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AUSTRALIA'S HERITAGE PROTECTION ACT: AN ALTERNATIVE TO COPYRIGHT IN THE STRUGGLE TO PROTECT COMMUNAL INTERESTS IN AUTHORED WORKS OF FOLKLORE

Jake Phillips[†]

Abstract: Australian indigenous communities are vulnerable to communal harm inflicted by the unauthorized, derogatory use of their works of folklore. Such works are often considered sacred to indigenous communities and are granted significant protection under customary law. However, under many circumstances, the 1968 Copyright Act, the Australian law governing authored works, fails to protect works of indigenous folklore. While an amendment to the Copyright Act appears a likely next step in Australia's efforts to recognize a community's interest in communal works of folklore, Australia's Heritage Protection Act represents a more appropriate and efficient vehicle for addressing unique communal interests in these cultural works.

I. INTRODUCTION

Over the past four decades, the demand for Aboriginal artwork has grown tremendously.¹ In 1988, retail sales of Australian Aboriginal art totaled \$18.5 million dollars (AUD).² By 1997, estimates valued the indigenous arts and crafts industry at over \$200 million.³ Regrettably, this increase in demand has been accompanied by an increase in the misuse⁴ of artwork representing indigenous folklore.⁵ Such artwork takes various

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¹ Danielle Cronin, *Appeal to Protect Artists*, CANBERRA TIMES (Austl.), Aug. 23, 2008, at A12.

² Colin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, 2 ABORIGINAL L. BULL. 5, 5 (1992) (Issue 56), available at <http://www.austlii.edu.au/au/journals/AboriginalLB/1992/26.html>.

³ Aboriginal and Torres Strait Islander Commission (ATSIC), *Cultural Industry Strategy: The Vision* (1997), http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/programs/Industry_Strategies/Cultural_Industry_Strategy/vision.html (last visited Jun. 27, 2009).

⁴ In this Comment, the term misuse refers to the unauthorized use of indigenous works of art in a manner that is deemed derogatory and inconsistent with the treatment given by the respective indigenous community.

⁵ This comment focuses on current and prospective legal treatment of communal material and artistic works that embody indigenous culture and heritage. Over the years, scholars have employed a variety of terms to describe such material. See, e.g., Daphne Zografos, *Legal Protection of Traditional Cultural Expressions in East and Southeast Asia: An Unexplored Territory?*, 18 AUSTRALIAN INTELL. PROP. L. J. 167, 167 n.1 (Aug. 2007) (noting that terms used to describe indigenous cultural material "include, but are not limited to: 'folklore', 'traditional cultural expressions', 'expressions of folklore', 'indigenous cultural and intellectual property', 'indigenous heritage', 'traditional knowledge'"). United Nations Special Rapporteur Erica-Irene Daes states that "[t]he heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to

forms including visual art, song, dance, and oral stories.⁶ While the focus has often been placed on the harms incurred by individual artists and creators of folklore,⁷ indigenous communities also experience significant harm when an author's works are misused. In one representative case before the Federal Court of Australia,⁸ *Milpurrurru v. Indofurn Pty. Lmt.*,⁹ a carpet company reproduced various designs created by indigenous artists on manufactured carpets, which it then sold within Australia.¹⁰ The unauthorized reproduction of the sacred images on carpets, to be trampled by homeowners, was "completely inappropriate and offensive" to both the artists and their respective communities.¹¹ In fact, even though the artists had no control over the misuse of their artwork, they themselves faced serious consequences within their communities.¹² Potential forms of punishment include being exiled from the community, being denied the right to paint the community's stories, or in times past, the offender could be put to death.¹³

The *Milpurrurru* case illustrates the importance of folklore within indigenous communities. Indigenous works of folklore symbolize more than a product of individual accomplishment worthy of economic reward.¹⁴ Such works represent "the symbolic connection to [indigenous] culture."¹⁵ For instance, certain forms of art are grounded "in myth and ancestral spirituality" and are "vehicles for narratives that remain central to ritual,

generation, and which is regarded as pertaining to a particular people or its territory." This includes "all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry . . ." even those created in the future. U. N. Econ. & Soc. Council [ECOSOC], Final Report, *Protection of the Heritage of Indigenous People*, ¶¶ 11-12, U.N. Doc. E/CN.4/Sub.2/1995/26 (June 21, 1995) (prepared by Erica-Irene Daes). This comment utilizes the term "folklore" and adopts Daes' definition of indigenous heritage and its past, present, and future manifestations where this term is used throughout the article.

⁶ See Daes, *supra* note 5, ¶¶ 11-12.

⁷ See, e.g., Liam Beasley, *Millions in Cash Changing Hands, Artists Not Seeing Any*, Australian Associated Press, July 29, 2003 (noting that current and proposed legislation involving moral rights for individual artists does not provide adequate protection with respect to the resale of artwork).

⁸ The Federal Court of Australia is a superior court of record and a court of law and equity consisting of a Chief Justice and other Judges that may hold office in accordance with the Federal Court of Australia Act. Federal Court of Australia Act, 1976, § 5(1)-(3) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/num_act/fcoaa1976249/s5.html.

⁹ *Milpurrurru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240.

¹⁰ *Id.* at 243.

¹¹ Margaret Martin, *What's In a Painting? The Cultural Harm of Unauthorised Reproduction: Milpurrurru & Ors v. Indofurn Pty. Ltd. & Ors*, 17 SYDNEY L. REV. 591, 594 (1995).

¹² *Millpurrurru*, 54 F.C.R. at 246.

¹³ *Id.*

¹⁴ See Samantha Joseph, *Protecting Indigenous Culture*, 6 INDIGENOUS L. BULL. 18 (2006) (Issue 18), available at <http://www.austlii.edu.au/au/journals/ILB/2006/23.html>.

¹⁵ *Id.* at 18.

landholding, and other aspects of lived culture past and present.”¹⁶ Indigenous society has a vital interest, both at the individual and communal level, in protecting its culture that has been, and remains, embodied in its folklore.

The Australian government is aware of concerns regarding indigenous folklore and has recently taken steps to address the protection of such works. For instance, the 2000 Copyright Amendment (Moral Rights) Act¹⁷ added an effective tool to the Copyright Act¹⁸ for attributing credit for an author's work and providing protection against derogatory uses of that work.¹⁹ Derogatory use includes a use or alteration of the work that is “prejudicial to the author's honour or reputation.”²⁰ Although the Copyright Act governs the intellectual property of creators of artistic works, the Act fails to provide adequate protection for works of folklore involving indigenous community interests. This failure is due in large part to the Copyright Act's focus upon individual protection of authors for a limited period of time; a focus that conflicts with the communal and perpetual ownership of such property under indigenous customary law.

This Comment argues that the Aboriginal and Torres Strait Islander Heritage Protection Act (“HPA”)²¹ offers a more promising vehicle for guarding against the misuse of folklore because its protections apply to communal works and extend over generations, in contrast to the limited protections currently offered under the Copyright Act. The goals of the HPA fit more squarely with indigenous concerns and thus it serves as a stronger legal tool for implementing protection of Indigenous folklore. Part II of this Comment examines the historical and contemporary background of current Australian law protecting Indigenous creative works. Part III explores relevant international laws and models relating to indigenous folklore. Part IV analyzes the shortcomings of both existing and proposed copyright legislation within Australia. Finally, Part V argues that Australia must

¹⁶ NICHOLAS THOMAS, POSSESSIONS: INDIGENOUS ART, COLONIAL CULTURE 197 (1999).

¹⁷ Copyright Amendment (Moral Rights) Act, 2000 (Austl.) (amending the Copyright Act, 1968 (Cth) (Austl.)), available at http://www.austlii.edu.au/au/legis/cth/num_act/cara2000342/.

¹⁸ Copyright Act, 1968 (Cth) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/.

¹⁹ See generally Copyright Amendment (Moral Rights) Act, 2000. See, e.g., *Meskenas v. ACP Publishing Pty Ltd.*, [2006] FMCA 1136, ¶¶ 1, 2, 39 (holding that the painter of a portrait had a claim for right of attribution and the right to not be falsely attributed where his work appeared in a publication naming a different person as the painter of the portrait).

²⁰ See Copyright Act, § 195AJ (Austl.).

²¹ Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/aatsihpa1984549/ [hereinafter HPA].

reform the HPA to specifically include safeguards for indigenous folklore to ensure adequate protection of this important element of communal culture.

