Can copyright be reconciled with First Nations' interests in visual arts?

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Three of my grandparents emigrated from Britain to New Zealand in the first decades of the twentieth century, two from Wales and one from Scotland. My remaining grandparent was a descendant of earlier British settlers. As told in the histories already repeated at this conference (and I'm thinking in particular of Mary Thomas speaking at the "Repatriation" session, this morning), my Welsh grandparents were not allowed to speak their own language as children at school. Rather, they were forced to speak English and were beaten if they dared to speak Welsh in the schoolyard. On leaving Britain as adults, they settled in Kohukohu a small rural settlement on the Hokianga Harbour in the Far North of the country, where my mother spent her early years. My father was born in Te Papapa, a suburb of Auckland. I spent my formative years living in Auckland on the shores of the Manukau Harbour. My name is Peter Shand and, as you have heard, I teach in the Fine Arts School of the University of Auckland and am currently a graduate student in London. Thus, you could say I am literally between homes here in Vancouver. Hence, I am especially grateful to the Musqueam Nation for permission to speak on your land and I want to recognise all the First Nations people present today and thank you for your welcome. I am grateful to Union of British Columbia Indian Chiefs for the opportunity to present a paper here, especially in the company of my fellow-panellists.[1]

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[1] Refer, for example, Sally McCausland "Protecting Aboriginal Cultural Heritage in Australia: Looking for Solutions in the Canadian Experience" (unpublished Master of Laws Thesis, University of British Columbia, 1997).

I: INTRODUCTION

My paper is part of an on-going project looking at the inter-action and cross-influences of indigenous peoples' rights, the visual arts, intellectual property and concepts of cultural authenticity. As such, it is a project concerned with cultural heritage in both a theoretical sense and its "lived realities".

I am aware that the study of cultural heritage has a certain cachet in liberal universities at the present time. Therefore, I want to register three riders on my talk. First, I am a pakeha New Zealander, which is to say I am a non-indigenous person. I am aware of the dangers this raises with respect to my seeming to put indigenous interests under investigation when, as you will hear, my methods are based in the European academic tradition. Secondly, I am an art historian by training, so I hope my legal analysis is not wanting. Finally, and perhaps because of these two prior limitations, I note that this paper is a sketch of the issues involved in ensuring the protection of indigenous interests in cultural heritage. As such, the questions I raise with respect to First Nations' interests in visual arts and the accommodation of those within Canadian copyright law are necessarily speculative and possibly overly optimistic. In fact, I was tempted to write two versions of it: this one "Can copyright be reconciled with First Nations' interests in visual arts?"; and another "Why copyright can't be reconciled …" and wait to see which had fewer problems in it.

As it turns out, I've gone with the difficult option, for this investigation is an extremely difficult and complex enterprise. Nevertheless, I hope the paper raises yet another consideration for those of you actively involved in securing First Nations' perspectives as paramount in the production, dissemination, treatment and discussion of First Nations' cultural heritages.

II: THE APPROPRIATION OF CULTURAL HERITAGE

The initial phase of modern cultural heritage appropriation was underscored by the twinned ages of Enlightenment and Empire, during which all the world was made over to fit the intellectual, economic and cultural requirements of first Europe, then the United States. The visual arts (if I may use the term uncritically) of indigenous peoples were looted, stolen, traded, bought and exchanged by colonials of every status – from Governors General to itinerant sealers.

These objects were studied, admired, looked at, forgotten, created manias of taste and connoisseurship or never saw the light of day again, whether in the private houses, the palaces or the museums of Empire. There many remain.

Because of their display, whether in spectacular, if bizarre, *mises en scenes* in nineteenth century anthropological museums or in formal isolation in houses of modern art, they became available for appropriation into the cultural language of the very colonisers who had initially dislocated them. Indeed, this seemingly hybrid language of the "primitive" and its putative other "modern" represents one of if not the key moment of cultural production in the twentieth century. It would seem, by the enthusiasms generated for "ethno-" and "eco-" tourism, "world music", debased forms of shamanism, pastiches of ritualised body marking, "third-world tat" or mystical experiences for industrial liberals that attraction for Otherness remains an important feature of Euro-American cultural values. Clearly there is the potential for significant, indeed, world changing benefits from this. Witness the significance of indigenous peoples' perspectives, arguments and, to a much lesser degree, claims in environmental planning; or the rise of a new dialogue in human rights, initiated by indigenous peoples of the world. Objects are being returned, ideologies are being respected, permission is being sought – just not enough and too infrequently.

With this in mind, there are three aspects of the appropriation of visual arts that I want to note: commercial exploitation, modernist "affinity" and postmodernist quotation. Each of these are illustrated with reference to an example from New Zealand – although I realise that you will know of equivalent examples of similar issues from each of the places you come from. These particular examples are connected by the fact that each of them involves the appropriation, in different guises, of the koru, an essential element of Maori visual design and artistry.

1. Commercial exploitation

Like the fashion houses of Paco Robanne and Jean-Paul Gaultier, this image of the work of New Zealand swimwear manufacturer, Moontide, is an example of the use that has been made of Maori design and its derivatives. What is interesting here, however, is the politics of use (that is the cultural politics of use, I'll leave feminist interventions to you) are more complicated than might first appear. This is not a case akin to the European fashion houses' appropriation of the forms in a formalist vacuum. The owner of the business, Tony Hart, and the firm's designers developed this swimwear line with a Maori entrepreneur from a predominantly rural area of New

Zealand. Buddy Mikaere, a Maori of standing in the community, negotiated the use of the koru motif. According to Hart, two concerns governed the design element's use: commercial viability and cultural respect. In recognition of this dual aim, part of the royalty from sales goes to the Pirirakau hapu ("sub-tribe") of the Ngati Ranginui people.

Not surprisingly, the line garnered a lot of press interest when it debuted at Sydney Fashion Week in 1998 – not least for its "ethical" handling of the "indigenous designs issue". What at first glance seems a direct and disrespectful appropriation is at least modified by this additional information. At the same time, concerns might be raised about the ability of an individual, hapu or iwi ("tribe") to independently sanction the use of a motif or design module or, indeed, to register some sort of interest in it as this might exclude both indigenous and non-indigenous use. The issue at hand relates to the specificity of the particular design and the control of its employment.

