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## Four Stories about Copyright Law and Appropriation Art

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*This article considers copyright law and the art of appropriation in an Australian context. It tells four stories about Australian artists – Imants Tillers, Gordon Bennett, Juan Davila and Tracey Moffatt. The stories examine the postmodern critique of copyright law, indigenous copyright and self-determination, the introduction of moral rights, and copyright, photography and film. The article concludes that the work of such contemporary artists has practical implications for the reform of copyright law.*

## Introduction

The art of appropriation is the process whereby artists borrow images from other sources, and incorporate them into new work to comment critically upon the original work and the political and economic system that created it. At its most extreme, it consists of the wholesale copying of an image from a single source, while in other contexts, it involves appropriating only part of a work, or simulating the “signature” style.<sup>1</sup> The art of appropriation involves the transgression of the rules of copyright law. An artist will infringe the economic rights of the owner of an original work if he or she uses or reproduces a substantial part of that work without the owner’s permission. After the passage of a moral rights Bill through federal Parliament, artists will in future also infringe the moral rights of the author of an original work when they fail to attribute the author, or harm the integrity of a work.<sup>2</sup> However, while a large number of artistic works have employed strategies of appropriation, only a few have provoked legal

action.<sup>3</sup> The vast majority of works circulated within the art world are not likely to attract this type of attention. The actions brought for copyright infringement are few because it is futile to pursue costly and time-consuming litigation given the meagre earnings of artists. It appears that artists only face legal actions once they have gained sufficient stature or notoriety to appeal to a broader audience. Even then, most cases are settled out of court before a decision is handed down by a judge.

Sceptics deny that contemporary artistic practices should have any necessary practical impact upon copyright law.<sup>4</sup> They assert that appropriation art is designed, not so much to reform the law, as to implicate the viewer in the artist’s critical gesture. Peter Anderson claims that copyright law is a creature of government regulation: “The goal of the law may not be to somehow ‘reflect’ the truth of art, rather, its purpose is to manage the cultural field.”<sup>5</sup> He invests the courts with the special responsibility of defending

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<sup>1</sup> Anderson, “On the Legal Limits of Art” [1994] *Arts And Entertainment Law Review* 70 at 72.

<sup>2</sup> Australian Government, *Proposed Moral Rights Legislation For Copyright Creators: Discussion Paper* (The Attorney-General’s Department, Canberra, 1994).

<sup>3</sup> In respect of the American situation, see Buskirk, “Commodification as Censor: Copyrights and Fair Use” (1992) 60 *October* 83 at 107.

<sup>4</sup> Saunders, *Legal Decisions and Cultural Theory* (Institute for Cultural Policy Studies, Griffith University 1989); Anderson, *op cit* n 1; and Sherman, “Appropriating the Postmodern: Copyright and the Challenge of the New” (1995) 4 *Social and Legal Studies* 31 at 42.

<sup>5</sup> Anderson, *ibid* at 74.

private property rights and individual autonomy. He assumes that the role of law is to regulate and resolve conflict between the private interest of owners in obtaining a reward, and the public interest of users in gaining access to information. This approach is a useful descriptive aid because it identifies the role of the government and the courts in law reform and clarifies the interests at stake. However, it is an unreliable guide as to how the law should manage the cultural field, because it is based upon a fundamental misunderstanding of artists and the work that they produce.

The major difficulty with this approach is that it denies creative artists a speaking position on copyright law. In effect it belittles and devalues their views and insights about the law. Peter Anderson takes the paternalistic attitude that only legal actors know what is best for creative artists, and therefore they should be the ones driving copyright law reform. The problem is that legal actors have not always had the best interests of creative artists at heart. Instead of encouraging creativity and promoting creative output, the federal government has sought to stimulate the commercial exploitation of that creative output.<sup>6</sup> It has increased copyright protection to facilitate the investment in technologies of mass dissemination. It has sought to protect the commercial interests of publishers, broadcasters, entertainment conglomerates, and telecommunications carriers. The courts, too, have mainly adjudicated between commercial interests. Few cases fall within the domain of culture. The majority of legal actions are mercantile in character. The danger is that copyright law reform will be driven by economic concerns of trade and competition, rather than by any understanding of art and culture. There is a need to take notice of the views and opinions of creative artists about how they are affected by copyright law.

A related problem with this view is that it fails to appreciate the range and diversity of contemporary artistic practice. There has been a tendency to rely upon American examples in the discussion of copyright law and appropriation art, such as in the

controversies over the work of Jeff Koons, 2 Live Crew, *Negativland*, and Sherrie Levine.<sup>7</sup> However, it would be unwise to extrapolate from the experience of the United States to Australia. Not only do legal precedents differ, but there are divergences in culture. In America, appropriation artists have been concerned about the death of the author, and the mechanical reproduction of original work.<sup>8</sup> However, the practice of appropriation has been different in Australia. It has been transformed by its new uses, its new position in a different time and place.<sup>9</sup> In Australia, appropriation artists have confronted the legacies of the nation's colonial past. They have addressed in different ways the cultural dislocation and displacement brought about by the historical experience of colonisation and the migration of peoples. "It is doubtful that any global and universal theory of cultural appropriation will be satisfactory", warns Jonathan Hart. "In speaking of cultural appropriation, we must complicate the debate with specific examples and with history and then proceed with some caution."<sup>10</sup>

This article provides a critique of copyright law using the methods and insights of legal storytelling. This type of critical legal scholarship poses a radical challenge to established ways of thinking and writing about the law.<sup>11</sup> It emphasises the importance of narrative in legal analysis, that is, the stories told and untold in law, rather than its abstract

<sup>6</sup> MacMillan, "Copyright and Culture: A Perspective on Corporate Power" (1998) 3 *Media And Arts Law Review* 71 at 74.

<sup>7</sup> *Rogers v Koons* 960 F 2d 301 (1992); *Luther R Campbell, aka Luke Skywalker v Acuff-Rose Music, Inc* 127 L Ed 2d 500 (1994); and *Negativland. Fair Use: The Story of the Letter U and the Number 2* (Seeland, Concord, 1995).

<sup>8</sup> McAuliffe, "Interview with Gordon Bennett", in Butler (ed), *What is Appropriation? An Anthology of Critical Writings on Australian Art in the '80s and '90s* (Power Publications, Sydney, 1996), p 277.

<sup>9</sup> Said, "Travelling Theory" in *The World, the Text, and the Critic* (Vintage, London, 1984), p 226.

<sup>10</sup> Hart, "Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies", in Ziff and Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, New Brunswick (NJ), 1997), p 141.