II. COPYRIGHT LAW IS INCOMPATIBLE WITH INDIGENOUS CULTURAL BELIEFS AND CANNOT ADEQUATELY PROTECT COMMUNAL INTERESTS

Copyright law is the branch of intellectual property law that grants rights to creators of artistic works.²² Before copyright vests²³ in the author, the work must satisfy three requirements: 1) it must be original;²⁴ 2) it must be in material form (i.e., written down or recorded in some tangible form);²⁵ and 3) it must have an identifiable author.²⁶ Copyright exists automatically once these requirements are met and no registration is necessary.²⁷ The theory underlying copyright law is that protection encourages authors to capitalize economically from their creations and to receive a return on their investment by publishing their works.²⁸ Although copyright protection is not perpetual, it lasts for the life of the author plus seventy years,²⁹ which presumably provides ample duration to provide incentive for the creation of new material.³⁰ Furthermore, the law benefits society by encouraging production and publication of new material and dissemination of that material to the public.³¹ Thus, the impetus behind copyright law, as with intellectual property law in general, is to encourage innovation and invention

²² See J.A.L. STERLING & GEOFFREY E. HART, COPYRIGHT LAW IN AUSTRALIA AND THE RIGHTS OF PERFORMERS, AUTHORS AND COMPOSERS IN THE PACIFIC REGION 18 (1981).

²³ To vest copyright in an individual is to give legal effect and recognition to that individual's entitlement to exercise those rights granted to an owner of the copyright provided in the Copyright Act 1968. See *Council of the City of Sydney v. Goldspar Pty. Ltd.* [2004] FCA 568, ¶ 91 (stating in contract dispute that where a contract vests copyright in one party, other potential authors are not owners of the copyright); see, e.g., Copyright Act, 1968, § 135ZZG (Austl.) (providing that copyright does not vest in the copier of work who makes valid copies of a work for individuals with disabilities). See generally BLACK'S LAW DICTIONARY 1594 (8th ed. 2004) ("to confer ownership of (property) upon a person").

²⁴ See Copyright Act, 1968 § 32(1) (Austl.).

²⁵ *Id.* § 22(1).

²⁶ *Id.* § 32(1)-(4). See also TERRI JANKE, OUR CULTURE: OUR FUTURE—REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS 52-53 (1998), available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/terry_janke_culture_future.pdf [hereinafter JANKE, OUR CULTURE: OUR FUTURE]

²⁷ See JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 51.

²⁸ See Joseph Githaiga, *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, 5 MURDOCH U. ELECTRONIC J.L. at ¶ 4 (1998) (Issue 2), available at <http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52nf.html>.

²⁹ Copyright Act, 1968, § 33 (Austl.).

³⁰ ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 467 (4th ed. 2007).

³¹ Australian Copyright Council, *An Introduction to Copyright in Australia* (Mar. 2007), <http://copyright.org.au/G010.pdf> (last visited Apr. 11, 2009).

by rewarding individual authors with a right to economically exploit their creations.³²

Indigenous folklore represents an important foundation for both the maintenance of traditional and historical indigenous culture, as well as an important source for the continuing growth of Australia's indigenous cultures. Wandjuk Marika, an indigenous artist from the Northern Territory, explained the importance stating: "Our art and culture are very dear to us, they embody the past history of my people, our beliefs today, and our strength to survive."³³ When indigenous communities assert an interest in a work of folklore, the interest represents a desire for the creation not to be used in a manner that degrades or undermines the purpose for which it was created—that is, to express and acknowledge important aspects of that community's tradition and culture.³⁴

Adherence by indigenous communities to the traditional laws governing their culture³⁵ creates a conflict with Australia's copyright regime because communal concerns and expectations are not addressed by Australia's Copyright Act.³⁶ Customary law remains a guiding force in many indigenous communities,³⁷ and encompasses two basic tenets: religion and the community.³⁸ As to the first, indigenous folklore is of religious significance due to its representation of the Dreaming. The "Dreaming" represents the "knowledge, faith, and practices that derive from stories of creation" and is the foundation for the rules, behavior, and ceremony governing Aboriginal society.³⁹ Thus, because of the intimate connection between indigenous folklore and religious beliefs, customary law governs the creation and disposition of indigenous works of art.⁴⁰ The second basic tenet of customary law is the community.⁴¹ The community is

³² See Githaiga, *supra* note 28, at ¶ 10.

³³ Joseph, *supra* note 14, at 18.

³⁴ See generally, *Milpururru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240.

³⁵ See, e.g., Dean A. Ellinson, *Unauthorized Reproduction of Traditional Aboriginal Art*, 17 U. N.S.W. L.J. 327, 328 (1994) ("Traditional Aboriginal customary laws continue to apply . . . in many Aboriginal communities").

³⁶ See Michael Davis, *Indigenous Peoples and Intellectual Property Rights*, Department of the Parliamentary Library, Research Paper 20, at Introduction (1996-97), <http://www.aph.gov.au/library/pubs/rp/1996-97/97rp20.htm> (last visited Apr. 11, 2009).

³⁷ See Ellinson, *supra* note 35, at 329.

³⁸ Rob McLaughlin, *Some Problems and Issues in the Recognition of Indigenous Customary Law*, INDIGENOUS L. BULL. (1996).

³⁹ Australian Museum, *Dreaming Online: Spirituality*, <http://www.dreamtime.net.au/indigenous/spirituality.cfm> (last visited March 28, 2009). See also Ellinson, *supra* note 35, at 330.

⁴⁰ See Ellinson, *supra* note 35, at 330.

⁴¹ See McLaughlin, *supra* note 38.

the recognized owner of cultural property, imagery, and folklore.⁴² Traditional themes and images must be protected against inappropriate reproduction and use.⁴³ Customary law requires that the group approve any reproduction of the communally owned culture.⁴⁴ The creator of the work then becomes “a custodian of the cultural property, and any use, alteration or reproduction of the work will need to be approved by community elders.”⁴⁵ From the community’s perspective, once the creation comes to fruition the community owns it because the creation constitutes communal culture.⁴⁶ Thus, an inherent disconnect exists between the protections provided under copyright law and those recognized under Aboriginal customary law: while the Copyright Act recognizes individual ownership and exclusive rights for an author of a work,⁴⁷ Aboriginal customary laws provide for communal ownership over works embodying tribal folklore and culture.⁴⁸

A. *Despite Recent Legislative Reform, the Copyright Act Still Fails to Adequately Protect Indigenous Communal Folklore*

For over twenty years, the lack of legislative protection for Indigenous intellectual property in Australia has concerned various groups tasked with representing indigenous interests, including the Australian government.⁴⁹ In 1981, a Working Party on the Protection of Aboriginal Folklore found that existing legislation did not provide sufficient legal protection for artists of traditional works of folklore.⁵⁰ A 1988 review of the Aboriginal Arts and Crafts Industry further highlighted the weaknesses of the Copyright Act with

⁴² COMMONWEALTH OF AUST. DEP’T OF COMMUNICATIONS, INFORMATION TECHNOLOGY & THE ARTS, REPORT OF THE CONTEMPORARY VISUAL ARTS AND CRAFTS INQUIRY 152 (2002), http://www.arts.gov.au/public_consultation/earlier-consultations/cvac_inquiry/report (last visited Apr. 11, 2009) [hereinafter REPORT].

⁴³ See JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 55 (“Under customary law, Indigenous custodians are collectively responsible for ensuring that important cultural images and themes are not reproduced inappropriately. The Indigenous creator must be careful not to distort or misuse the cultural knowledge embodied in a work.”).

⁴⁴ See Ellinson, *supra* note 35, at 331.

⁴⁵ REPORT, *supra* note 42, at 152.

⁴⁶ See Githaiga, *supra* note 28, ¶¶ 11-15.

⁴⁷ See Terri Janke & Robynne Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006*, (May 2006), http://www.australiacouncil.gov.au/__data/assets/pdf_file/0013/2704/icip.pdf (last visited May 29, 2009).

⁴⁸ See REPORT, *supra* note 42, at 152.

⁴⁹ See ABORIGINAL & TORRES STRAIGHT ISLAND COMM’N, RECOGNITION RIGHTS AND REFORM: A REPORT TO GOVERNMENT ON NATIVE TITLE SOCIAL JUSTICE MEASURE § 6.35 (1995), available at http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/issues/Indigenous_Rights/social_justice/Recognition/RECOG1.pdf [hereinafter ATSIC REPORT].