2. Modernist "affinity"

Modernist appropriation is seemingly more straightforward.[2] Modernist artists from Paul Gauguin forward were attracted to the potential for their work they saw in indigenous cultural heritage. They both copied individual examples into their work and emulated styles; they even presented their work as capturing the essences they asserted were present in such indigenous objects. The marriage of a high-modernist abstraction with, in this case, the koru is a complicated affair. On one hand, the original is an example of design surely at least as sophisticated as this painting by pakeha artist Gordon Walters. Nevertheless in his appropriation of the form Walters affects a dislocation of the source form from its initial cultural context. In so doing, specific meanings are erased and cultural significances shift and slide to the point that some have argued

[2] The most important recent re-statement of this position was made in the 1984 blockbuster exhibition at the Museum of Modern Art in New York: *"Primitivism": Affinity of the Tribal and the Modern*. This show positioned examples of indigenous cultural heritage in formal connection with modernist artworks in order to pursue the principal theses of the exhibition: that both "sets" of work revealed key expressive tendencies of humanity and that the concerns of modernist artists squared with those asserted to be in the minds of indigenous artmakers. The accompanying advertising campaign put this in the shape of a series of crude comparisons of indigenous and modernist objects with the bye-line "Which is 'primitive'? Which is modern?' The exhibition was the subject of intense criticism, most notably reviews by: James Clifford (*Art in America* 73: 4, April 1985, 164); Hal Foster (*October* 34, 1985, 45); and Thomas McEvilley (*Artforum*, November 1984, 54).

Some useful texts might include: James Clifford, *The Predicament of Culture* (Cambridge: Harvard, 1988); Susan Hiller (ed.), *The Myth of Primitivism* (London: Routledge, 1991); Colin Rhodes, *Primitivism and Modern Art* (London: Thames and Hudson, 1994); and my own doctoral thesis "Adrift on an Ocean of Affinities: Modernist Primitivism and the Pacific 1891-1984" (unpublished: The University of Auckland, 1997).

the appropriation to be an equivalent of colonial occupation of indigenous art and design, a silencing of the koru.[3]

Yet when on the cover of a book about cultural relations, an image such as this garners admiring or at least accepting comment from many citizens, including Maori academics, as it seems to them to signify a "bi-cultural" national style. In a similar vein, versions of the principal design aspect (the bar and stop) crop-up as logos for nationalist enterprises: from Government Agencies to the first America's Cup yachting challenge in 1984/85. The "affinity" here is one of visual similarity overlain with at least one layer of additional interpretation.

3. Post-modern quotation

Of course, the certainty of signs and signification is said no longer to be available – certainty itself is presented as an illusory commodity in much contemporary art. Post-modern quotation reflects a pervasive sense of contingency and dislocation, in which all forms, regardless of their original cultural context are available for re-inscription. This image by New Zealand artist Dick Frizzell, shows an apparently humorous juxtaposition of two feted local icons. One is the ta moko of Maori warriors (as pastiche on the face of Eric Cantona on a cover of the men's style magazine *GQ* or employed seriously in campaigns for Air New Zealand or Adidas, sponsors of the national rugby team, the All Blacks). The other is the face of the "Four Square Man", a logo for a chain of convenience stores.

The fusion of high and low cultures in this example is a useful illustration of the opportunities for cultural critique and revelation made possible through dislocation. There are meshes of: the authoritative and the quotidian; the "sacred" and the commercial; official and unofficial; culture and advertising; two forms of cultural specificity; and two systems of meaning. Nevertheless, the exhibition in which this and other appropriations of Maori forms appeared was a *succès de scandale* for Frizzell. He was vilified and championed, both.

[3] See, for example, Ngahuia Te Awekotuku interview with Elizabeth Eastmond and Priscilla Pitts in *Antic* (1, June 1986, 44), which makes this claim, as does Rangihiroa Panoho's essay in *Headlands: Thinking Through New Zealand Art* catalogue (Sydney: Museum of Contemporary Art, 1992) and my own account (supra, note 2); and compare with Francis Pound, *The Space Between: Pakeha Use of Maori Motifs in Modernist New Zealand Art* (Auckland: Workshop Press, 1994) and Leonard Bell's essay in *Gordon Walters: Order and Intuition* edited by James Ross and Laurence Simmonds (Auckland, 1989).

Importantly, these positions did not simply split along racial lines as the catalogue contained essays by Maori writers and a few pakeha academics rose to the bite of the images.[4]

Summary: Cultural appropriation

At play behind my use of these examples is the observation that responses vary according to political interpretations of the images (and, perhaps, are unstable even then). What I might say is prescient criticism might seem censorious forms of political correctness to you and what you might regard as somewhat naïve readings of cultural symbols I might see as the potential of signs to overcome their original cultural contexts. This is the direct consequence of a hybridising of languages. The efficacy of these connections is important to the claims of both appropriating non-indigenous artists and designers *and* those indigenous artists and designers who work in traditional or authentic methods – for these have as surely been affected by the contact of peoples as have their colonising Others.

In New Zealand, some commentators on appropriation have looked to Julia Kristeva's metaphor for language: "[every] text takes shape as a mosaic of citations; every text is an absorption and transformation of other texts."[5] In doing so it seems to me that they ignore two crucial issues. First, language is not static (which is her point, in part) but is also dependent on who is speaking and who is listening. In a dialogical system such as authorised cultural appropriation or hybridity this is extremely important. Secondly, their use of the mosaic metaphor is dependent upon the severing of language from specific meaning. While this might well be the experience of pakeha academics, it is not clear that the languages of indigenous peoples are so "cut loose". To the contrary, language is what sustains people. For Maori: "Ko te reo te **mauri** o te mana Maori" (The language is the life force of mana Maori); "Ke ngaro te reo, ka ngaro taua, pera I ta ngaro o te moa" [6] (If the language is lost, humanity will be lost, it will be as dead as the moa)

What remains a concern is that the unauthorised appropriation of indigenous cultural heritage affects real harm for indigenous peoples, their ancestors and their descendants. This is

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[4] See *Dick Frizzell: "Tiki"* catalogue (Auckland: Gow Langsford Gallery, 1992); and compare with Ngahuia Te Awekotuku interviewed by myself in *Stamp* (34: December 1992/January 1993, 24).

[5] Kristeva, *Semiotikè recherches pour une sémanalyse* (Paris: Seuil, 1967) 146; quoted in Culler *Structuralist Poetics: Structuralism, Linguistics and the Study of Literature* (London: Routledge and Kegan Paul, 1975) 139.

[6] From oral submissions made by Sir James Henare to the Waitangi Tribunal, reported in *Findings of the Waitangi Tribunal relating to Te Reo Maori and a claim lodged by Huirangi Waikerepuru and Nga Kaiwhakapumau I te Reo Incorporated Society* (Wellington: The Waitangi Tribunal, 1986) paras 6.1.21 and 3.1.4.

why, at an international level, the Draft Declaration on the Rights of Indigenous Peoples, for example, includes rights: prohibiting subjection to cultural genocide (Art. 7); affirming the practice and revitalising of cultural traditions and customs (Art. 12); affirming the maintenance and development of distinct identities (Art. 8); and belonging to communities or nations (Art. 9). In the context of this paper it also includes bedrock rights to self-determination (Art. 3) and recognition and full ownership, control and protection of cultural and intellectual property (Art. 29). The potential for harm is why, at a local level, the importance of the need for protection is made evident by the paper that follows this one. [7]

III: OPPOSING AUTHENTICITIES: INDIGENOUS PEOPLES' INTERESTS IN VISUAL ARTS AND PRINCIPLES OF INTELLECTUAL PROPERTY

Broadly speaking, there are three platforms to advance protection for cultural heritage: international documents; national *sui generis* legislation; and revision of existing intellectual property legislation.