<sup>11</sup> Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 *Michigan Law Review* 2411; Abrams, "Hearing The Call of Stories" (1991) 79 *California Law Review* 971; Farber and Sherry, "Telling Stories Out of School: An Essay on Legal Narratives" (1993) 45 *Stanford Law Review* 807; and Sarma, "Storytelling and the Law: A Case Study of *Louth v Diprose*" (1994) 19 *Melbourne University Law Review* 701.

rules and principles. Legal storytellers insist that judges and other legal decision-makers tell "stock stories", which reinforce the dominant discourse. They claim that such legal narratives serve to exclude, silence and oppress outsiders, particularly those who are not part of the dominant culture, particularly people of colour, women and the poor. Legal storytellers argue that the telling of "counter-stories" by outsiders is a means of challenging dominant legal stories and questioning their underlying presumptions and received wisdoms. They hope that such storytelling will help transform the legal system so that is more inclusive and responsive to the needs of outsider groups.

This article considers copyright law and the art of appropriation in the context of Australian visual arts in the 1980's and 1990's and seeks to counter the exclusion of artists from public discourse by telling narratives about their work. The article contains a collection of four stories and examines the artistic and critical exchange between several Australian artists over cultural appropriation. The first chronicle about Imants Tillers considers the postmodern critique of copyright law. The second story about Gordon Bennett investigates indigenous intellectual property and self-determination. The third narrative about Juan Davila is critical of the introduction of moral rights. The fourth story about Tracey Moffatt considers copyright law, photography and film. The stories suggest that the art of appropriation has acquired specific meanings and particular histories in the context of Australian visual arts. It has generated a diverse range of responses to cultural dislocation and displacement in the wake of empire and the migration of peoples. In this context, the role of copyright should be to promote genuine reconciliation between indigenous and non-indigenous people.

### **Part 1. "Mammon or Millennial Eden": Imants Tillers**

Postmodernism is a cultural phenomenon that has arisen out of a crisis within modernism.<sup>12</sup> It is distinguished by its negation of authorship,

aggressively derivative style, and its criticism of consumer capitalism. The Latvian migrant, Imants Tillers, is a famous Australian postmodernist artist. "I have", he said, "inherited two cultural identities, but through this fact, ironically, I also belong fully to neither".<sup>13</sup> Imants Tillers is a cosmopolitan raider of art history. He appropriates images from a range of sources, including European art and indigenous culture. However, the *Copyright Act* 1968 (Cth) grants no explicit exemption in the case of works of parody or burlesque.<sup>14</sup> Postmodern work, such as that of Imants Tillers, risks copyright infringement if it reproduces a substantial part of another person's work without that person's permission.<sup>15</sup> The defence of fair dealing is only available in a limited range of circumstances, such as for the purpose of research or study, criticism or review, or the reporting of the news. The appropriation of copyright materials for the aim of parody or pastiche would not be regarded as fair use under present case law. Postmodern artists are exposed to the threat of injunctions restraining the exhibition and distribution of their work, and the award of damages for the infringement of copyright.

Imants Tillers is not blissfully unaware about the ethical problems that attend to the appropriation of indigenous culture and heritage. He recognises that contemporary Australian art is marked by two convergent tendencies: the assimilation of "traditional" Aboriginal cultural forms into "contemporary art" and the emergence of "Aboriginality" as a ubiquitous quality which is no longer the exclusive domain of "black" Aborigines.<sup>16</sup> Imants Tillers makes the sound point that social justice must be achieved for indigenous people before any viable cultural reconciliation can take place:

"The reluctance for a more explicit identification with the Aborigines, for an authentic 'cultural convergence' can in part be explained by the

<sup>12</sup> Jameson, "Postmodernism and Consumer Society" in Foster (ed), *Postmodern Culture* (Pluto Press, London, 1983), p 111.

<sup>13</sup> Tillers, *Diaspora* (Museum of Contemporary Art, Sydney, 1993), p 36.

<sup>14</sup> *AGL Sydney Ltd v Shortland County Council* (1989) 17 IPR 99 at 105.

<sup>15</sup> Wood, "Copyright Law and Postmodern Artistic Practice: Paradox and Difference" (1996) 1 *Media And Arts Law Review* 72 at 79.

<sup>16</sup> Tillers, "Locality Fails" in Butler (ed), op cit n 8, p 139.

deep guilt underlying Australian culture, for the history of white settlement in Australia in relation to the Aborigines is a story of homicide, rape, the forcible abduction of children from their parents and the methodical dispossession of the lands upon which their well-being, self-respect and survival have depended. 'Cultural convergence' is an attractive idea because it offers a painless way to expiate our collective guilt of this history while simultaneously suggesting an easy solution to the more mundane but nevertheless pressing problem of finding a uniquely Australian content for our art in an international climate sympathetic to the notion of "regional" art. The reality of "cultural convergence" which necessitates that political and economic inequities be rectified first is a less satisfying prospect."<sup>17</sup>

It is a shame that the artist is not as sensitive to such power relations in his own work. Instead of trying to develop an authentic national tradition based on the physical environment, Imants Tillers argues that his experience of Australia is mediated by images. He feels at liberty to appropriate international imagery, as well as white and Aboriginal Australian culture, to invent a national identity. In the vision of Imants Tillers, indigenous culture is anachronistic:

"A country like Australia today is primarily an amalgamation of different diasporas from around the world – the Irish, the Jewish, the Anglo-Saxon, Greek, Italian, Chinese, Vietnamese, etc. The Latvians are just a part of that".<sup>18</sup>

He consigns Aboriginal people to being lost vagrants in terra nullius.<sup>19</sup>

In 1984, Michael Jagamara Nelson painted his signature work, *Five Stories*, in the bold iconographic style of Papunya painters like Clifford Possum Tjapaltjarri. He fused together an array of Dreaming sites and journeys into one coherent overall image. Imants Tillers was moved by the sight of the painting, *Five Stories*, to quote sections

of it in a painting that he called *The Nine Shots*.<sup>20</sup> He would be liable for copyright infringement given that he reproduced a substantial part of the painting by Michael Jagamara Nelson. Forty-five of the 91 panels of the new work had traces of the original painting. Significant features of the composition were also the same, such as the position of a snake and several roundels. Imants Tillers presented his work as a comment on contemporary art practice in Australia, his contention being that Australian artists typically copied what they saw in international art magazines, but without ever acknowledging their source materials. He told Vivien Johnson what he would have said to Michael Jagamara Nelson by way of explanation:

"I acted on an intuition, a feeling that I can't fully explain now, that elements of these two images – parts of your *Five Stories* and parts of Georg Baselitz's *Forward Wind*, 1966 needed to be brought into contact with each other and that I was to be the catalyst for their meeting. My impulse at this moment in 1985 before your work was internationally famous and before Aboriginal art had become the mainstream of contemporary Australian art, was to elevate you and your images and thus an aspect of contemporary Australian art to a comparable status to that of Georg Baselitz who was at that time Germany's leading contemporary artist and one of the stars of the international art world. In this way I hoped to defeat 'provincialism' and to subvert the international art centres' domination over the peripheries, the margins of world culture by showing them that your art and the art of the Indigenous Australians was more than a match for the best that the rest of the world had to offer."<sup>21</sup>

Michael Jagamara Nelson was puzzled by the reasoning that appropriation was a legitimate technique in postmodern art. The idea of art as cultural critique was alien to Western Desert concepts of culturally affirmative art. Michael Jagamara Nelson was concerned about the propriety of *The Nine Shots* as a use of *Five Stories* imagery

<sup>17</sup> Ibid, p 140.

<sup>18</sup> Cumow, *Imants Tillers and 'The Book Of Power'* (Craftsman House, Sydney, 1998), p 126.

<sup>19</sup> McLean, *White Aborigines* (Cambridge University Press, Cambridge, 1998), p 117.

<sup>20</sup> Johnson, *Michael Jagamara Nelson* (Craftsman House, Sydney, 1997), pp 70-75.

<sup>21</sup> Ibid, p 71.

because he would be censured by his own community if his designs ended up in culturally inappropriate contexts. Under Aboriginal law, the artist is held responsible for the unauthorised reproduction of a story or imagery of a third party, even if the artist had no control over or knowledge of what occurred.<sup>22</sup> If the art work was misused, the traditional owners may have censured the painter by stopping him from painting, excluding him from the community, and seeking recompense. In the end, Michael Jagamara Nelson gave his qualified consent to *Nine Shots* as an act of cultural exchange between black and white artists. He told Imants Tillers that it was "all right" this time but warned him against getting carried away.<sup>23</sup> However, there has been a deep disquiet about the appropriation of this image among Aboriginal communities.

Imants Tillers went on to use imagery appropriated from the Michael Jagamara Nelson painting which was chosen for the Parliament House mosaic in his design for the tiled interior of a new Federation Pavilion constructed in Sydney's Centennial Park. The Federation Pavilion carried a bombastic inscription, "Mammon or Millennial Eden?", taken from Bernard O'Dowd's poem, *Australia*. Imants Tillers copied Georg Baselitz's "The Poet". This action indicates that the work is European in inspiration and linked to the white Australian's view of the colonisation of Aboriginal territory. Imants Tillers also reproduced Michael Jagamara Nelson's mosaic design because it fulfilled certain requirements of the mythology of nation: antiquity, spirituality, continuity, an expression of myths of creation and origin.<sup>24</sup> His appropriation was controversial given that the Federal Pavilion was unveiled in 1988, the year of the bicentennial celebrations held by the Australian state.<sup>25</sup> Imants Tillers knows that it is a monument to white culture in Australia – 1901 would only be celebrated by white people. But he felt that his responsibilities lay with his client, the state. Fiona

Nicholl considered the state's deployment of Aboriginal art in relation to the political process of reconciliation.<sup>26</sup> She discussed the government agenda in terms of a tension between "reconciliation with", defined as "harmonizing", "healing" or "making friendly after estrangement", and "reconciliation to" – as in rendering another "resigned or contentedly submissive".<sup>27</sup> Public policy emphasised the reconciliation of indigenous people to the cultural and economic prerogatives of non-Aboriginal Australia.

Postmodern sceptics contend that questions of cultural appropriation are not legal issues to be addressing in terms of asserting rights, but ethical ones to be addressed in moral and political communities.<sup>28</sup> For instance, Lisa-Jane Wood argues:

"Tillers' entitlement to appropriate forms of Aboriginal art is a social and ethical rather than a legal inquiry and the question itself is premised to some degree upon the notion that Aboriginal art is itself intrinsically opposed to post-modern practice by being 'truly creative' and thus in need of protection from the world 'taint' of post-modernism."<sup>29</sup>

However, she fails to recognise that there is no consensus or agreement in the artistic community as to what ethical standards and norms should govern appropriation. In any case, it is wishful thinking to believe that voluntary codes of ethics alone can protect indigenous art if they are not legally binding. The lack of supporting mechanisms for investigation and enforcement would make it difficult to ensure compliance. There would be little redress against amoral states, corporations or

<sup>22</sup> *Milpurrruru v Indofurn Pty Ltd* (1994) 30 IPR 209 at 214-215.

<sup>23</sup> Johnson, op cit n 20, p 73.

<sup>24</sup> Willis, *Illusions of Identity: The Art of Nation* (Hale and Iremonger, Sydney, 1993), p 123.

<sup>25</sup> Foss, "Mammon or Millennial Eden? Interview with Imants Tillers" (1988) 23/24 *Art and Text* 124 at 138.

<sup>26</sup> Nicoll, "The Art of Reconciliation: Art, Aboriginality and the State" (1993) 52 (4) *Meanjin* 705 at 706.

<sup>27</sup> See also Reynolds's discussion of the ambivalence in the term "reconciliation": Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen and Unwin, Sydney, 1996), pp 183-184.

<sup>28</sup> Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Ziff and Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, New Brunswick (NJ), 1997), p 74.

<sup>29</sup> Wood, "Copyright Law and Postmodern Artistic Practice: Paradox and Difference" (1996) 1 *Media and Arts Law Review* 72 at 84.

individuals who would use indigenous art without any regard for the norms of political communities. Thus, legislative changes should underpin the development of ethical guidelines.

## Part 2. "Myth of the Western Man": Gordon Bennett

Indigenous people are concerned about the appropriation of indigenous arts and cultural expression by the state and the market for the purposes of nation-building and commercial profit.<sup>30</sup> However, there are difficulties protecting indigenous cultural works under Australian copyright law. In particular, there are problems with collective ownership, the requirement of material form, and duration of rights. In response, the courts and legislators have sought to recognise the rights of "traditional" indigenous people to control the use and reproduction of indigenous designs.<sup>31</sup> There is a debate about whether any legislative reforms should extend to "urban" indigenous artists.<sup>32</sup> Such artists occupy a doubly marginal position:

"On the one hand, they suffer the social and economic deprivation associated with their Aboriginality, while on the other they are stigmatised for not being 'real' or 'authentic' Aboriginal artists."<sup>33</sup>

Gordon Bennett is an "urban" Aboriginal artist who borrows from both European and traditional

indigenous sources. He uses the devices of postmodernism, such as appropriation, quotation, allusion, and montage. His work raises three legal issues about the art of appropriation. First, is it lawful for an artist to draw on historical materials in the creation of a new work? Secondly, is it acceptable for an artist to borrow from a postmodern work, which itself infringes other copyright work? Thirdly, is it permissible for an "urban" indigenous artist to copy "traditional" indigenous art?