⁵⁰ See *id.* § 6.35.

respect to the significant interests in the protection and maintenance of indigenous folklore as required under customary laws.⁵¹

The Copyright Amendment (Moral Rights) Act 2000⁵² gave authors additional rights in their creative works. These rights include the right of an author to be attributed authorship of a work and the right to not be falsely attributed authorship of a work (the right of attribution), and the right to prevent derogatory use or treatment of their works (the right of integrity).⁵³ Collectively, these rights are known as “moral rights.” Because moral rights aim to protect the author’s integrity, they are inalienable, and thus cannot be assigned or transferred to another with a sale of the copyrighted work.⁵⁴ Furthermore, such rights only accrue when the author has a copyrightable work.⁵⁵ Although moral rights are not specifically designed to protect indigenous artists per se as the Act’s provisions apply to all artists, these rights do provide indigenous artists with a useful tool to carry out their responsibility to protect their works under customary law.⁵⁶

In the same year that Parliament added moral rights to the Copyright Act, Senator Aden Ridgeway, only the second indigenous person to sit in Federal Parliament,⁵⁷ pushed the Senate to extend moral rights to indigenous communities as well.⁵⁸ The Senator’s proposed amendment would have included a definition of indigenous cultural work and would have allowed

⁵¹ See *id.* § 6.35.

⁵² See generally Copyright Amendment (Moral Rights) Act, 2000, § 193-195AZO, available at [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/D25408DC39D0C132CA257434001EEDAE/\\$file/1592000.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/D25408DC39D0C132CA257434001EEDAE/$file/1592000.pdf).

⁵³ See Australian Copyright Council, G043, *Moral Rights Information Sheet*, at 1 (June 2006), http://www.copyright.org.au/pdf/acc/infosheets_pdf/g043.pdf/view (last visited July 9, 2009); see also Virginia Morrison, *The New Moral Rights Legislation*, 18 COPYRIGHT REP. 170 (2000), available at www.copyright.org.au/pdf/acc/articles_pdf/A01n02.pdf.

⁵⁴ See Terri Janke, *Berne Baby Berne: The Berne Convention, Moral Rights and Indigenous People’s Cultural Rights*, 5 INDIGENOUS L. BULL. 14, 15 (2001) (Issue 6), available at <http://www.austlii.edu.au/au/journals/ILB/2001/11.html> [hereinafter Janke, *Berne Baby Berne*].

⁵⁵ *Id.* at 17.

⁵⁶ See, e.g., Anna Kingsbury, *Protecting Indigenous Knowledge and Culture Through Indigenous Communal Moral Rights in Copyright Law: Is Australia Leading the Way?*, 12 N.Z. BUS. L.Q. 162, 164 (“[M]oral rights have the potential to accommodate some of the concerns of indigenous peoples . . . Moral rights may be applicable and useful in some cases where economic rights are inadequate, and moral rights have a cultural dimension not found in the purely economic rights, making them more suited to protection of cultural rather than simply economic value.”).

⁵⁷ Danielle Cronin, *In Obama’s Footsteps*, CANBERRA TIMES (Austl.), Oct. 31, 2008, <http://www.canberratimes.com.au/news/opinion/editorial/general/in-obamas-footsteps/1348339.aspx> (last visited Jun. 27, 2009).

⁵⁸ Helen Dakin, Australian Copyright Council staff attorney, *Call for Law Reform for Indigenous Artists* (Mar. 3, 2003), www.copyright.org.au/pdf/acc/articles_pdf/A03n03.pdf (last visited Jun. 27, 2009) (article to be published in Copyright World).

communities to assert moral rights with respect to a defined indigenous cultural work.⁵⁹

Although communal moral rights are still absent from the Copyright Act, it appears the government is taking steps to adopt communal moral rights in the near future. In 2003, a governmental joint media release stated that “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 community knowledge and wisdom.”⁶⁰ During 2003, a draft amendment was distributed to a few select organizations (and one individual) for comment.⁶¹ In 2007, the Senate Standing Committee on Environment, Communications, Information Technology and the Arts introduced a report recommending that “the government introduce revised legislation on Indigenous communal moral rights.”⁶² However, despite these attempts to create communal moral rights, the Copyright Act remains devoid of any provisions extending protection to communities.

B. Judicial Efforts to Protect Indigenous Folklore Highlight the Copyright Act's Inapplicability to Protect Communal Folklore

Past federal judicial decisions expose inherent inadequacies in the protection of indigenous folklore under Australian copyright law.⁶³ Cases such as *Yumbulul v. Reserve Bank*,⁶⁴ *Milpurrurru v. Indofurn Pty. Ltd.*,⁶⁵ and *Bulun Bulun v. R & T Textiles*,⁶⁶ all before the Federal Court of Australia,

⁵⁹ Australian Democrats, *Press Release, Democrats Seek Government & ALP Support for Indigenous Moral Rights* (Dec. 7, 2000), http://www.democrats.org.au/news/?press_id=2875&display=1 (last visited Jun. 27, 2009).

⁶⁰ Jane Anderson, *The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill*, 27 U. N.S.W. L.J. 585, 597 (2004) (italics removed) (quoting Dep't of Comm., Info. & Tech., Commonwealth Attorney-General's Dep't, & Dep't of Immigr. & Multicultural & Indigenous Aff., *Press Release, Indigenous Communities to Get New Protection for Creative Works* (May 19, 2003))[hereinafter Anderson, *The Politics of Indigenous Knowledge*].

⁶¹ Jane Anderson, *Indigenous Communal Moral Rights: The Utility of an Ineffective Law*, 5 INDIGENOUS L. BULL. 8, 8 (2004) (Issue 30), available at <http://www.austlii.edu.au/au/journals/ILB/2004/15.html> [hereinafter Anderson, *Indigenous Communal Moral Rights*]. The draft was titled Copyright Amendment (Indigenous Communal Moral Rights) Bill (Draft Bill). *Id.*

⁶² STANDING COMMITTEE ON ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS, INDIGENOUS ART: SECURING THE FUTURE (2007), available at http://www.aph.gov.au/Senate/Committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/report.pdf.

⁶³ See *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481(Austl.); *Milpurrurru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240 (Austl.); *Bulun Bulun v. R & T Textiles Pty. Ltd.* (1998) 86 F.C.R. 244 (Austl.).

⁶⁴ *Yumbulul*, 21 I.P.R. 481.

⁶⁵ *Milpurrurru*, 54 F.C.R. 240.

⁶⁶ *Bulun Bulun*, 41 I.P.R. 513.

exhibit a struggle by courts to find a legal remedy to protect indigenous ownership rights in communal property. These three cases highlight the inherent conflict that arises when the Copyright Act meets with communal property interests. With each successive case, the courts appear more willing to craft protections for communal folklore, but each case also highlights the shortcomings of the Copyright Act as an effective remedy to this recurring problem.

In *Yumbulul v. Reserve Bank of Australia*, the Federal Court declined to recognize a cause of action for communal harm when the Reserve used sacred images on a commemorative ten dollar bank note.⁶⁷ Mr. Yumbulul, an Aboriginal artist, inherited the right to make Morning Star Poles⁶⁸ from his mother's clan group. Morning Star Poles are decorated wood poles that "have a central role in Aboriginal ceremonies commemorating the deaths of important persons, and in inter-clan relationships."⁶⁹ The Reserve Bank of Australia incorporated one of Mr. Yumbulul's designs on a Morning Star Pole displayed at the Australian Museum in Sydney.⁷⁰ The bank then reproduced an image of that pole on its commemorative note. Its use of the pole and the traditional designs thereon upset the Aboriginal community.⁷¹ The court acknowledged the concerns of Aboriginal communities with the regulation of works deriving from communal folklore, but failed to find a cause of action for communal harm.⁷² In recognizing the limits of copyright law, presiding Justice Robert French wrote:

[I]t may . . . be 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. But to say this, is not to say that there has been established in the case, any cause of action.⁷³

Thus, despite the significant harm felt by the community in having one of its religious symbols emblazoned on the national currency, the court determined that the law did not offer redress.

⁶⁷ See *Yumbulul*, 21 I.P.R. at ¶ 21.

⁶⁸ See *id.* ¶ 4. Morning Star Poles are decorated wood poles that "have a central role in Aboriginal ceremonies commemorating the deaths of important persons, and in inter-clan relationships." *Id.* Construction of the poles differs between clans, and the identifying characteristics of a clan's Morning Star Pole "may be maintained jealously." *Id.*

⁶⁹ See *id.*

⁷⁰ See *id.* ¶¶ 4, 20.