1. The alternatives: international agreements and special national legislation

International reform will necessary build on the extremely significant report, *Protection of the Heritage of Indigenous People* prepared by Erica-Irene Daes in 1997 as well as other significant documents supported by the United Nations[8] and the increasing number of documents prepared by non-governmental indigenous groups.[9] Importantly, all of these stress the

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[7] See also, for example: the United Nations Report produced by the Keynote Speaker at this Conference, Erica-Irene Daes, *Protection of the Heritage of Indigenous People* (New York and Geneva: United Nations, 1997); Dean A. Ellinson, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17 *University of New South Wales Law Journal* 327; and *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, Touring Exhibition Catalogue (Sydney: National Indigenous Arts Advocacy Association, 1996).

[8] These include: The Tunis Model Law on Copyright for Developing Countries, 1976; Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1985; The Draft United Nations Declaration of the Rights of Indigenous Peoples, 1993; The Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, and The Draft Declaration of Cultural Rights.

[9] Such as: The Mataatua Declaration, which resulted from the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples in Whakatane in 1993; The statements from the Jaulayinabul Conference on Intellectual and Cultural Property, 1993, and from the United Nations' Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights, Suva 1996, and The COICA Statement 1994.

The Mataatua Declaration, for example, stresses the importance that indigenous peoples:

- define their own intellectual and cultural property;

importance of self-determination as a key element of securing the necessary protection of indigenous cultural interests by indigenous peoples.

In the national arena, the Australian Copyright Council advocates separate legislation for the control of indigenous cultural heritage rather than amending the existing Copyright Act. Specifically, it presents the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984, as "a potential vehicle for protecting Indigenous intellectual property in ways which are satisfactory for the Indigenous community."[10] In New Zealand, the Taonga Maori Protection Bill is currently being re-drafted. What is interesting about the document in its original form, was that it closely reflected the core concerns of the Mataatua Declaration, which it seemed to be a response to. More focussed legislative programmes such as these have the distinct advantage of creating a single, unified basis for intellectual property rights.[11] To this end, *sui generis* legislation affords the possibility of establishing a legislative régime that recognises, affirms and gives action to indigenous intellectual property rights in its fullest sense.

What these approaches overcome is the piecemeal reform of intellectual property statutes. There is additional interest in evading such reform because of fundamental antipathies between intellectual property law and the interests of indigenous peoples. Its division into component parts (Patents, Copyright, Industrial Design, Trademarks as well as new rights in Broadcasts, Databases, Performances) arguably reflects an atomistic, divisionist interpretation of rights, quite

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- note the inadequacy of existing mechanisms of protection;
- develop an independent code of ethics for external users;
- prioritise indigenous education and research;
- reacquire traditional lands;
- maintain and promote traditional practices;
- establish bodies to monitor the commercialism of indigenous cultural properties in the public domain, advise on cultural heritage protection and provide a forum for mandatory consultation for any legislation concerning indigenous intellectual or cultural property rights;

and of the importance that states and national and international agencies:

- recognise the fact that indigenous populations are the guardians of traditional knowledge (with a concomitant right of controlling the dissemination of information);
- recognise the right of indigenous peoples to create new knowledge based on the traditional;
- note the inadequacy of existing protection mechanisms; and
- develop a new intellectual property rights régime in full co-operation with indigenous peoples that incorporates: collective and individual ownership; retroactive coverage; protection of culturally significant items from debasement; a co-operative framework; multigenerational coverage.

[10] Ian McDonald: *Bulletin 94 (revised): Protecting Indigenous Intellectual Property: A Copyright Perspective* (Sydney: Australian Copyright Council, 1997) 64.

[11] Indeed, it would not be inappropriate to bring all indigenous cultural interests into a unified legislative programme. To this end, important issues of Maori cultural property rights could be included in a rewriting of culturally directed property legislation.

out of step with an holistic world view.[12] Similarly, cultural property is sectioned-off from intellectual property, a problem Daes addresses.[13] Rosemary Coombe has argued that the law is based on what is, for indigenous peoples, a debilitating series of distinctions and it thereby re-inscribes a structure that is anathema to indigenous peoples.[14] Furthermore, she speaks of the law acting hegemonically, forcing indigenous peoples to articulate their concerns "in a language power understands" – which is to say it silences indigenous peoples' own languages.[15]

2. The problems with copyright

Copyright is commonly rejected as the most unpalatable form of protection available. Daes describes existing forms of legal protection of intellectual property such as patent and copyright as "not only inadequate … but inherently unsuitable"[16] to indigenous peoples' needs. James Tunney denies that Western systems can accommodate the complexity of indigenous cultural heritage interests, describing intellectual property and indigenous peoples as "square pegs and round holes".[17] Vivien Johnson sees a "total conflict" between copyright and indigenous peoples' interests.[18] In her 1997 Masters Thesis, my fellow panellist Sally McCausland quotes the Canadian Royal Commission Report on Indigenous Peoples when it states that intellectual property law is "inherently unsuited to protecting the traditional knowledge and cultural heritage of Aboriginal peoples".[19] Similarly, Peter Drahos quotes the CIOCA Statement: "[prevailing] intellectual property systems reflect a conception and practice that is: colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples; racist, in that it belittles and minimises the value of our knowledge systems; usupatory, in that it is essentially a practice of theft."[20]

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[12] See, for example, Richard Spaulding. "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997) 47 *University of Toronto Law Journal* 35, 46

[13] Daes (supra, note 7) para 21.

[14] Refer, Rosemary Coombe "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 *Canadian Journal of Law and Jurisprudence* 249.

[15] Rosemary Coombe, *The Cultural Life of Intellectual Properties* (Durham: Duke University Press, 1998) 9, 241.

[16] Daes (supra, note 7) 32

[17] James Tunney "E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles?" [1998] *European Intellectual Property Reports* 335.

[18] *Copyrites* catalogue (supra, note 7) 3

[19] Canadian Royal Commission Report, vol. III, 597 quoted in McCausland (supra, note 1) 37.

[20] Peter Drahos "Indigenous Knowledge and the Duties of Intellectual Property Owners" (1997) 11 *Intellectual Property Journal* 179, 196

Why are copyright and indigenous art practices so incompatible?[21] The extent of the mismatch can be charted by comparing the points to be made in Diane Biin and Lou-ann Neel's paper following this presentation (the nature of the relationships that exist between community, maker, content of the object and the spiritual, natural and social systems in which it is made) with the four principal concepts that underlie copyright (authorship and ownership; originality; fixation; and duration). What is interesting here is that these four ideas form as much of a re-enforcing matrix of authenticating principles within their own field of logic as do the principles of indigenous art-making Diane and Lou-ann will speak of today and as they have done in the past.