Gordon Bennett's work is located within the specific histories of Aboriginal and European ethnic relations within Australia, and questions the prevailing accounts of these histories. He hopes to show the constructed nature of history and of identification as arbitrary, not fixed or natural, but open to new possibilities of meaning and of identification. In a manifesto, Gordon Bennett states his artistic credos:

"I use post-modern strategies of quotation and appropriation to produce what I have called, as an ironic strategy, 'history' paintings. I draw on the iconographical paradigm of Australian, and by extension European, art in a way that could constitute a kind of 'ethnographic' investigation of a Euro-Australian system of representation in general, but which has focused on the representation of Aboriginal people in particular. By recontextualising images, or fragments of images, in particular relationships I hope to create a turbulence in the complacent sense of identification with pop history, and create a kind of chaos of identification where new possibilities for signification in representation can arise; in this way new relationships to others may be forged by the insights gained from the understanding and perception of 'flux' and 'nuance' that exist between any hard-and-fast definitions of identification."<sup>34</sup>

For instance, in the painting, *Myth Of The Western Man (White Man's Burden)*, Gordon Bennett depicts Captain Ahab struggling to drive a harpoon into Moby Dick. He uses a web of Jackson Pollock's style of painting on which are stamped the

<sup>30</sup> Janke, *Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* (Australian Institute of Aboriginal and Torres Strait Islander Studies, Sydney, 1997), p 27.

<sup>31</sup> This can be seen in a series of copyright cases: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Foster v Mountford* (1976) 29 FLR 233; *Bulun Bulun v Nejlum Pty Ltd* (unreported, Federal Court, NT, 1989); *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurrruru v Indofurn Pty Ltd* (1994) 30 IPR 209; and *Thomas v Brown* (1997) 37 IPR 207. It is also evident in the inquiries into indigenous cultural and intellectual property, most notably the *Stopping the Ripoffs Issues Paper* (1994) and the *Our Culture, Our Future* project (1997).

<sup>32</sup> The terms "traditional" and "urban" indigenous people are used with quotations because such classifications have been based upon notions of authenticity in the white community.

<sup>33</sup> Gray, "Black Enough? Urban and Non-traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art" (1996) 7 (3) *Culture And Policy* 29 at 39.

<sup>34</sup> McLean and Bennett, *The Art of Gordon Bennett* (Craftsman House, Sydney, 1996), pp 42-43.

dates of historical events relating to the atrocities perpetrated against Aboriginal people. Gordon Bennett alludes to the American novel, *Moby Dick*, because the story refers to the history of race relations, with reference to the onslaught of imperialism, the murder of indigenous people, and the institution of slavery.<sup>35</sup> His visual translation of *Moby Dick* is legally acceptable, because the copyright in the literary work has expired, and the work is in the public domain. In offering a pastiche of Jackson Pollock, Gordon Bennett comments upon how the artistic hero of modernism appropriated the formal characteristics of Navaho sand paintings without any concern for their social or political context.<sup>36</sup> It is unlikely that the appropriation of general design features and artistic styles would infringe the copyright in Jackson Pollock's work, because protection is given for the form of expression of ideas rather than for ideas. Most of the events gleaned by the artist about the persecution of Aboriginal people were drawn from the work, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788* by Bruce Elder.<sup>37</sup> The use of historical sources is permissible under copyright law, so long as the exact arrangement is not taken.<sup>38</sup>

Gordon Bennett is ambivalent about postmodernism, at once using its techniques of pastiche and parody, while criticising its tendencies towards colonialism.<sup>39</sup> He has been construed as a

counter-appropriator, taking on and outwitting High Art tricksters at their own game.<sup>40</sup> This practice raises complications for copyright law – is it permissible to copy a work that itself is a reproduction of another work? As Ricketson notes, this question is a matter of some importance, particularly in the age of postmodernism.<sup>41</sup> Recent case law indicates that a work can be an original work in which copyright will subsist, even though it itself is an infringement of the copyright in an earlier work.<sup>42</sup>

In his painting, *The Nine Ricochets (Fall Down Black Fella, Jump Up White Fella)*, Gordon Bennett offers a rejoinder to Imants Tillers's *Pataphysical Man* and *The Nine Shots*, which, as has been discussed, appropriated paintings both by George Baselitz and Michael Jagamara Nelson.<sup>43</sup> He comments that appropriation of indigenous art is a type of colonisation; and that the reappropriation of European art and illustration is a form of empowerment. Similarly, in *The Recentered Self*, Gordon Bennett enters into a dialogue with Imants Tillers's *The Decentered Self*. He insists that the individual self should not be reduced to a function of discourse, but must be situated within a cultural and historical context.<sup>44</sup> Gordon Bennett is critical of Imants Tillers's textual version of postmodernism, because it suffers from historical amnesia. The eclectic mix of styles deprives the work of specific context and historical sense. Imants Tillers fails to reach out beyond the formal boundaries of the work, and evoke the cultural forces from which it emerged. Gordon Bennett seeks to resist this ahistorical tendency of postmodernism. His approach to quotation is to select images from European and Australian history that have accumulated certain meanings over time,

<sup>35</sup> Melville, *Moby Dick* (Penguin Books, New York, 1988).

<sup>36</sup> Hoorn, "Positioning the Post-colonial Subject: History and Memory in the Art of Gordon Bennett" (1993) 31 (2) *Art And Australia* 216 at 224.

<sup>37</sup> Elder, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788* (Child and Associates, Sydney, 1988).

<sup>38</sup> In Australia, this issue has been raised in controversies over plagiarism by Thomas Keneally and Helen Darville: Pierce, *Australian Melodramas: Thomas Keneally's Fiction* (University of Queensland Press, Brisbane, 1995) and Jost, Totaro, and Tyshing, *The Demidenko File* (Penguin Books, Sydney, 1996). In England, this matter was considered in *Harman Pictures NV v Osborne* [1967] 1 WLR 723; and *Ravenscroft v Herbery and New English Library Ltd* [1980] RPC 193. In the United States, this matter was considered in *Salinger v Random House* 811 F 2d (1987).