⁷¹ See *id.* ¶ 21.

⁷² See *id.*

⁷³ See *id.*

Milpurrurru v. Indofurn Pty. Ltd., decided three years later, illustrates the applicability of the Copyright Act to Indigenous individuals, but also highlights the Act's inability to provide substantive protection or forms of redress for harmed communities.⁷⁴ The applicants in the case were three living indigenous artists and the representatives of two deceased indigenous artists.⁷⁵ Respondent, Indofurn, manufactured and imported into Australia woolen carpets bearing reproductions of the artists' designs.⁷⁶ Justice von Doussa found that Indofurn had substantially copied the artists' work and was liable for infringements under Section 37 of the Copyright Act.⁷⁷ In deciding remedies for the infringement, Justice von Doussa engaged in a lengthy discussion of the monetary harms suffered by the artists.⁷⁸ However, he noted that damages under copyright law only extend to the "pirating of cultural heritage" where such pirating directly affects the copyright owner, not the community.⁷⁹ The Australian Copyright Council suggests that perhaps "his Honour meant to refer to the fact that the remedies under the Copyright Act do not match the remedies that may have been applied were the matter governed by customary law."⁸⁰ While the individual artists were compensated under the Copyright Act, any "[a]nger and distress suffered by those around the copyright owner," such as that felt by the artists' community, were not recognized under copyright law except to the extent that it constituted part of the copyright owner's injury and suffering.⁸¹

In *Bulun Bulun v. R & T Textiles*, John Bulun Bulun and George Milpurrurru, both leading Aboriginal artists and members of the Ganalbingu people, alleged a violation of the Copyright Act by a textile company's use of a piece of artwork painted by Bulun Bulun in 1978.⁸² The company reproduced on its fabric "substantial aspects of the artwork."⁸³ Bulun Bulun argued that the reproduction violated his personal copyright in the painting. The textile company conceded that it had infringed on Bulun Bulun's copyright by printing his artwork on their fabric.⁸⁴ Milpurrurru argued on behalf of the Ganalbingu people that the community was an equitable owner

⁷⁴ See generally *Milpurrurru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240 (Austl.).

⁷⁵ See *id.* at 243.

⁷⁶ See *id.*

⁷⁷ See *id.* at 264, 272.

⁷⁸ See *id.* at 273-77.

⁷⁹ See *id.* at 277.

⁸⁰ See Ian McDonald, *Copyright and Intellectual Property Concerns of Australia's Indigenous People*, <http://www.copyright.org.au/publications/A97n12.pdf> (last visited May 11, 2009).

⁸¹ See *Milpurrurru*, 54 F.C.R. at 277.

⁸² See *Bulun Bulun v. R & T Textiles Pty Ltd* (1998) 86 F.C.R. 244, 247 (Austl.).

⁸³ *Id.* at 252.

⁸⁴ See *id.* at 247-48.

of the copyright and thus entitled to legal redress.⁸⁵ The textile company refused to concede that the Ganalbingu community maintained an equitable ownership in the copyright.⁸⁶

Bulun Bulun created the original work, a bark painting, with the permission of the senior members of the Ganalbingu people,⁸⁷ basing it upon traditional communal knowledge passed down for generations.⁸⁸ Milpururru premised the community's claim on the theory that under Aboriginal customary law, representatives of the community had the power "to regulate and control the production and reproduction of the corpus of ritual knowledge,"⁸⁹ which the painting represented. Thus, while the legal title vested only in the artist, the community believed it had an equitable title claim based on the artist's position as fiduciary⁹⁰ in which he owned the copyright in trust for the community.⁹¹ The fiduciary relationship arises when one person's "exercise of power or discretion can adversely affect the interests of the person to whom the duty is owed."⁹² In this case, the artist was given permission to paint a work based on trust and confidence in the artist that the work would be used and reproduced according to traditional custom.⁹³

The Federal Court first found that although Bulun Bulun had not held the copyright as trustee for the community because there was no evidence that he had intended to so act,⁹⁴ there was a fiduciary relationship between the artist and the Ganalbingu people.⁹⁵ As a result of this relationship, Bulun Bulun had an obligation not to exploit his artistic work in opposition to customary law and, in the event of infringement by a third party, he should have taken reasonable and appropriate action to remedy infringement of the copyright of the work.⁹⁶ Thus, although the court accepted the premise that "[u]nauthorised reproduction of [the painting] threatens the whole system

⁸⁵ *See id.* at 246-47.

⁸⁶ *See id.* at 248.

⁸⁷ *See id.* at 252.

⁸⁸ *See id.* at 250-51.

⁸⁹ Justice Ronald Sackville, *Legal Protection of Indigenous Culture in Australia*, 11 CARDOZO J. INT'L & COMP. L. 711, 741 (2003).

⁹⁰ A fiduciary is "[a] person who is required to act for the benefit of another . . . on all matters within the scope of their relationship . . ." *See* BLACK'S LAW DICTIONARY 658 (8th ed. 2004).

⁹¹ Justice Ronald Sackville, *supra* note 89, at 741.

⁹² *Bulun Bulun*, 86 F.C.R. at 261 (citing *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 C.L.R. 41, 96-97).

⁹³ *See id.* at 250-51.

⁹⁴ *See id.* at 259.

⁹⁵ *See id.* at 262.

⁹⁶ *See id.* at 263.

and ways that underpin the stability and continuance of Yolngu⁹⁷ society,”⁹⁸ the court held that the only remedy available to the community in such a situation is to bring a claim against the author as a fiduciary in order to force the author to exercise his copyright interests in the work.⁹⁹

This case exposes the vulnerability of communal rights with respect to indigenous folklore and the significance of Australian copyright and common laws governing the individual. However, by folding indigenous customary law into Australian fiduciary law, the court was able to provide one avenue of potential redress for communities faced with circumstances of misappropriation by exercising the copyright second-hand through the artist-proxy. Even so, the solution employed by the court relies on a specific relationship between the artist and the community, as well as a valid copyright interest held by the artist. It also forces the community to undergo the convoluted process of acting as a third party in order to get redress for direct harm. Thus, while communities may be able to employ the Copyright Act under certain circumstances, the Act falls far short of providing communities with an effective and efficient solution for protecting their folklore.

III. CURRENT INTERNATIONAL LAW PROVIDES GREATER RECOGNITION AND PROTECTION FOR INDIGENOUS FOLKLORE

International authorities recognize the unique challenges facing the protection of indigenous cultural expressions. Although numerous international legal guidelines exist, four are essential to a discussion of protection of indigenous works of art: 1) The Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”),¹⁰⁰ 2) the Tunis Model Law on Copyright (“Model Law”),¹⁰¹ 3) the Model Provisions for National Laws on the Protection of Expressions of Folklore Against

⁹⁷ The Yolngu (or Yolŋu) are an indigenous Australian people inhabiting north-eastern Arnhem Land in the Northern Territory of Australia. The Yolngu are made up of a number of different subgroups or clans, of which the Ganabingu are but one. See <http://www.nationmaster.com/encyclopedia/Yolngu>.

⁹⁸ See *Bulun Bulun*, 86 F.C.R. at 251.

⁹⁹ See *id.* at 263.

¹⁰⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3, available at http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf. Australia became a signatory to the Berne Convention in 1928. See World Intellectual Property Organization, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

¹⁰¹ Tunis Model Law on Copyright for Developing Countries (1976), available at http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf [hereinafter Tunis Model Law].

Illicit Exploitation and Other Prejudicial Actions (“Model Provisions”),¹⁰² and 4) the United Nations Declaration on the Rights of Indigenous Peoples.¹⁰³ Although none of these models and treaties govern Australian law with respect to its treatment of communal folklore,¹⁰⁴ they represent a strong consensus by the international community that such protections are necessary to recognizing and preserving rights to artistic works representing indigenous culture.

The Berne Convention provides international protection for works of art and literature. It was formulated in 1886, and was revised in 1971 to include a provision allowing countries to designate a specific authority for the protection of national folklore.¹⁰⁵ However, one scholar notes that “[a]lthough the concept of ‘folklore’ is a potentially useful one for Indigenous concerns, as it embraces a more holistic notion of culture, the term is relatively contentious in its relevance, applicability or appropriateness to describe and define indigenous culture.”¹⁰⁶ Furthermore, the provision is optional, protecting folklore only where a nation has enacted domestic statutes that recognize folklore as a protected subject matter and authorized “a competent authority to enforce the convention’s vested rights.”¹⁰⁷ Even where nations meet these requirements, control is wielded by the state, which some argue is “antithetical to Indigenous peoples’ aspirations for self-determination.”¹⁰⁸ Therefore, although the Berne Convention provides at least some avenue for protection, the process is convoluted and the protection less than ideal from the standpoint of indigenous people.