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[21] If I may summarise some of the observations from Lou-ann Neel's answers to a couple of questions I put to her about the nature of her practice in particular and First Nations' practitioners in general in an e-mail a fortnight before the Conference. I quote the following:

- a principle of connectedness between the land and the people (and thus, the creative works of the people). Inter-connected and inter-dependent;
- the works created by our 'artists' [there is no specific word for artists, rather practitioners are knowledgeable or skilled] are manifestations of the ideology, mythology, spirituality, and the social, political, economic, and cultural expressions and experiences of our people. They speak to our ongoing encounters with the mortal world, the spirit world and the natural world;
- our stories of Creation are directly connected with specific locations on our land; these are the places where our first ancestors came to be, and this is how we are connected to these lands;
- the forms in our design-works follow a strict 'artistic' discipline in terms of how they are shaped and connected to create everything from the most simple to the most complex of designs. Forms cannot simply be thrown together ... they are meticulously organised in exacting proportion. This is why it is important for 'artists' to apprentice with those who are recognised as knowledgeable and skilled in the disciplines. 'Artists' within each family group have to train and apprentice in order to learn which designs they have the right to create and use, and which designs they would need to seek permission to use;
- our traditional potlatch system is made up of all the families of our Kwakwala-speaking people. Each generation of each family has invested and re-invested tremendous wealth over countless generations to retain the rights of ownership and usership over the elements, forms, and expressions of our creative works. For instance, songs, dances, masks, ceremonial objects, regalia, dance screens, poles, houseposts etc. etc. are all creative works that have been paid for and are owned by (or carry certain usership rights) amongst one or more families within the system. Ownership and usership are intrinsic to the system and vice-versa;
- the traditional system is the social, political, economic, and legal framework for all aspects of the culture particularly one's roles, responsibilities, obligations, rights and prerogatives within the context of one's position within the family and community. While artists can exercise some control over their work and its reception and distribution outside of the community, there is still an equal degree of responsibility back to the community in terms of creating commercial versus ceremonial works. Properly trained artists have an understanding of the pieces that cannot be produced for commercial sale, and pieces that can be commissioned by families within the potlatch system;
- as a practitioner of the discipline, ownership of works created using the discipline are partially mine and partially my families' (i.e., extending out to both maternal & paternal grandparents' families = four tribal affiliations);
- this is what we mean when we say that those outside the system do not have the right to reproduce, sample, or use any of these pieces – most especially outside of their intended context. This is why we regard the use, abuse, and appropriation of all elements of our designs and creative works as outright theft; and this is why we must re-build and re-establish the traditional disciplines of our people so we can exercise our rights of ownership and usership in our terms, and within our systems.

The following sections deal with the copyright concepts in very brief outline.[22]

2.1 Authorship and ownership.

Authorship in the Canadian Copyright Act comes in three basic forms: individual, collective and joint authors. It is usually with these authors that ownership of copyright interests initially lie.[23] The dominant concept of authorship in Euro-American conceptions is the individual author. In the context of art making, this often squares with the naïve and Romantic image of the lone artist struggling away in a garret, wrestling with creative dæmons. Such authors are said to create unique products deserving of protection – and to this extent there might be broad agreement. The difficulty in this context is apparent in the fact that "artist" (or "author") is not an indigenous conception of the role played by individuals. Martha Woodmansee has contrasted this individuated authorial responsibility with a Medieval concept of authorship wherein the author makes a substantial, original contribution "as part of an enterprise conceived collectively"[24] – this author does not act alone, in a way analogous to the process of authorisation of indigenous art-makers.

Furthermore, key concepts, narratives or designs articulated in individual objects are not the artist's to do with as she pleases but come with complex duties and responsibilities that seem to derive from an ongoing interest on the part of the community for whom they hold particular value. This does not necessarily make resulting works "joint" or "collective", though. This is partly because such works still require there to be identifiable contributing individuals whether or not their contributions to works are distinctive (collective authors in such things as encyclopædias or magazines) or not (joint authors). It might be enough that collective enterprises in weaving or carving might convey interests to those directly involved in the manufacture of such items but still there is no extension to the "keepers" of the information contained in them – whether senior members of a community or the community at large. The principal reason for this is the focus on direct *authorial* contribution to a given work in the independent and individual

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[22] For longer exposition of this, see Anne Barron, "Now Other Law? Author-ity, Property and Aboriginal Art", *Intellectual Property and Ethics*, edited by Lionel Bently and Spyros Maniatis (London: Sweet and Maxwell, 1998) 37, 68 following.

[23] There are exceptions in different jurisdictions such as when work is done as a pert of employment or in cases of commissions.

[24] Using the example of St Bonaventura; see Martha Woodmansee, "On the Author Effect: Recovering Collectivity", *The Construction of Authorship: Textual Appropriation in Law and Literature* edited by Woodmansee and Peter Jaszi (Durham, Duke University Press, 1994) 15, 17.

sense that authors are conceived of in orthodox copyright law.[25] Nevertheless, it is with respect to ownership that is some possibility of protection (as discussed below).

2.2 Originality.

Originality in copyright is concerned with the origination of works. For indigenous peoples this raises the problems with respect to the realisation of known narratives or rearticulation of established designs. Indeed, an Australian report into heritage protection[26] raised the possibility that if they contain "traditional" stories of Dreaming, Aboriginal Australians' work might not suffice as original because of their antiquity and the fact that they are often repeated among members of the community. As it turns out, however, successive Australian decisions have utilised a low standard of testing for originality so that individual works, even in traditional modes of working such as bark painting, have repeatedly been found to be original. In those instances it has been enough that there has been some visible presence of the hand of an individual artist and the recognition by artist and community that he or she was responsible for a particular version of a narrative. In this respect, they have accommodated indigenous interests insofar as they are compatible with original artworks made by *individual* artists. Narratives themselves, however, do not garner protection in and of themselves, only as "original" manifestations by authors.

2.3 Fixation.

Copyright is concerned with the intellectual dimension of things. To this end, protection is granted to the material manifestation of authors' ideas – the physical expression of those ideas. What this ignores in terms of indigenous peoples' interests is that the "things" that most warrant protection are often not physically manifested. By this I mean that the ideas behind the works (narratives, principles of design, the meanings of both narratives and designs, the secret and/or

[25] An example of this is that copyright will go to the person who expressed something, not the one who had or came up with the idea for a work. This affects the position of indigenous artists when they realise narratives or designs taught to them by an elder, say, who holds the information for the community. Only the artist, the one who fashions the object and the expression of the ideas, will be eligible to be the first owner of copyright. (She may, of course, make it over (assign) it to whomsoever she pleases after the event but she is assumed to be the first owner of copyright.)