<sup>39</sup> Michaels, "Postmodernism, Appropriation and Western Desert Acrylics" in Cramer (ed), *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery* (Institute of Modern Art, Brisbane, 1989), p 26.

<sup>40</sup> Johnson, "The Unbounded Biennale: Aboriginal Art Now" (1993) 31 (1) *Art and Australia* 49 at 50.

<sup>41</sup> Ricketson and Richardson, *Intellectual Property: Cases, Materials and Commentary* (2nd ed, Butterworths, Sydney, 1998), p 166.

<sup>42</sup> *A-One Accessory Imports Pty Ltd v Off Road Imports Pty Ltd* (1996) 34 IPR 306.

<sup>43</sup> Butler, "Two Readings of Gordon Bennett's *The Nine Ricochets*" (1992) 19 *Eyeline* 18.

<sup>44</sup> On the issue of discourse and subjectivity, see Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (Routledge, London and New York, 1994).



and place them in new relationships to other images.<sup>45</sup>

However, Gordon Bennett has also found it difficult to avoid the appropriation of "traditional" Aboriginal designs and images. He is thus open to the accusation that he is replicating the imperialist appropriation of the postmodern artists that he has intended to criticise. His defence against such charges has been twofold. First, Gordon Bennett argues that appropriation occurs when an artist steals a particular design or copyright.<sup>46</sup> He thus reasons that his use of the dots and roundels which characterise Western Desert Aboriginal painting does not amount to appropriation. However, this rationalisation is inadequate in my view. It would seem unjust to exploit the failure of copyright law to protect "traditional" Aboriginal designs and images. It also displays little respect for indigenous protocols about the ownership of their cultural heritage. Secondly, Gordon Bennett offers the rejoinder to such arguments that, even if he was guilty of appropriation, he should be exonerated or excused. For example, he admits to appropriating a Mimi spirit figure by a central Arnhem Land artist called Guningbal. After receiving criticism from the "traditional" owners of the design, Bennett visited Maningrida, and apologised for his appropriation. "I won't", he said in an interview with Bob Lindgard, "be appropriating any more Aboriginal images because I now more fully understand the situation".<sup>47</sup> Yet, he continued, "you have to understand my position of having no designs or images or stories on which to draw to assert my Aboriginality. In just three generations that heritage has been lost to me." After that interview, Gordon Bennett has since admitted this was a poor excuse.<sup>48</sup> His status as a dispossessed indigenous person did not justify his appropriation of Aboriginal art, and it misrepresented his own aesthetic aspirations.

The courts may be an inappropriate forum to hear and settle cultural disputes about indigenous people using "traditional" material without

community permission. Any such conflict would involve complex and competing considerations of artistic freedom, individual as against collective rights, and "Aboriginality" itself.<sup>49</sup> Stephen Gray contends that there is a need to recognise the rights of "urban" Aboriginal artists to use "traditional" designs in pursuit of their own artistic freedom of expression, as well as the possibility of receiving protection for their own sacred-secret designs.<sup>50</sup> By contrast, Terri Janke believes that the focus should be upon "traditional" arts and cultural expression.<sup>51</sup> She is concerned that "urban" indigenous people will borrow "traditional" styles from communities to which they do not belong. Even sympathetic judges would find it difficult to resolve such matters. It is preferable that cases of indigenous artists borrowing from "traditional" designs should be resolved within Aboriginal communities, rather than under adversarial systems of litigation. This process could make use of alternative methods of dispute resolution, such as mediation, conciliation, and facilitation.<sup>52</sup> Such strategies would be useful, especially with dealing with disputes between indigenous people, such as when Gordon Bennett used imagery that belonged to "traditional" communities. This model is consistent with political and cultural self-determination, because it recognises the right of indigenous people to own, control and manage various aspects of their cultural heritage.<sup>53</sup>

### Part 3. "Stupid as a Painter": Juan Davila

Postmodern art is often offensive to the social mores of the public – it is dissonant, grotesque, bohemian, and sexually shocking. It does not

<sup>45</sup> McLean and Bennett, op cit n 34, p 42.

<sup>46</sup> Ibid, p 87.

<sup>47</sup> Lingard, "A Kind of History Painting" (1989) 19 *Tension* 39 at 41.

<sup>48</sup> McLean and Bennett, op cit n 34, p 93.

<sup>49</sup> Gray, "Black Enough? Urban and Non-traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art" (1996) 7 (3) *Culture and Policy* 29 at 41.

<sup>50</sup> Gray, "Squatting in Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14 (2) *Law in Context* 29 at 42.

<sup>51</sup> Janke, *Our Culture, Our Future: Proposals For The Recognition And Protection Of Indigenous Cultural And Intellectual Property* (Australian Institute of Aboriginal and Torres Strait Islander Studies, Sydney, 1997), p 71.

<sup>52</sup> Ibid, p 73.

<sup>53</sup> Gray, op cit n 49, at 42.

communicate to its public in a purely passive state, but only by dint of encouraging and overcoming resistance. Juan Davila is one of Australia's leading painters and performance artists, outstanding in the generation which came to dominate our avant-garde art during the 1980s.<sup>54</sup> Chilean-born, he emigrated to Melbourne in 1974, just after the fall of Allende. His art follows the postmodern practice of suggesting meaning by assembling multiple quotations of previously made images, especially from other art and from commercial advertising. It is informed by a queer aesthetic, which challenges sexual archetypes and social mores.<sup>55</sup> His work raises a number of issues in copyright law. First, will the new moral rights regime be used to censor obscene, blasphemous and offensive art? Secondly, will the new scheme be sensitive to the needs and interests of indigenous people? Third, will the moral rights legislation impinge upon political discussion?