A more useful tool for indigenous artists is the Berne Convention’s moral rights provision, which obliges signatory countries to include provisions granting authors a right to claim authorship of a work and to

¹⁰² Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (United Nations Educ., Sci. and Cultural Org. & World Intell. Prop. Org. 1985), available at <http://unesdoc.unesco.org/images/0006/000637/063799eb.pdf>.

¹⁰³ Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess., 107th plen. mtg., UN Doc A/RES/61/295 (Sept. 13, 2007) [hereinafter U.N. Declaration].

¹⁰⁴ Countries are not bound by U.N. declarations (and Australia is not a signatory of the Declaration on the Rights of Indigenous Peoples). Further, although Australia is a signatory to the Berne Convention and thus bound by its provisions, that treaty does not require protection of folklore, though it does provide an option for such protection. See *infra* Part III.

¹⁰⁵ See Davis, *supra* note 36, at International Developments.

¹⁰⁶ *Id.* at International Developments; Protection of Folklore.

¹⁰⁷ Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 315 (1994).

¹⁰⁸ See Davis, *supra* note 36, at Protection of Folklore.

object to derogatory treatment of their work.¹⁰⁹ These rights are inalienable and thus the author still maintains the ability to enforce the rights even if copyright has been assigned to another.¹¹⁰ Thus, with the addition of moral rights legislation, indigenous creators have a substantive means for protection of their work, even when the copyright is held by another. However, the Berne Convention fails to provide enforceable provisions requiring signatory countries to enact legislation that would shield communal works of folklore from misuse.

The 1976 Tunis Model Law on Copyright, developed through the World Intellectual Property Organization,¹¹¹ expands the protections for works of folklore suggested by the Berne Convention by exempting folkloric works from various copyright requirements.¹¹² For instance, Section 18(i) defines folklore to include works by authors or ethnic communities. Thus, this provision skirts the typical requirement under traditional copyright law that a work must have an identifiable author, under which “communities” do not qualify.¹¹³

The Tunis Model Law also protects “works derived from national folklore.”¹¹⁴ Thus, where a work would not normally qualify for copyright because the work builds only incrementally on traditional knowledge, and is not therefore wholly original, under the Model Law, such works would enjoy protection. Finally, the Model Law exempts folklore from the typical fixation requirement.¹¹⁵ Thus, Aboriginal oral stories, traditional dances, and performances would be protectable embodiments of folklore despite not being fixed in some tangible form (as required by the Australian Copyright Act).

Most recently, in September of 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (“Declaration”).¹¹⁶ The Declaration represents more than twenty years of work by indigenous people to gain international support for recognition of

¹⁰⁹ See Berne Convention for the Protection of Literary and Artistic Works, Art. 6*bis*. Australia’s inclusion of moral rights within the Copyright Act was its response to meet its obligation under the Berne Convention. See Janke, *Berne Baby Berne*, *supra* note 54, at 14-15.

¹¹⁰ See Berne Convention for the Protection of Literary and Artistic Works, Art. 6*bis*.

¹¹¹ The World Intellectual Property Organization (“WIPO”) is a United Nations agency that is dedicated to “developing a balanced and accessible international intellectual property (IP) system” The WIPO, created in 1970, administers a wide range of treaties, including the Berne Convention for Protection of Literary and Artistic Works. One hundred eighty-four countries, including Australia, are WIPO members. See http://www.wipo.int/freepublications/en/general/1007/wipo_pub_1007.pdf.

¹¹² Tunis Model Law § 1(5*bis*).

¹¹³ See *infra* Part IV.A.

¹¹⁴ Tunis Model Law § 2(1)(iii).

¹¹⁵ See Tunis Model Law § 1(5*bis*).

¹¹⁶ See U.N. Declaration, *supra* note 103.

distinct indigenous cultural rights.¹¹⁷ While numerous articles within the Declaration generally address and protect indigenous culture,¹¹⁸ Article 31 secures a specific right for indigenous peoples to protect and develop their cultural heritage and intellectual property.¹¹⁹

In addition, the Declaration emphasizes the importance of collective rights of communities, as opposed to the highly individualized theory guiding typical Western human rights discussion.¹²⁰ Thus, although the Declaration is not legally binding, its adoption marks a significant point in the recognition of unique indigenous concerns regarding maintenance of their communal culture. Despite the Declaration's lack of direct application to Australia, the underlying principles of the document should inform future legal and policy debate aimed at increasing protection of indigenous works within Australia.

As the international community continues its efforts to strengthen and expand protection for indigenous works of folklore, Australia must implement reform with respect to its own laws governing such works if it wants to be recognized as a leader in indigenous rights. Despite Australia's commitment to moral rights under the Copyright Act, that Act alone is unsuitable to provide broader protections for indigenous folklore. Australia should divert its focus from the Copyright Act to the HPA if it hopes to upgrade its protections for communities to keep pace with the international community.

IV. AUSTRALIA'S COPYRIGHT ACT FAILS TO PROVIDE ADEQUATE PROTECTION FOR INDIGENOUS COMMUNITIES

Because Australia's Copyright Act governs the treatment of artistic and cultural works, it currently represents the most likely defense against misuse of traditional works of folklore. However, in many cases communal works of folklore are not covered by Australia's Copyright Act.¹²¹ While the Act's umbrella of protection fits well within the scope of Australian intellectual property rights, the Act does not adequately protect indigenous

¹¹⁷ See Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB J. INT'L L. 439, 440 (2008).

¹¹⁸ See, e.g., U.N. Declaration art. 5 (providing a right for indigenous peoples to maintain and strengthen their cultural institutions); *id.* art. 11 (providing a right for Indigenous peoples to "practice and revitalize their cultural traditions and customs"); *id.* art. 15 (securing for Indigenous peoples the "right to the dignity and diversity of their cultures . . .").

¹¹⁹ United Nations Declaration on the Rights of Indigenous Peoples art. 31.

¹²⁰ See Davis, *supra* note 117, at 462-63.

¹²¹ See *supra* Part II.

property arising under traditional customary law.¹²² Due to the unique communal and historic nature of indigenous culture, works of folklore often fail to satisfy the elements of copyrightable work. In cases where an individual artist can obtain a copyright, and communities are extended some protection by way of a fiduciary relationship with the artist, the protection provided under the Copyright Act still fails to adequately protect the communal interest in the work.¹²³ Finally, despite the promise of an amendment extending individual moral rights to communities, such legislation would act only as a minor patch in an act replete with larger holes that allow legitimate communal concerns to slip through the Act's protections.

A. *Indigenous Folklore Often Fails to Meet the Elements Required to Obtain Copyright Protection*

When an indigenous community grants permission to an artist to create a work of folkloric art based on an element of communal culture, the community generally has no right under the Copyright Act to protect the final product from misappropriation or misuse. Protection often fails because the representative work does not meet the elements under the Copyright Act (originality, materiality, and identifiable authorship) that would allow the community to own the copyright over the work.¹²⁴

Works created on behalf of the community may fail to meet the requirement that the work contain sufficiently distinct characteristics so as to constitute an "original artistic work" within the meaning of the Copyright Act.¹²⁵ Section 32(1) of the Act provides that copyright exists "in an original . . . artistic work."¹²⁶ The term "original" is not specifically defined within the act. Webster's Third New International Dictionary defines "original" as "a model, pattern or archetype that is copied."¹²⁷ Originality, it seems, is largely contingent on the existence of prior material: if a newer work is premised on a prior model or pattern, only the prior model would constitute the original. Thus, determination of whether a work of folklore is

¹²² Johanna Gibson, *Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property*, 6 AUSTRALIAN INDIGENOUS L. REP. 1, at 1 (2001) (Issue 4).

¹²³ Cf. *Bulun Bulun v. R & T Textiles Pty. Ltd.* (1998) 86 F.C.R. 244 (Austl.) (holding that the only recourse for the community is to bring a claim against the fiduciary as opposed to bringing a claim against the party who actually misappropriated the communal artwork).

¹²⁴ Rachael Grad, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 DUKE J. COMP. & INT'L L. 203, 227 (2003).

¹²⁵ See generally Gibson, *supra* note 122.