[26] Report of the Working Party on the Protection of Aboriginal Folklore (Canberra: Department of Home Affairs and Environment, 1981).

sacred nature of those interwoven concerns) can be of greater and more lasting "value" to peoples.[27]

2.4 Duration.

The basic term of protection offered by the Copyright Act is the life of the author plus 50 years – a period of time that previously affected protection to the second generation of decedents of the original author. The difficulty for indigenous peoples is that this length of time is inadequate protection for the content of artworks (you will recall that narratives as such are not protected) and for the interests of succeeding generations.[28]

Summary

For the most part, copyright protects against certain acts of illicit copying treatment as against the interests of those *individuals* who hold interests in specific, *original objects* for a *limited period* of time. It also can cover a right of attribution and some acts of derogatory treatment through the implementation of moral rights clauses.[29] Crudely, it is neither broad nor generous enough to offer the level of protection that might accord with the philosophies, interests, methods or works of First Nations peoples. It, therefore, offers individual indigenous artists potential remedies against unauthorised copying which, in Coombe's terms, say, tries to corral and limit indigenous interests within a prescriptive legal framework.

IV: CAN COPYRIGHT BE RECONCILED WITH FIRST NATIONS' INTERESTS IN VISUAL ARTS?

Of the suggested areas for introducing levels of protection, reform of existing intellectual property legislation has been roundly criticised as the least suitable for achieving the desired

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[27] Clearly, then, there is haphazard protection for perfomative aspects of culture in that they will most likely have to be fixed or recorded in some form in order to attract protection.

[28] This is a specific concern of the Mataatua Declaration (supra, note 9), for example.

[29] Moral rights clauses concern rights that are deemed to be theoretically indivisible from the personhood of the author. The principal concerns are: the right to be identified as an author (or not to be identified); the right to object to mis-identification as the author of a work; the right to object to derogatory treatment of the work. A significant difficulty arises in the Canadian Copyright Act (and in the English and New Zealand acts and may also occur in the Australian act when moral rights are finally included) in that these rights may be waived. Of course artists can consent to acts that impinge on their moral rights but the ability to waive them in whole or part carries with it a

ends for indigenous peoples. The two other major suggested approaches, international agreement and *sui generis* national legislation, are, perforce, more sweeping in the changes offered and the protections provided. Yet this is their Achilles' heel, for the degree of political change required, especially at a national level, is enormous. For many governments (especially those in nations where indigenous peoples are not political majorities) key aspects of draft documents such as rights of self-determination create an insurmountable barrier to accession or implementation. This is why I want to present a brief analysis of recent developments in one area of copyright. At the very least it serves as a backstop whilst larger, more complex forms of protective measures are sought. To this end, the partial and contingent reconciliation of copyright and indigenous rights is potentially transitional; as Bita Amani suggests but not for the reasons she presents (cultural assimilation[30]), rather, they are transitional because they anticipate a more wide-reaching solutions.

In addition, it is important to note a few things. First, judges cannot manufacture *sui generis* legislation (much less international agreements) in decisions, and decisions are required now by indigenous communities and their artists. Secondly, copyright does provide some protection already (which the succeeding paper will address in some detail). There are, admittedly, serious limitations in its value for indigenous peoples. The most important of these is that it seems to advance the position of an individual, and offers protection only to her original, material creations and for a time tied to her life (not that of her community nor of the narratives or iconography contained in her work). Thirdly, the history of copyright development is piecemeal, in part due to its receptiveness to lobbying from specific interest groups at different periods of time.[31] This may have advantages for indigenous peoples. Finally, there has been a slight opening-up of what seemed to be a closed, defined field. This has occurred in a way that has potential for indigenous peoples' claims (though more so here in Canada rather than in Australia, the country where the recent copyright cases I want to talk about have been argued).[32]

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significant disruption of the idea that such interests are crucial to personhood. One might compare French legislation, for example, where moral rights can neither be assigned nor waived.

[30] Bita Amani, "Copyright, Cultural Industries and Folklore: *A Tall Tale of Legal Fiction*" (1999) 13 *Intellectual Property Journal* 275.

[31] Refer, for example, Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999).

[32] See, for example: *Foster v Mountford* (1976) 29 FLR 233; *Bulun Bulun v Nejlam Pty. Ltd.* (1989) 10 *European Intellectual Property Reports* 346; Yumbulul v Reserve Bank of Australia and Others (1991) 21 IPR 481; *Milpurrurru and Others v Indofurn Pty. Ltd. And Others* (1994) 30 IPR 209.

1. Alternative forms of copyright: Bulun Bulun and Milpurrurru v R&T Textiles[33]

Despite what seems to be an inherent antipathy between indigenous peoples' rights and intellectual property, an important theoretical development in the law of copyright has been attempted in Australia. “Equitable copyright” is an attempt to wrest from the libertarian doctrine of intellectual property a system that reflects the communal aspect of art ownership in indigenous Australian communities. It was argued in the recent case before von Doussa J. in the Federal Court of Australia: *Bulun Bulun and Milourrurru v R & T Textiles* (subsequently referred to as *Bulun Bulun*)..

The case is concerned with two main issues. First, a claim for collective interest in copyright. Secondly, whether authorised artists are under additional obligations either because they hold the copyright in trust for the community or because of a fiduciary relationship to them. The applicants’ claims were an attempt to present as either superior or at least equivalent, some form of collective custodial rights to the individual copyright[34] - indeed Colin Golvan calls the case a “test case” for equitable copyright.[35]

What I want to do in this section is to question whether the decision in this case has any potential application in Canada and whether it may represent an opportunity for First Nations’ to protect designs and maybe even narratives over which they have custody. I stress that this is very much a preliminary investigation and would require a lot more work if it were to be argued in any future proceedings.

A brief version of the facts follows. John Bulun Bulun and the second applicant, George Milpurrurru, are leading Aboriginal Australian artists. They are also senior members of the Ganalbingu People. Bulun Bulun was the legal owner of the copyright subsisting in the painting *Magpie Geese and Water Lilies at the Waterhole*, 1978, which he painted with the permission of senior members of the Ganalbingu People. The respondent imported and sold fabric that infringed copyright in the artistic work. Bulun Bulun sued as the legal owner of the copyright; Milpurrurru as the representative of the Ganalbingu People, who, it was claimed, were the equitable owners of the copyright in the painting. This interest arose from their ownership of and relationship to Ganalbingu country in Australia’s Northern Territory. The respondent admitted

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[33] (1998) 175 ALR 193. Refer also Colin Golvan “Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments” [1999] *European Intellectual Property Reports* 599.
[34] Refer Daes (supra, note 7) 79 and 171. Also, the decision *Milpurrurru and Others v Indofurn Pty. Ltd. And Others* (supra, note 32) is interesting because of the recognition of “cultural harm” in the assessment of damages.
[35] Golvan (supra, note 33) 602.

infringement of Bulun Bulun's rights but did not admit the collective claim, as represented by Milpurrurru's suit. When the case proceeded to trial, Milpurrurru argued that under customary law, the Ganalbingu People had the power to control the reproduction of manifestations of the corpus of ritual knowledge. It was the community's contention, therefore, that Bulun Bulun held the copyright in the artistic work in trust for them or, alternatively, had a fiduciary obligation to them. This is what is meant by the term "equitable copyright".