The introduction of a moral rights regime will give judges the power to censor works that they find offensive, indecent or distasteful because it amounts to derogatory treatment of the author's work. Once a law student, Juan Davila remains blasé about the threat of legal action. He prefers to transgress the boundaries of law, rather than respect its sanctions. In his infamous work, *Stupid as a Painter*, Juan Davila cites an ironic comment made by French Dadaist Marcel Duchamp to refute the myth of the artist as a romantic hero and genius.<sup>56</sup> The painting is based on the procedure of appropriation, mixing images from pornographic magazines, gay comics, and graffitied walls with quotations from artists such as Andy Warhol, Roy Lichtenstein and Robert Mapplethorpe, and writers like Manuel Puig, the author of *The Kiss of the Spider Woman*. On a series of panels, a figure concocted from these elements masturbated, until in the last panel, a super stud made it with Wonder Woman. Juan Davila is a provocateur and an exhibitionist who courts public

fame and sensation, much in the same manner as his contemporaries Jeff Koons and Andres Serrano. The public discussion about *Stupid as a Painter* was predictably, "Is it art or is it pornography?". Complaints by religious groups, such as the Festival of Light, led to the Vice Squad of the police force to raid the Art Gallery of New South Wales and seize the painting on the suspicion that it was a work of pornography. It was difficult, though, to decide whether the work of Juan Davila is obscene or about obscenity. However, Premier Neville Wran intervened, and the painting was released for public viewing at other galleries. The *Discussion Paper on Moral Rights* cited Juan Davila as one of the artists who would benefit from the introduction of a moral rights regime into copyright law.<sup>57</sup> It noted that the artist would have been able to protest when his painting *Stupid As A Painter* was originally exhibited in separate pieces, rather than as a single work. However, the *Discussion Paper On Moral Rights* fails to recognise there is a danger that his obscene parodies would be prejudicial to the reputation of the original authors, and infringe their moral right of integrity not to be subjected to derogatory treatment.

Given the transgressive nature of his own work, it is striking that Juan Davila is critical of his contemporaries who appropriate Aboriginal art work.<sup>58</sup> He maintains that the market, the museum and the state reward the management of the colonial issue only insofar as it contributes to the national story. Juan Davila argues that artists such as Imants Tillers speak inside the authority and prestige of a colonising tradition. He said that the appropriation of aboriginality shows a double orthodoxy. First it indulges in the game of quoting the plight of others, by re-enacting what used to be the optimism of the social sciences and their ideology of modernisation. Secondly, it shows quotation as theft in the "aboriginalisation" of white Australian painting, which repeats modernism's impulse to address itself to the primitive. Juan Davila comments:

<sup>54</sup> Davila, *Hysterical Tears* (Greenhouse Books, Melbourne, 1985) and Davila, *The Mutilated Pieta* (Art and Text Monograph, Sydney, 1985).

<sup>55</sup> Butler, "Duchamp's Queer Signature" (1996) 6 *Arena Journal* 109 at 114.

<sup>56</sup> Carroll, "A History of Moral Censorship and the Visual Arts in Australia" in Australian Centre For Contemporary Art, *Moral Censorship and the Visual Arts* (1989), p 8.

<sup>57</sup> Australian Government, *Proposed Moral Rights Legislation for Copyright Creators: Discussion Paper* (The Attorney-General's Department, Canberra, 1994), p 61.

<sup>58</sup> Davila, "Aboriginality: A Lugubrious Game?" (1987) 23 *Art and Text* 53 at 54.

"Painting, therefore, is no longer a scene that can propose anything. Its passive dealings with 'aboriginality' only continue a homogenous system and a fixed memory, only ignore the dual problem of national disintegration and multinational capital integration. We live a paradigm of modernisation, but this time round through the post-modern debate, which prevents any consideration of the means used to construct 'identity' or what we consider 'our own'."<sup>59</sup>

His comments reinforce that the appropriation of indigenous art cannot be examined in isolation, but must be considered in an international context. In the 1980s, United States corporations involved in the global trade of information successfully lobbied for the inclusion in GATT of a code on intellectual property, known as TRIPs.<sup>60</sup> However, the global system of intellectual property denied indigenous groups any return from or control over the exploitation of their folklore.<sup>61</sup> Furthermore, the implementation of international treaties in Australia has ignored the situation of indigenous people. The move to introduce moral rights and performers' rights has taken place without a consideration of the needs and interests of Aboriginal and Torres Strait Islanders.

There is also a danger that the proposed moral rights legislation could be used to stifle political and social criticism in the arts. Like Gordon Bennett, Juan Davila works in a postmodern manner, and appropriates historical signs to grotesquely humorous and political effects. It is arguable that such work could infringe moral rights even though it provides the social benefit of political communication and criticism. However, it is difficult at times to determine whether postmodern art is critical of materialist society or just complicit with social and economic life. In a feisty exchange, Juan Davila argues that Gordon Bennett's pictures

hang easily in the museum: "We just have a sum of differences translated into a market spectacle."<sup>62</sup> He is concerned that Gordon Bennett promotes aboriginality from the centre, and not just as a minority discourse. Juan Davila believes Gordon Bennett is just an abstract painter, his protests at colonial violence failing to exceed the Eurocentrism of his voice and the certitude of the state. His attack is revealing because his aesthetic and his political intentions are very similar to those of Gordon Bennett. His criticisms could rebound on his own highly commercial work. It is unlikely that the implied freedom of political communication could operate as a successful defence to a claim of copyright infringement.<sup>63</sup> First, the proposed moral rights regime might not be a burden on the freedom of communication, because a fine distinction is drawn between political speech and artistic expression.<sup>64</sup> Secondly, the moral rights legislation would in any event be seen as reasonably appropriate and adapted to serve a legitimate end – namely, protecting the reputation of artists, and the integrity of their work.<sup>65</sup>

Postmodern artists support users' interests in gaining access to, and use of, copyright materials at the lowest possible cost. This approach supports an open and accessible intellectual commons to encourage learning and education. It calls for a narrow initial coverage of property rights, and an expansive application of concepts of fair use and compulsory licensing to achieve this end. However, Juan Davila insists that there needs to be differential treatment accorded to indigenous culture. The postmodernist techniques of intertextuality, parody and borrowing may be radical when directed against the Western Canon.<sup>66</sup> However, the same techniques

<sup>59</sup> Ibid at 55.

<sup>60</sup> *The Agreement on Trade-Related Aspects of Intellectual Property Rights Contained in Annex 1C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (1994).

<sup>61</sup> The term "folklore" is contested. See Dawson, "The Law of Literature: Folklore and Law" in *Tall Stories?: Reading Law and Literature* (Dartmouth Publishing Company, Aldershot, 1996), p 245.

<sup>62</sup> McLean, "Gordon Bennett's Home Decor: The Joker in the Pack" (1998) 4 (1) *Law/Text/Culture* 287 at 299.

<sup>63</sup> Bannister, "It Ain't What you Say, It's the Way that you Say it: Could Freedom of Political Expression Operate as a Defence to Copyright Infringement in Australia?" (1996) 14 (1) *Copyright Reporter* 22.

<sup>64</sup> *Theophanous v Herald And Weekly Times Ltd* (1994) 182 CLR 104 at 122.

<sup>65</sup> *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 108.