¹²⁶ Copyright Act, 1968 (Cth), § 32(1) (Austl.).

¹²⁷ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1591 (Philip Babcock Gove ed., G & C Merriam Co. 1967).

original requires reference to prior works to determine if the creation in question represents material already in the public domain, or if it is sufficiently novel in and of itself to constitute an original.¹²⁸ The High Court of Australia¹²⁹ (“High Court”) has adopted the view that courts must assess the originality of a certain work by examining the substance of the work compared to that of another.¹³⁰ Even where a small portion of another work is appropriated, if the portion taken constitutes a “material part” of the greater work, then the greater work will not be deemed original under the Act.¹³¹ For indigenous works in which the artist relies heavily on a pre-existing traditional design as the material portion of the work, courts will be reluctant to find sufficient originality within the meaning of the Copyright Act.

Under the plain meaning of the term “original,” the artistic work in question must not be a reproduction of another work. This restriction presents a problem for works created on behalf of an Aboriginal community. Artists are often given the task of creating artwork based on prior works or based on existing folklore represented by Dreamings or other expressions of culture.¹³² Aboriginal artists that are viewed as having the greatest skill are those artists that can render established totemic designs with great “precision and fidelity.”¹³³ Each clan owns specific designs that are passed down through generations, and select members are taught the sacred designs.¹³⁴ Because of the repetitive nature of the designs, such works may not possess the originality required under the Copyright Act. Although courts have typically applied a low threshold for establishing originality, “some observers caution that despite a lack of prior judicial comment on the matter, it is a potentially substantial problem.”¹³⁵

In addition to originality, the Copyright Act also requires that the work be reduced to material form in order to initiate protection under the Act.¹³⁶

¹²⁸ See *Intellectual Property and Traditional Cultural Expressions/Folklore*, 9 WORLD INTEL. PROP. ORG., Booklet 1.

¹²⁹ The High Court of Australia, which consists of a Chief Justice and six Associate Justices, is the country's supreme court and the final court of appeal for both the federal and state court systems. *The High Court of Australia—About the Court*, http://www.hcourt.gov.au/justices_01.html (last visited Oct. 28, 2008) (listing the names of the Chief Justice and the six Associate Justices).

¹³⁰ *Data Access v. Powerflex Services* (1999) 202 C.L.R. 1, 31-33 (Austl.) (citing Mason, C.J. dissenting in *Autodesk Inc. v. Dyason II* 176 C.L.R. 300 (Austl.)).

¹³¹ See *id.*

¹³² See Githaiga, *supra* note 28, ¶¶ 4-21.

¹³³ See LOUIS A. ALLEN, *TIME BEFORE MORNING: ART AND MYTH OF THE AUSTRALIAN ABORIGINES* 33 (Thomas Y. Crowell Co. 1975).

¹³⁴ *Id.*

¹³⁵ See Githaiga, *supra* note 28, ¶ 20.

¹³⁶ See Copyright Act 1968 (Cth), § 22 (Austl.).

The Act defines “material form” as “any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced).”¹³⁷ The materiality requirement poses a significant problem for various works of folklore. Indigenous folklore includes oral stories and ritualistic songs and dance.¹³⁸ For instance, Dreaming stories represent a vital part of indigenous folklore, as these stories often provide the subject matter for indigenous works of art.¹³⁹ These stories represent an oral tradition among individual clans, having been handed down from one generation to another.¹⁴⁰ Because these representations of folklore are not expressed in material form, such works are not protected.

Finally, various works of folklore within Aboriginal communities fail to meet the third requirement under the Copyright Act that the work have an identifiable author. Although the Copyright Act provides protection for joint authorship of a work that is actually created by two or more authors, the Act does not recognize alternative forms of collective ownership.¹⁴¹ For instance, “membership of the author of a community whose customary laws invest the community with ownership of any creation of its members is not recognized.”¹⁴² Again, where the representations of Aboriginal folklore in oral stories and dance rituals do not have a recognizable author, such works fail to qualify for copyright protection.

B. Even Where Communities Can Exercise a Copyright Interest Through a Trust or Fiduciary Relationship, the Protection Still Falls Short

Australian courts, in cases such as *Bulun Bulun*, have found that under some circumstances, indigenous communities can force an author to exercise his copyright ownership to protect the work on behalf of the community.¹⁴³ As a result, the community can force the author to exercise his or her right to protect the work under the Copyright Act. However, the moral rights provision under the Act grants the author the right to protect the work from

¹³⁷ See *id.* § 10.

¹³⁸ Australian Government, *Australian Indigenous Cultural Heritage*, <http://www.cultureandrecreation.gov.au/articles/indigenous/> (last visited Jun. 27, 2009); Australian Government, *The Dreaming*, <http://www.cultureandrecreation.gov.au/articles/indigenous/dreamtime/> (last visited Jun. 27, 2009).

¹³⁹ Bobbie Leigh, *Dreaming Stories*, 27 ART & ANTIQUES 82, ¶¶ 9-11 (2004) (Issue 9), available at http://www.annepetty.com/images/Dreaming_Stories.pdf.

¹⁴⁰ *Id.*

¹⁴¹ See *Bulun Bulun v. R & T Textiles Pty. Ltd.* (1998) 86 F.C.R. 244, 247 (Austl.).

¹⁴² *Id.*

¹⁴³ See *id.*

derogatory use. These rights are inalienable and may only be exercised by the author of the work.¹⁴⁴ Logically then, once the author dies, so too does the community's ability to force the author to exercise the moral rights connected to the work.

C. *Proposed Communal Moral Rights Legislation Will Not Sufficiently Fill the Gaps in Protection of Communal Interests*

Future legislation extending moral rights to communities will not solve the Copyright Act's inadequate protection of indigenous folklore. Indigenous communal moral rights represent the most likely next step in the Australian government's attempt to protect communal works of indigenous folklore. Members of Parliament seem to view indigenous communal moral rights as a great step forward in the scheme of protecting indigenous creative works.¹⁴⁵ Such legislation, however, can just as easily be seen as merely a step sideways with regards to protection under the current legal framework. For instance, as evidenced by the court's decision in *Bulun Bulun*, indigenous communities already have the ability to compel an author to enforce his or her rights, including moral rights, under the Copyright Act. Thus, legislation adding communal moral rights simply codifies a form of protection that courts have already recognized under the common law. Such legislation would therefore provide no greater protection for most works than can currently be achieved under current Australian law.¹⁴⁶

One potential area of benefit could be an extended period of protection for works of folklore. For instance, under the current Copyright Act, moral rights only last for the term of the copyright itself,¹⁴⁷ meaning the life of the author plus 70 years.¹⁴⁸ By allowing communities to exercise the moral rights in perpetuity throughout their existence, such legislation may actually provide at least some substantive benefit to communities. However, without an actual bill to consider, it is mere speculation as to whether Parliament would consider granting perpetual protections under the Copyright Act when doing so would undermine one of the core theories of copyright law: namely that authors will only be able to exercise their

¹⁴⁴ Copyright Act § 195AN(3) (Austl.).

¹⁴⁵ See RICHARD ALSTON, DARYL WILLIAMS, & PHILIP RUDDOCK, *Joint Media Release* (May 2003), available at http://www.richardalston.dcita.gov.au/Article/0,,0_4-2_4008-4_114525,00.html.

¹⁴⁶ See Ian McDonald, Australian Copyright Council staff attorney, *Indigenous Communal Moral Rights* (July 16, 2003), www.copyright.org.au/pdf/acc/articles_pdf/A03n24.pdf (article to be published in *Australian Intellectual Property Law Bulletin*).

¹⁴⁷ Copyright Act, 1968, § 195AM(3) (Austl.).

¹⁴⁸ *Id.* at § 33(2).

copyright for a specifically designed period of time before the material enters into the public domain to be used freely by everyone.