2. How the claims fared

In relation to collective ownership, Mr. Justice von Doussa rejected that the Ganalbingu people could claim this in the present day. He found that while collective ownership of artworks survived the reception of the English common law into Australia in 1788, its recognition in common law was rendered redundant by the codification of copyright law in statute. This, he said, prevented communal title from being asserted as part of the general law. Section 8 of the Australian Copyright Act categorically states: 'copyright does not subsist otherwise than by virtue of this Act'. As the Act does not consider collective ownership other than by identifiable individuals who have made specific contributions to the resulting product, there is no room for the type of interest claimed.

In respect of the "equitable copyright" arguments, von Doussa J.'s decision holds more hope in the context of this paper. He found that John Bulun Bulun was under a fiduciary obligation to the Ganalbingu People. This arose because of the relationship he had with them and the responsibilities that arose from his being given permission to embody part of their ritual knowledge in his work. It was a relationship of trust and confidence and that placed particular duties on him. These were two-fold: the obligation not to exploit the work in a manner contrary to customary law; and the responsibility to take appropriate action against third parties if there was any subsequent infringement of the copyright.

Nevertheless, von Doussa J. also found that the absence of anything more than a fiduciary relationship did not give the Ganalbingu People an equitable interest in the copyright. Therefore, their primary right would be to sue the authorised artist if he or she were to break one of his or her two obligations (of improper exploitation; to restrain and seek remedy of third party infringers). In the case at hand, because Bulun Bulun had brought an action against the fabric importers he had fulfilled his obligations to the Ganalbingu People and, as a result, they had no cause of action. Their secondary right would be to apply for an interlocutory injunction to

prevent the reproduction and sale of infringing copies if an artist refused or was unable to – the court might infer a remedial constructive trust in this circumstance. The result for the community is that, as Golvan argues:

> the tribal owners may, under principles of equity, protect their interests in the designs for which they are the custodial owners, and that they may obtain an interlocutory injunction to prevent the improper reproduction of a design without permission. In order to obtain any further relief, it will be necessary for the tribal owners to join the legal owner of copyright, who will in most cases be the artist who created the artistic work in question. It will be appreciated that there is a fundamental dichotomy of interests between the rights of ownership as they stand under Aboriginal law and the rights of ownership under Western law.[36]

This, then, gives the community a limited, though important, right to prevent infringement. What is unavailable, without the involvement of the copyright owner, is any further action or any claim for damages, even that resulting from "cultural harm".

3. What can we take from this?

Clearly, the findings in *Bulun Bulun* represent a minimum level of protection that could be argued for in Canada. This would be dependent only on confirming aboriginal customary traditions of maintained ownership, instruction and permission of would-be users of traditional heritage and finding the requisite level of trust and confidence von Doussa J. spoke of in the relationship between community and art-maker. These are at least implied in the First Nations people's philosophy of cultural heritage and it seems safe to assume that a good case could be made for the type of land-people-culture nexus that von Doussa J. easily accepted in *Bulun Bulun* is also true of First Nation peoples.

The following points may also be noted:

1. It should be stressed that von Doussa J.'s judgements in indigenous cultural heritage cases are significant attempts at reconciling conflicting principles. In his calculation of damages in

[36] Refer Golvan "Tribal Ownership of Aboriginal Art" [1992] *Art and Entertainment Law Reports* 15. Prior to this comment, he quotes Viscount Cave L.C. in *Performing Right Society Ltd. v London Theatre of Varieties Ltd*. [1924] AC 1, who said: "'That an equitable owner may commence proceedings alone, and may obtain interim protection in form of an interlocutory injunction is not in doubt; it was always the rule of the Court of Chancery and is, I think, the rule of the Supreme Court that, in general, where the plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action. If this were not so, the defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner by persons claiming under him as assignees for value without notice without any prior equity, and proceedings might be indefinitely and oppressively multiplied."

Milpurrurru and Others v Indofurn Pty. Ltd,[37] for example, he appears to try to marry indigenous demands with copyright.

2. The protection to individual authors/artists is re-affirmed by the decision in *Bulun Bulun* and this affords some important level of protection.
3. A limited collective interest is recognised. Bulun Bulun took action appropriate to his position as fiduciary against R & T Textiles. "However, had the position been otherwise," von Doussa J. commented, "equitable remedies could have been available" to the Ganalbingu People. Thus, for example, if an artist denied the existence of his or her obligations and refused to protect the copyright from infringement then a remedial constructive trust might be imposed to strengthen the standing of the beneficiary community to bring proceedings to enforce the copyright.[38]
4. The decision speaks of the grant of permission for the creation of the artistic work "is predicated on the trust and confidence which those granting permission have in the artist."[39] This, it seems to me, would apply equally to any authorised artist, whether Ganalbingu, Aboriginal Australian or Other – although, clearly, the nature of the information told and permission given would likely be very different.[40]
5. von Doussa J. rejected the express trust arguments on the evidence. The question of the requirements of such a trust are left open in his brief discussion of what would have to be satisfied if Bulun Bulun's intention were to have created an express trust.[41]

V. MIGHT CANADA REACH BEYOND *BULUN BULUN*?

Can anything greater than a *Bulun Bulun*-type protection be had – by which I mean, what are the bases for a claim of collective ownership? If I may assume that a collective right of control existed in 1846, when Crown sovereignty was asserted over British Columbia,[42] the key

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[37] 30 IPR 209 at 239 fol. In calculating damages pursuant to s 115.4.b of the Australian Copyright Act a judge is enabled to have regard to "all other relevant matters". Upon his consideration of this "the cultural issues which are so important to the artists and their communities assume great importance" and an award of damages "to reflect culturally based harm" was made (at 246).
[38] (1998) 175 ALR 193, 211.
[39] Ibid, 209.
[40] I'm thinking in particular of non-indigenous artists who are told certain information and given permission to use certain versions of designs or narratives in their work.
[41] Ibid, 207.
[42] Refer, Delgamuukw v British Columbia [1997] 3 SCR 1010.

question is whether it survived until 1982. If so, then it is both "recognised and affirmed" by s. 35 (1) of the Constitution Act, which would put its existence almost beyond doubt. It provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed." It is important to note, too, that their expression need not take an archaic form. It is clear from the decisions in *R v Sparrow,*[43] *Delgamuukw v British Columbia*[44] and Lambert J.'s dissenting opinion in *R v Van der Peet*[45] that non-traditional activities make take place so long as they do not undermine the very reason for First Nation occupation of a particular area. In *R v Sparrow*, for example, Dickson CJ. states that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time." He goes on to quote Brian Slattery's suggestion that such rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."[46] In this way, indigenous cultures are not preserved in aspic.[47]