<sup>66</sup> Brydon, "The White Inuit Speaks" in Ashcroft, Griffiths, and Tiffin (eds) *The Post-Colonial Studies Reader* (Routledge, London, 1995), p 140.

repeat the imperialist history of plunder and theft when directed against indigenous culture. One manifesto called the Bellagio Declaration seeks to reconcile the interests of artists in being able to draw upon the public domain, and the interests of indigenous people in protecting their culture:

"In general, we favor increased recognition and protection of the public domain. We call on the international community to expand the public domain through expansive application of concepts of 'fair use', compulsory licensing, and narrower initial coverage of property rights in the first place. But since existing author-focused regimes are blind to the interests of non-authorial producers as well as to the importance of the commons, the main exception to this expansion of the public domain should be in favor of those who have been excluded by the authorial biases of current law."<sup>67</sup>

There needs to be different treatment of indigenous and non-indigenous people in the realm of intellectual property.<sup>68</sup> Such special measures can be justified by the need to redress the historical wrongs and disadvantages suffered by indigenous people – such as the dispossession of land, the assimilation of indigenous people, and the cultural genocide resulting from the forced abduction of children from their parents.<sup>69</sup> Such an approach would reduce conflict and confrontation among indigenous and non-indigenous artists over the ownership of cultural heritage.

#### Part 4. "Something More": Tracey Moffatt

The idea that copyright law has nothing to do with gender is a male fantasy. Feminist literary

critics have emphasised that notions of authorship, creativity and ownership have long been bound up with ideas of masculinity and femininity.<sup>70</sup> The practices of parody and pastiche, too, have been used to challenge gender stereotypes. Tracey Moffatt is an independent photographer and filmmaker with an Aboriginal heritage. Her work involves reworking images and stories taken from popular culture and high art in order to imaginatively explore colonial, racial, and gender experiences. In taking over and duplicating images, Tracey Moffatt attempts to eradicate the exclusion of women from history and mythology. Rather than seeing copying as a negative condition, as a neurosis, she affirms that it is a positive source of agency.<sup>71</sup> Her work challenges copyright law in a number of respects. First, is authorship bound up with identity politics? Secondly, is copyright law appropriate for photography given that it was designed for a print culture? Thirdly, is copyright law capable of dealing with cinematography and other cross-art forms made possible by new digital technologies?

Tracey Moffatt's photographic series and films seem to hint at a political agenda – be it race, gender or class.<sup>72</sup> But whenever such elements appear, Moffatt muddies the attempt to read them straightforwardly. In 1992, Tracey Moffatt was drawn into an exchange of faxes and letters with curator Clare Williamson over her declining to be in a 1992 show *Who Do You Take Me For* featuring British and Australian black artists and mounted by the Brisbane Institute of Modern Art to tour nationally. She wrote forcefully about her desire not to be "ghettoised" as an Aboriginal artist:

<sup>67</sup> O'Keefe, "The Bellagio Declaration: Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-colonial Era" (1995) 4 (2) *International Journal of Cultural Property* 388.

<sup>68</sup> Lingard, "Appropriation of Aboriginal Imagery: Tim Johnson and Imant Tillers" in Cramer (ed), *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery* (Institute of Modern Art, Brisbane, 1989), pp 23-24; and Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen and Unwin, Sydney, 1996), pp 180-181.

<sup>69</sup> McDonald, *Protecting Indigenous Intellectual Property* (Australia Copyright Council, Sydney, 1997), p 53.

<sup>70</sup> Showalter, "Feminist Criticism In The Wilderness" in Lodge, *Modern Literary Criticism: A Reader* (Longman House, London and New York, 1988), p 330; Wright, "A Feminist Exploration of the Legal Protection of Art" (1994) 7 (1) *Canadian Journal of Women and the Law* 59; and Bowrey, "Copyright, The Paternity of Artistic Works, and the Challenge Posed by Postmodern Artists" (1994) 8 *Intellectual Property Journal* 285.

<sup>71</sup> For a discussion of feminism and mimicry, see Irigaray, *Speculum of the Other Woman* (Cornell University Press, New York, 1985), p 125.

<sup>72</sup> Smee, "Multiple Exposure", *The Sydney Morning Herald*, 9 May 1998, p 3.

"I have never been a mere social-issues type artist, in fact my work has never been BLACK. (If there is such a definition.) I have made a point of staying out of all black or 'other' shows (except once, years ago, when my work wasn't even well-known but even then I felt it was a step backwards in my career). I want to be exhibited in Contemporary Art Spaces and not necessarily always bunched together with other artists who make careers out of 'finding themselves – looking for their identities!' The reason why I have been successful is that I have avoided allowing myself to be ghettoised as a black artist."<sup>73</sup>

Tracey Moffatt is concerned that the ethnographic view of Aboriginal art that troubled artists like Michael Jagamara Nelson has returned to haunt artistic criticism. She wants her photographic narrative series and films to be seen as contemporary art. However, Tracey Moffatt could have been clearer in her criticism so as to dispel any controversy. Her comments have been misunderstood as advocating a deracinated identity, in which Aboriginal culture assumed no importance. In fact, Tracey Moffatt steers a difficult middle course. Her flirtation with different styles, her love of all the most volatile forms of the human imagination – infatuation, wit, whim and desire – stand as a corrective not only to straitened ideologues, but also to the more conservative arbiters of taste, who refuse to see beyond the supposedly timeless values of art.<sup>74</sup>

Tracey Moffatt established her reputation with her photographic series of narratives, *Something More*. She tells the story of an innocent girl of mixed race who leaves her country home for the big city of Brisbane, only to meet a violent end on the road. The form of this work challenges the traditional value judgments of copyright law, because it is difficult in photography to identify the moment of originality, and the author of the work in the collaborative process.<sup>75</sup> There has been a long-

standing Luddite prejudice that photography is just a mechanical act performed by a technician and, therefore, undeserving of copyright protection. However, as the work of Tracey Moffatt demonstrates, photography is an art form that requires aesthetic judgment, skill and knowledge, as well as technical proficiency. The content of the collection, *Something More*, also tests copyright law, because it draws upon the imagery and iconography of a range of sources. Tracey Moffatt is working from a reservoir of images that includes commercial and avant-garde film. She pays homage to one of her favourite films, Ken Hannam's 1975 feature *Sunday Too Far Away*, which starred Jack Thompson. Tracey Moffatt recalls the styles and colours of the European and Aboriginal traditions of landscape painting, such as in the work of Arthur Boyd and Albert Namatjira.<sup>76</sup> This quotation is legally permissible, because it is not an infringement of copyright to copy a design style. Like Juan Davila, Tracey Moffatt also appropriates soft pornography, drawing upon images from erotic photography and the fetishes of sado-masochism. However, she would be less likely to face legal retribution than Juan Davila, because her oblique and elliptical images serve to send up rather than appeal to the audience's appetite for melodrama and titillation.