Furthermore, it is likely communities would only be able to exercise their rights under very limited circumstances. For instance, the proposed Draft Bill¹⁴⁹ contained five conditions that would have to be met before a community would qualify for moral rights: 1) there must be a work, 2) the work must draw on the body of traditions or beliefs held in common by the indigenous community, 3) there must be an agreement between the community and the creator of the work, 4) there must be an acknowledgement of the community's association with the work, and 5) interested parties in the work must consent to the initiation of the communal moral rights.¹⁵⁰ Additionally, each condition "must be met before the first [commercial] dealing with the work, otherwise no rights arise."¹⁵¹ Clearly, the third and fifth requirements require mutual consent by both the community and the author of the work prior to initiation of the moral rights. Thus, because the third and fifth (and perhaps even the fourth) requirements are conditional upon the creator's own assent, it appears indigenous communities would have no legal control without the blessing of the author. It seems logical that if the author were willing to extend moral rights to communities, that same author would be willing to exercise his or her moral rights as a fiduciary of the community as in *Bulun Bulun*. Thus, under this proposed regime, communal moral rights would not confer any additional benefits upon a community that wishes to protect a certain work of folklore. In fact, one author has suggested that, "[h]ypothetically speaking, under the draft Bill [i]ndigenous communal moral rights would not have been recognised in any of the copyright infringements that constitute Australian jurisprudence in this area."¹⁵² Thus, what is needed is a legal tool that allows a community to protect its communal folklore when an author will not or cannot exercise his moral rights, despite the community's request.

Finally, these proposed communal moral rights, as with individual moral rights, would only apply to works that qualify for protection under the Copyright Act. Thus, the proposed legislation would fail to bridge the wide gaps in the substance of copyright protection, such as for unfixed works, works with no identifiable author, and works that fail to qualify as original. Furthermore, when the copyright duration expires, anyone would have the

¹⁴⁹ In 2003, an Indigenous Communal Moral Rights Draft Bill was circulated to a limited number of parties. See *supra* Part II.A.

¹⁵⁰ See Anderson, *The Politics of Indigenous Knowledge*, *supra* note 60, at 597-98.

¹⁵¹ *Id.*

¹⁵² See Anderson, *Indigenous Communal Moral Rights*, *supra* note 61, at 8.

ability to copy the work, so long as the treatment was not derogatory. Moral rights do not prevent the appropriation of a work once the copyright term expires. Therefore, communal moral rights would be exercisable only where the community feels an artistic work will be subject to derogatory treatment. All other uses of the work will be sanctioned once the copyright term expires. Thus, in order for communities to be able to assert an interest in their cultural works of folklore, they need greater protection than can be afforded by application of the Copyright Act alone.

V. BY EXPANDING ITS PROTECTIVE SCOPE, THE HPA COULD PROVIDE THE NECESSARY SECURITY FOR COMMUNAL WORKS OF FOLKLORE

The HPA was enacted in 1984 with the purpose of preserving and protecting areas and objects in Australia “that are of particular significance to Aboriginals in accordance with Aboriginal tradition.”¹⁵³ The HPA enables the Commonwealth to initiate protection over these areas and objects when protection under the laws of the State or Territory falls short.¹⁵⁴ Protections can either be short-term or long-term, and are backed by criminal sanctions.¹⁵⁵ Although the HPA was introduced merely as a temporary measure, the sunset clause was removed in 1986 when it appeared that future land rights legislation would not be introduced.¹⁵⁶

A. *The HPA Protects Aboriginal Areas and Objects of Particular Significance*

The scope of the HPA's protections is somewhat narrow, limited to those objects and areas of archeological or scientific value.¹⁵⁷ Contemporary works of folklore often do not qualify for protection.¹⁵⁸ As such, the HPA would need to undergo revisions before communities would be able to effectively utilize the law to protect communal folklore. Interestingly, until 2006, the HPA did, in fact, afford some protection to contemporary works of folklore, albeit only with respect to Aboriginal objects and areas located in Victoria.¹⁵⁹ In 1987, the Aboriginal and Torres Strait Islander Heritage

¹⁵³ HPA, § 4.

¹⁵⁴ ELIZABETH EVATT, REVIEW OF THE ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984, at xiii (1996).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 80-82.

¹⁵⁸ *See id.* at 37 (noting that the HPA does not cover traditional and contemporary cultural expressions).

¹⁵⁹ *See* Aboriginal and Torres Strait Islander Heritage Amendment Act [Amendment Act], 1987 (Austl.).

Amendment Act (Amendment Act)¹⁶⁰ added Part II.A to the HPA. Part II.A applied only to Victoria,¹⁶¹ but expanded the definition of “Aboriginal cultural property” to include not only “places” and “objects,” but also “folklore.”¹⁶² Part II.A further defined “Aboriginal folklore” as “traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs, and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.”¹⁶³ The repeal of these provisions in 2006 left the HPA as it stands today, limited to protecting only significant Aboriginal objects and places from injury or desecration.¹⁶⁴

The HPA does not grant indigenous communities a private right of action to protect cultural property. Instead, the HPA places the power of enforcement in the Minister for Aboriginal Affairs.¹⁶⁵ An Aboriginal community that perceives a threat to a cultural object or place must file a complaint with the Minister for Aboriginal Affairs.¹⁶⁶ The Minister has no obligation to declare an object or place protected—this is true whether the Minister receives a complaint or identifies a threat to cultural property in some other way.¹⁶⁷ Although the Minister must consider a report prepared following an application by an Aboriginal community for the protection of a “specified area”¹⁶⁸ (the “Area Report Requirement”), no such requirement exists for the protection of objects.¹⁶⁹ With respect to applications for the protection of cultural objects, the Minister must consult with the appropriate Minister from the state or territory in which the problem arises in order to determine whether the law of that state or territory provides sufficient protection.¹⁷⁰ The Honorable Elizabeth Evatt¹⁷¹ noted in her review of the

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at Preamble. The Victorian government requested that the Parliament of the Commonwealth enact provisions within the HPA for the protection and preservation of Aboriginal cultural heritage in Victoria. *Id.*

¹⁶² *Id.* § 7(21A)(1).

¹⁶³ *Id.*

¹⁶⁴ HPA, § 4.

¹⁶⁵ *See generally id.* §§ 9-16. Under the HPA, the Federal Minister for Aboriginal Affairs serves as the liaison for communities that wish to file a declaration for the protection of a significant Aboriginal area or object. *See* Graeme Neate, *Biting the Bullet: Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 2 ABORIGINAL L. BULL. 7 (Dec. 1989) (Issue 41), available at <http://www.austlii.edu.au/au/journals/AboriginalLB/1989/59.html>.

¹⁶⁶ *See generally* HPA, §§ 9-13, 21.

¹⁶⁷ *See id.* § 21E(3).

¹⁶⁸ *Id.* § 10.

¹⁶⁹ *See generally* HPA (containing no provision requiring a report regarding protection of cultural objects).

¹⁷⁰ *Id.* §13(2).

¹⁷¹ The Honorable Elizabeth Evatt served as the Chief Judge of the Family Court of Australia from 1976 to 1988 and served as a member of the UN Human Rights Committee from 1993 to 2000, among

HPA (“Evatt Review”)¹⁷² that “[t]here is no right to a declaration of protection,” and the power to protect an area or site is entirely discretionary.¹⁷³ Thus, although the HPA provides a process for protecting areas and objects of cultural importance, the enforcement mechanisms are vested in regulators rather than communities, and would have to be revised to provide substantive rights for Aboriginal communities.

B. Compared to the Copyright Act, the HPA Provides a Superior Platform for Protecting Communal Works of Folklore

When compared to the Copyright Act, the HPA has greater potential to adequately protect communal interests in works of folklore. As discussed in Part II of this comment, the Copyright Act applies only to identifiable authors of a specific work.¹⁷⁴ And, as noted in Part IV, even where a community may benefit from protection under the Copyright Act, the Act only affords protection for a limited period of time.¹⁷⁵ Because Aboriginal cultural property descends from generation to generation, protection limited in duration does not adequately protect the communities’ interests. Thus, the Copyright Act appears to be a poor platform for the exercise of communal interests. The HPA, in contrast, could be a more appropriate vehicle for communities to exercise interests in communal works of folklore.

Commentators have recognized the HPA’s potential as a means to protect indigenous communities against misuse and misappropriation of works of folklore¹⁷⁶ and criticized the law for not establishing adequate protection for such works.¹⁷⁷ In its current form, the HPA does not allow indigenous communities to protect works of folklore. For instance, the law does not cover intangible aspects of culture such as oral histories and stories or ceremonies involving song and dance.¹⁷⁸ The Evatt Review notes that the law does not cover all aspects of cultural heritage important to Aboriginal people and highlights the fact that it “makes no provision concerning intellectual property.”¹⁷⁹ Indeed, “[m]ost applications under the Act have

other distinguished accomplishments. International Commission of Jurists, *Elizabeth Evatt*, http://www.icj.org/article.php3?id_article=2882&id_rubrique=13&lang=en (last visited May 1, 2009).