It seems to me that there are two ways by which one might try to extend beyond *Bulun Bulun* in the Canadian context. One is to argue for a continuation of common law rights that may accommodate indigenous interests. The other is to circumvent the strict interpretation of existing legislation by positing the continued existence of an aboriginal right analogous to copyright.[48]

1. Common law

In the eighteenth and nineteenth centuries in Britain, certain rights continued for the authors of unpublished works. The most significant of these in this context is that the common law of England gave perpetual proprietary rights to unpublished works. This is relevant for two reasons. First, there is no reason to doubt that customary First Nations laws relating to the

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[43] [1990] 1 SCR 1075.
[44] [1997] 3 SCR 1010, 1088-89
[45] [1993] 5 WWR 459, 488 fol.
[46] Dickson C.J., *R v Sparrow* [1990] 1 SCR 1075, 1093 quoting Brian Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727, 782.
[47] Talal Asad terms this "synchronic essentialism" — a situation whereby the colonised people is set as a fixed, static and knowable cultural condition in opposition to the declaration of the colonising culture as forward moving, heterogeneous, diachronic. Refer, Asad, 'Two European Images of Non-European Rule', *Anthropology and the Colonial Encounter* (London, Ithaca Press) quoted in Edward Said, *Orientalism* (Harmondsworth: Penguin, 1985) 240.
[48] It is important to note here that the heart of aboriginal claims seems to be more of an absolute proprietary right than a copyright per se. The objective of a proprietary right in this context is to control each and all uses of cultural heritage – which goes beyond the negative right copyright confers (to control some forms of reproduction and/or copying). In the argument that follows, the aboriginal right may be a way of securing some form of proprietary rights in objects and ideas of cultural significance.

"ownership" of artistic works survived the introduction of the English common law in the same way Australian Aboriginal laws did in that country.[49] Secondly, s. 4(1)(g) of the present Canadian Act specifically excludes exhibition from the definition of publication.[50]

Thus, an exhibited work by a First Nations artist might seem to retain protection under common law. Not so. In *Bulun Bulun*, von Doussa J. noted that the common law right in unpublished works had been subsumed by statute when the law of copyright was codified in the British Copyright Act of 1911 (which formed the basis for Australia's 1912 Copyright Act and Canada's Copyright Act of 1921). As he succinctly put it:

> [copyright] is now entirely a creature of statute … The exclusive domain of the Copyright Act is expressed in s. 8 … namely, that 'copyright does not subsist otherwise than by virtue of this Act.[51]

Section 63 of the current Canadian Act contains a very similar provision. It states:

> No person is entitled to copyright or any similar right in any literary, dramatic, musical or artistic work otherwise that under and in accordance with this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

This point has been emphasised in recent Canadian case law, as when McLachlin J. declared: "copyright law is purely statutory law, which 'simply creates rights and obligations upon the terms and in the circumstances set out in the statute'".[52]

To this end, arguments based on the assertion of old common law rights are extremely unlikely to succeed. Indeed, in *Bulun Bulun* this very factor was fatal to the claim for communal title in artistic works. von Doussa J. argued that customary Aboriginal laws were subsumed by statute, as common law rights had been. In light of this, he limited possible meanings of non-individual ownership to those posited in the Australian Act. As the legislation did not consider the possibility of collective ownership in the manner asserted by Milpurrurru, von Doussa J. rejected the claims to authorship (and first ownership) of anyone other than a person or people who contributed directly to the production of the work itself. In this way, he emphasised the core

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[49] (1998) 175 ALR 193, 204.
[50] This overcomes the rule in *Britain v Hanks Bros and Co* (1902) 86 LT 765 cited by von Doussa J. at 205.
[51] (1998) 175 ALR 193, 205. This is also dealing with common law rights to works prior to first publication abolished by the English Copyright Act 1911, which with modifications, became law in Australia by s. 8 of the Copyright Act 1912.
[52] *Bishop v Stevens* [1990] 2 SCR 467 at 477 quoting *Compo Co. Ltd. V Blue Crest Music et al* [1980] 1 SCR 357 at 373.

legal presumptions of the Act. Given the parallel clause in the Canadian statute, the survival of a collective right in common law alone is unlikely to be helpful to First Nations claimants.

2. Aboriginal rights and cultural heritage.

The preceding discussion of s. 63 of the Copyright Act seems to bring my argument to a dead end. Nevertheless, I'm not so sure it does. The interaction of cultural heritage rights and intellectual property principles is as yet untested in the courts so some room for speculation remains open. In his alumni address at this University last year, for example, Mr. Justice Lambert made the following remark about cultural rights in light of *Van der Peet* and *Delgamuukw*:

> cultural rights may be land related but need not be, and they may have to do with self-regulation of the society, but need not be. It is unfortunate that the first cases on this subject seem to be gaming cases. It is important to understand, however, that the three types of land related rights dealt with in *Delgamuukw* should not be regarded as exhausting the scope of aboriginal rights, or deciding that the aboriginal rights of the Gitksan cannot, in some cases, be exercised in Vancouver.[53]

In the context of this paper, potential responses to s. 63 turn on the continued existence of an aboriginal right to control cultural heritage during and beyond its materialisation by an individual in an object. In testing this, courts might make a "nature and incident" test akin to that in the revolutionary Australian land rights case *Mabo v Queensland 2*.[54] Both Stephen Gray[55] and Damian Abrahams[56] argue that Australian Aboriginal art is, at the very least, clearly nature and incident to occupation of land – it may be claimed that they are one and the same. This relationship of mutual re-enforcement is also present in Diane and Lou-ann's articulation of the relationship between cultural heritage and land. It may be further bolstered by the "integral to a distinctive culture" test articulated in *R v Sparrow* – surely there can be little more integral to a culture that the protection of its internal systems of structuring and presentation. In this scenario, aboriginal rights would be unaffected by s. 63 because they are incident to land rights and analogous to resource rights.

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[53] Hon. Mr. Justice Douglas Lambert "*Van Der Pleet* and *Delgamuukw*: Ten Unresolved Issues" (1998) 32 *University of British Columbia Law Review* 249, 267.
[54] (1992) 175 CLR 1.
[55] Stephen Gray "Wheeling, Dealing and Deconstruction: Aboriginal Art and Land post-Mabo" (1993) 3 (no.63) *Aboriginal Law Bulletin* 10 at 11.
[56] Damian Abrahams "The Relevance of Representative Proceedings to Aboriginal Tribes in Arts Cases" (1996) 1 *Media and Arts Law Review* 155 at 171.

