is highlighted by a successful action by a group of Indigenous artists against the International Olympic Committee for breach of moral rights under Swiss law. Moreover, there is scope for the use of the *Trade Practices Act 1974* (Cth) to combat fake Indigenous art—as illustrated by the recent action taken against Australian Icon Products Pty Ltd. Nonetheless, there remain limitations on the use of copyright law and consumer protection laws in protecting traditional knowledge. Problems that still need to be dealt with include communal ownership, material form, the protection of artistic styles and the duration of the protection. There are also significant practical difficulties in Indigenous communities obtaining access to justice—without help from case lawyers, advocacy organizations and regulators.

An Indigenous certification trademark system was set up in Australia in part to overcome some of the problems associated with copyright law and consumer protection law. However, it failed to realize such ambitions because of practical and symbolic problems with the scheme. There are a number of salutary lessons to be drawn from the experience. The authenticity marks regime was flawed in its initial conception because it was too narrowly focused on regulating art and craft products for the tourist market. There was no oversight of the quality of the products that were seeking accreditation. The definition of “authenticity” was based on a specious idea of “pan-Aboriginality” and there was a failure to recognize the regional diversity of Aboriginal and Torres Strait Islander communities. As a result, the NIAAA failed to win the support of stakeholders such as creative artists, Indigenous communities and regional art centres. Furthermore, the practical impact of the authenticity marks scheme was overestimated. The certification trademarks provided only limited protection against the forgery of Indigenous art. It will be difficult to salvage the authenticity marks. Nonetheless, there is still scope for the strategic use of trademarks in Australia. The development of certification marks for regional centres—such as the certification mark established by Desart, a regional arts advocacy group—might help empower local communities.

At an international level, there are a number of models for the protection of Indigenous icons and insignia. In New Zealand, the success of Māori-made marks demonstrates that it is possible for certification trademarks to work properly. In Canada, too, there is a long-standing Igloo Tag Trademark Program. However, there are a number of important conditions to ensure the success of such an Indigenous certification mark. There is a need for Indigenous artists and communities to be well represented by a stable and well-funded advocacy organization. There is also a demand for funding agencies to supervise and monitor the operation of such projects. The government needs to show greater commitment and responsibility to ensure the viability of such policy projects and retain control over the administration of a scheme such as the authenticity marks

program in its initial phases. In the long term, there is a need for a *sui generis* regime to protect Indigenous cultural property.<sup>204</sup> An international treaty could help define the essential features of such a *sui generis* regime. An Indigenous certification trademark scheme should be an integral element of such a treaty.

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204. *Our Culture*, *supra* note 1.