¹⁷² Justice Evatt was tasked with conducting a comprehensive review of the Aboriginal and Torres Strait Islander Heritage Protection Act. See EVATT, *supra* note 154, at Preface. The work commenced in December 1995, and the Review was completed roughly nine months later. See *id.*

¹⁷³ See EVATT, *supra* note 154, at 8.

¹⁷⁴ See *supra* Part II.

¹⁷⁵ See *supra* Part IV.B.

¹⁷⁶ See Golvan, *supra* note 2, at 6.

¹⁷⁷ See JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 283-84.

¹⁷⁸ See *id.*

¹⁷⁹ See EVATT, *supra* note 154, at 16-17.

related to areas and sites.”¹⁸⁰ Even though it appears as though folklore in the form of tangible artistic works such as paintings or sculptures could qualify as “objects” under the HPA, this is not the case. Under Australian cultural heritage laws, heritage is typically defined by its “scientific, historical, or archaeological value,”¹⁸¹ and such legislation fails to emphasize “living heritage,” and the cultural values of the community.¹⁸² Contemporary forms of indigenous art thus do not appear to qualify for protection as “heritage” under Australia’s heritage laws. Finally, an order of protection under the HPA is subject to the discretion of the Minister of Aboriginal Affairs,¹⁸³ leaving indigenous communities largely incapable of exercising any affirmative or definitive power to protect their cultural works under the HPA. As a result of these significant deficiencies within the law, the HPA currently is not equipped to address communal concerns regarding works of folklore.

Despite the HPA’s current shortcomings, its goals provide a strong foundation for providing significant protection for indigenous folklore. As stated in the Purposes of the Act, the HPA is intended to preserve and protect from injury and desecration “areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.”¹⁸⁴ Additionally, the Evatt Review notes that the HPA “is a law for the benefit of Aboriginal people.”¹⁸⁵ Communal works of folklore could fall squarely under the purposes of the HPA. Indigenous communities do not wish to protect such works based on the works’ individual economic or societal value as would be the purpose under the Copyright Act, but rather to protect these works based on cultural value to the community. Because communities view these communal works as sacred due to their traditional aspects and because these traditional aspects are at the very core of what indigenous communities desire to protect,¹⁸⁶ the HPA is an ideal tool to safeguard these works of folklore. By placing protection of such works under the umbrella of a law that more closely coincides with indigenous concerns and purpose, courts may find it much easier to enforce those protections.

By extending protection to communal works of folklore, the HPA could effectively complement the Copyright Act’s individual protections

¹⁸⁰ *Id.* at 3.

¹⁸¹ JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 80-82.

¹⁸² Report, *supra* note 42, at 157.

¹⁸³ See JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 82.

¹⁸⁴ HPA, § 4.

¹⁸⁵ See EVATT, *supra* note 154, at 76.

¹⁸⁶ See *supra* Part II.

with communal protection over works of folklore in specific circumstances where individual protections would not suffice. Such protections may appear to encroach upon the province of the Copyright Act. Section 8 of the Act provides that “copyright does not subsist otherwise than by virtue of this Act.”¹⁸⁷ Further protections provided under the HPA for copyrightable works (artistic works, performances, etc.) may be seen as a *de facto* copyright protection that should be barred under the Copyright Act. However, by placing the emphasis on protection of the underlying tradition and culture that folklore represents, the HPA may be viewed not as legislation tangentially extending copyright, but rather as existing legislation being expanded to include additional cultural works. Also, under the HPA, protections are extended only as a “last resort.”¹⁸⁸ This emphasis could remain an underlying goal of a revised HPA. Thus, the Copyright Act’s protections could still remain valid and controlling except where such protections fall short. Under circumstances where the protection falls outside of the copyright realm, HPA provisions protecting communal works would be triggered, thereby providing communities with an avenue of relief that is otherwise unavailable under the Copyright Act.

By widening the scope of the HPA’s focus to include a broader definition of cultural objects that encompasses works of folklore similar to that of Part II.A, the HPA could be used to effectively protect indigenous works of folklore throughout the country. A revised HPA could place the power of protection with the courts as opposed to the Minister of Aboriginal Affairs. Instead of granting indigenous communities a passive right to bring their concerns to an official who is under no obligation to extend adequate protections, the HPA could grant certain rights on behalf of the community to protect their property in a similar fashion to the protection afforded to artists under the Copyright Act and provide a judicial review mechanism for administering such rights. In determining whether a certain work of folklore requires protection under a revised HPA, the courts could use an objective test measured by indigenous customary law. Prior cases indicate that courts are relatively comfortable using indigenous customary law to determine whether indigenous interests merit legal protection. For instance, in *Bulun*

¹⁸⁷ Copyright Act, 1968, § 8 (Austl.).

¹⁸⁸ See Aboriginal and Torres Strait Islander Heritage (Interim Protection) Bill 1984, Second Reading, Mr. Holding (Minister for Aboriginal Affairs), (May 9, 1984), <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=:group=:holdingType=:id=:orderBy=customrank;page=0;query=Content%3A%20Date%3A09%2F05%2F1984;querytype=:rec=11;resCount=Default> (last visited May 29, 2009); see also JANKE, OUR CULTURE: OUR FUTURE, *supra* note 26, at 283 (stating that the Act should only be used to protect Indigenous heritage “where State and Territory laws are ineffective or where no equivalent law applies.”).

Bulun, the Federal Court was willing to recognize a fiduciary relationship between the Galanbingu community and an individual artist once the Court determined that under customary law and tradition the relationship between artist and community was one of trust.¹⁸⁹ In a similar vein, where a community has expressed concern regarding a work of folklore, courts could determine whether, under the customary law and tradition, the community has an interest in the work and whether the interest warrants protection by the HPA.

The courts have provided similar tests in determining whether to recognize Aboriginal communal rights in property. In *Mabo v. The State of Queensland* [No. 2],¹⁹⁰ the High Court found that the common law of Australia recognized a form of native title where the right to such title is grounded in the customs or laws of the people.¹⁹¹ The High Court emphasized the importance of looking to evidence of traditional laws and customs of the community that give rise to an interest in the land.¹⁹² This analysis by the court could be transplanted into the context of protection of folklore: where the community is able to provide evidence that their “traditional laws and customs” give rise to an interest in the work, the community could maintain a claim for the protection of such works under the HPA.

By granting similar rights to an individual author under the Copyright Act and to a community under the HPA, there may initially appear to be a conflict between the two laws. Where a community has an interest in opposition to those interests of the individual creator, should the individual’s interests win out under Copyright law, or should the communal interests take precedence under the HPA? Although it may seem that a conflict of interests could present a serious problem, the courts have already defined a solution. In *Bulun Bulun*, where both the individual author and the community expressed different claims in a single work, the Federal Court was able to address both concerns by applying the communities’ customary laws. Communities will only have a valid claim where the creator of the work of folklore has in some way been given permission by the community to create a work, or has otherwise appropriated some cultural aspect that the clan perceives as being owned by the community. Thus, customary law would draw the boundary lines with regard to whether the law governing the

¹⁸⁹ See *Bulun Bulun v. R & T Textiles Pty. Ltd.* (1998) 86 F.C.R. 244, 259.

¹⁹⁰ *Mabo and Other Plaintiffs v. the State of Queensland* [No. 2] (1992) 175 C.L.R. 1.

¹⁹¹ *Id.* at 15.

¹⁹² See *id.* at 58-62.

individual (copyright) or the law governing the community (HPA) should apply.

VI. CONCLUSION

This Comment has argued that the Australian Copyright Act does not adequately protect Aboriginal folklore. The Copyright Act protects only original works with identifiable authors that are reduced to a material form. These requirements are problematic in the context of indigenous folklore. Indigenous artwork and other cultural works draw on traditional designs and culture that have evolved over many generations, and, as such are not original and do not have readily identifiable creators in the classic sense. Furthermore, indigenous folklore includes oral stories and dance ceremonies that do not fall under the formal materiality requirement articulated in the Copyright Act. Though amendment of the Copyright Act could address these issues to a limited extent, more adequate protection would be better achieved by amending the HPA.

As the U.N. Declaration discussed above illustrates, there is an international consensus that indigenous people have a right to have their heritage and folklore protected. If Australia hopes to keep pace with human rights standards, it should consider placing protections outside the realm of copyright law. The HPA's goals parallel indigenous concerns regarding their folklore. By amending the HPA to include certain enforcement mechanisms and to extend its protective scope, the law could prove an effective new tool for Australia's indigenous communities to protect their folklore and their heritage.