Tracey Moffatt draws upon folk stories and fairy tales about the fallen woman in her "bad girl" imagery. As Angela Carter notes:

"Ours is a highly individualized culture, with a great faith in the work of art as a unique one-off, and the artist as an original, a godlike and inspired creator of unique one-offs. But fairy tales are not like that, nor are their makers".<sup>77</sup>

Such folklore deserves to be in the intellectual commons, rather than subject to private ownership, because it provides a sign language and image store that can be used by artists. Tracey Moffatt hopes to recover the myth of the Fallen Woman from misogynistic fairy tales. However, Marina Warner warns:

<sup>73</sup> Bonyhady, "Colour Separation" (1998) 3 (5) *The Australian's Review of Books* 12 at 13.

<sup>74</sup> Smee, op cit n 72.

<sup>75</sup> Bowrey, "Copyright, Photography and Computer Works – The Fiction of an Original Expression" (1995) 18 (2) *University of New South Wales Law Journal* 278 at 297.

<sup>76</sup> Newton and Moffatt, *Fever Pitch* (Piper Press, Sydney, 1995), p 16.

<sup>77</sup> Warner, *From the Beast to the Blonde: On Fairy Tales and their Tellers* (Vintage, London, 1995), p 418.

"The mythology of ungovernable female appetite can't be made to work for women; ironies, subversion, inversion, pastiche, masquerade, appropriation – these postmodern strategies all buckle in the last resort under the weight of culpability the myth has entrenched".<sup>78</sup>

This comment suggests that counter-appropriation is of limited efficacy in changing unequal power relations.

Tracey Moffatt has also created audio-visual work, making avant-garde films, as well as documentaries and music video clips. Like Gordon Bennett, she has engaged in the practice of counter-appropriation. Instead of challenging official histories, Tracey Moffatt has focused upon subverting the mythologies of the dominant community. Her 1989 short film *Night Cries: A Rural Tragedy* was a gloss upon *Jedda*, Charles Chauvel's 1955 feature film in which an orphaned Aboriginal baby girl is fostered by the white station owner's wife.<sup>79</sup> The original was a paternalistic and racist fable, in which Jedda met her death after spurning the match of a young man and falling in love with a wild Aboriginal outlaw. In *Night Cries: A Rural Tragedy*, Tracey Moffatt appropriates *Jedda* and imagines what would have happened if the foster child of the story had survived to care for the foster mother in her decrepitude. She depicts a Aboriginal girl suffering under the dominion of her wicked stepmother, and experiencing a sense of release and loss at the eventual death of the older woman. The film *Night Cries: A Rural Tragedy* is a critique of the policies of racist assimilation and the forced abduction of children from their birth parents. The question arises whether this parody of *Jedda* would infringe the copyright that subsisted in the original film, and its accompanying scripts, choreography and music. It would be difficult in this case to prove that there had been a substantial taking of the original work, because of the way in which the author has transformed the original.<sup>80</sup> As

had been discussed in relation to Gordon Bennett, the introduction of moral rights would pose a serious threat to adaptations and parodies which treat the original in a critical and distorting fashion.

Tracey Moffatt offers a timely warning that law reform should not ghettoise indigenous art. There is a need to safeguard that copyright law does not have the effect of reifying the work of Aboriginal artists.<sup>81</sup> Care must be taken to ensure that copyright law allows for evolution and change within the artistic practice of indigenous communities. In particular, the development of copyright law has lagged behind new technologies.<sup>82</sup> Both courts and legislators have sometimes been slow to accommodate new forms of cultural creation.<sup>83</sup> Digital technologies have given artists, such as Tracey Moffatt, a greater capacity to mix and blend different art forms. Copyright law classifies works according to discrete legal categories. It protects original literary, dramatic, musical and artistic work, as well as other subject matter, such as sound recordings, broadcasts, and cinematographic films. Copyright law must become flexible and adaptable to take account of cross-art forms. It would be unfortunate if the development of multimedia or mixed media works were to be hampered because they were seen as component parts instead of an integrated whole.

## Conclusion

Sceptics claim that contemporary artistic practices do not have any necessary practical impact upon copyright law.<sup>84</sup> The major difficulty with this view is that it denies artists a speaking position on copyright law, even though they are the main

<sup>78</sup> Warner, *Managing Monsters: Six Myths of our Time*. (Vintage, London, 1994), p 11.

<sup>79</sup> Newton and Moffatt, *Fever Pitch* (Piper Press, Sydney, 1995), p 19.

<sup>80</sup> *Zeccola v Universal City Studios Inc* [1982] AIPC 90-019; (1982) 46 ALR 189; and *Telmak Teleproducts Australia Pty Ltd v Bond International* (1986) 6 IPR 97.

<sup>81</sup> McDonald, *Protecting Indigenous Intellectual Property*. (Australia Copyright Council, Sydney, 1997), p 55.

<sup>82</sup> *Phonographic Performance Company of Australia Limited v Federation of Australian Commercial Television Stations* (1998) 40 IPR 225 at 241.

<sup>83</sup> Attorney General's Department, *Copyright Reform and the Digital Agenda* (Australian Government Publishing, Canberra, 1996).

<sup>84</sup> Saunders, *Legal Decisions and Cultural Theory* (Institute for Cultural Policy Studies, Griffith University, 1989); Anderson, "On the Legal Limits of Art" (1994) 5 *Arts And Entertainment Law Review* 70; and Sherman, "Appropriating the Postmodern: Copyright and the Challenge of the New" (1995) 4 *Social and Legal Studies* 31 at 42.

subjects of the legislation. A related problem is that this approach homogenises the range and diversity of contemporary artistic practices. This article has sought to counter the exclusion of artists from public discourse by telling stories about their work. The first narrative about Imants Tillers emphasised the need to reform copyright in order to promote genuine reconciliation between indigenous and non-indigenous people. The second narrative regarding Gordon Bennett stressed that the self-determination of indigenous people must be respected in decision-making. The third story about Juan Davila

underscored the need to expand the public domain, and protect indigenous culture at the same time. The final coda about Tracey Moffatt emphasised the demand to accommodate new technologies. The stories suggest that artists can shed light upon the practical operation of copyright law – how the law works, how it is experienced, and how it is understood. They indicate that artists can give constructive and informed advice about how copyright law should manage the cultural field in the future.