3. Remaining questions

As a consequence of the foregoing analysis I have two questions for the legal and constitutional analysts here (in all probability they are very naïve).

3.1 Was the custodial right positively *extinguished by the codification of copyright in Canadian law?*

Rights extinguished prior to 1982 are no longer protected and the wording of s. 63 was included in the preceding Copyright Acts and so pre-date the Constitution Act. This argues for extinguishment. Nevertheless, a crucial observation by Dickson CJ. regarding the Crown's case in *R v Sparrow* was its confusion of regulation and extinguishment: meaning that mere regulation of an activity does not necessarily result in an extinguishment of the right claimed. Indeed, the test for extinguishment adopted by the court "is that the Sovereign's intention must be *clear and pain* if it is to extinguish an aboriginal right."[57] On the face of it, it seems ludicrous to suggest that the Copyright Act does not make a clear statement with respect to the source of copyright. At the same time, however, the concerns of indigenous peoples are about the exercising of traditional custodial rights that are analogous to some form copyright and existed before sovereignty over British Columbia was declared. The question of a "clear and plain intention", therefore, is a little more open. Indeed, the best one might be guaranteed of proving by s. 63 is that successive legislatures either simply had not considered the question of custodial aboriginal title in intangible cultural heritage or had an implied intention to extinguish. This falls short of the rigour of the test in *R v Sparrow*.

I am not suggesting that the relevant section of the Act is simply "the regulation of an activity," it is clearly more than that, for it creates the basis of the rights copyright holders enjoy. In addition, I note a certain irony in my argument. On one hand I am positing the idea of a system running parallel to the Copyright Act. At the same time, the sorts of remedies that communities might seek are, to some extent at least, those given in the Act for particular infringements the Act contemplates. There is, then, a degree of inconsistency, or having one's cake and eating it, to suggest that an aboriginal right ought to be able call on copyright to be

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[57] [1990] 1 SCR 1075, 1097 and 1099 (emphasis added). An additional and explicit consequence of this point is that it ensures aboriginal rights are not defined by the different forms in which traditional activities have been regulated by Provincial or Federal Governments.

enforced at the same time as one is refusing the singular basis of copyright's existence (i.e. from statute). Still, this seems to be a line of enquiry that deserves to be fleshed-out.

3.2 Is the recognition of the continuation of collective rights and/or equitable copyright as a parallel system of "copyright" protection anathema to Canadian legislative certainty?

Even "recognised and affirmed" rights are not absolute because "Aboriginal rights remain subject to the sovereign power of the Crown to legislate with respect to Aboriginal peoples in accordance with the fiduciary owed to them in context of a unique contemporary relationship with the Crown."[58] There is a similar sting in the *Delgamuukw* tail when Chief Justice Lamer repeats the point he made in *Van der Peet*:

> although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evident which accords due weight to the perspectives of aboriginal peoples. However, that accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure'.[59]

Peter Hutchins pulls a similar tension from *Mabo* when he quotes Mr. Justice Brennan's expansive view, "although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire concerned with the development of its colonies" together with his warning that any development cannot fracture "the skeleton of principle which gives the body of our law its internal shape and internal consistency".[60]

Whether or not a parallel "copyright" system based on aboriginal rights strains the legal and constitutional structure of Canada ought not to be a lightweight test. Such rights should not be assumed to be incompatible because of their absence from legislation, their inconvenience or because they do not square with the laws of another epoch. At the same time, s. 63 of the Copyright Act cannot, indeed, should not be treated glibly as it has been the sole basis for copyright in modern legal history. To an extent, then, what co-exist here are two opposing authenticities, a repetition of the inherent problem of trying to reconcile indigenous rights with intellectual property.

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[58] Sparrow SCR 1109
[59] Lamer CJ at 1066.
[60] Peter W. Hutchins with Carol Hilling and David Schulze: "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 *University of British Columbia Law Review* 251, 252, quoting Brennan J., *Mabo v Queensland 2* (1992) 175 CLR 1, 18.

VI: CONCLUSIONS

To return to the question posed in the title of this paper: can copyright be reconciled with First Nations' interests in visual arts? Frustratingly, my answer, beyond the important but limited notion of the fiduciary responsibilities of an artist, is "not sure".

The two questions above were intended to posit principles that seem to clash as far as the Copyright Act is concerned. The analysis of these principles reflects the interests and expectations of who is speaking and who is listening. Let me put this another way:

1. If I were to argue for the level and expressiveness of intention required to extinguish an aboriginal right to be set high, then there is patent support for an indigenous rights perspective. It leaves unanswered how one might pursue remedies for any breach – except, of course, by recourse to indigenous law. This, in turn, assumes the development of parallel systems of justice that, in order to be affective in this area, would apply equally to First Nations peoples and Others. It remains to be seen whether or not this would be a politically acceptable option in Ottawa.
2. If I were to argue for the paramount importance of legislative certainty, then any parallel system of copyright is extremely dangerous because it pulls into question the autonomous nature of the Act itself. The certainty of legislation explicitly supports a notion of the centrality of Parliamentary sovereignty as a constitutional certainty. From an indigenous rights perspective, it may also parallel the central problem of appropriation in the visual arts and how non-authorised artists assume they are self-authorising.

There is a familiar ring to these opposing positions. In speaking about *Delgamuukw* Patricia Monture-Angus, for example, suggests it is a symbol of the inequity of negotiation and/or litigation that at all times indigenous sovereignty issues (such as aboriginal title or aboriginal rights) are available for negotiation but that the sovereignty vested in the Crown (or national or provincial governments) is never similarly available for scrutiny.[61] This reveals the extent to which the sovereignty attached to colonising structures is presented as a given whilst parallel indigenous structures are presented as mutable, especially if this means squaring them with the assumed pre-eminence of Euro-centric modes of governance. Monture-Angus asserts

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[61] Monture-Angus, "Aboriginal and treaty rights in Canadian law: Retracing colonial patterns", unpublished lecture at the University of Auckland, July 28, 1998. In this context, she noted that in the judgement in *Calder v Attorney-General of British Columbia* (1970) 74 WWR 481, affirmed [1973] SCR 313.a clear, unequivocal statement regarding provincial sovereignty may be contrasted with a long, eloquent description of aboriginal title at the same time as it is denied that such title has any legal right attached to it.

that if full and frank negotiation is to take place in which core indigenous concepts and political structures are to be put up for review at the negotiating table then the same must occur with respect to settler assumptions of sovereignty, legislation and other structures of law. In the absence of this, the culture of one-sided settlement presumes to set limits to the integrity of distinctive indigenous cultures. Certainly it is clear that the development of any form of collective ownership rights faces formidable philosophical, political and legal hurdles.

Similarly in relation to appropriation of indigenous cultural heritage core assumptions prevail for non-indigenous and/or unauthorised appropriators. How can limits be put on artistic and intellectual freedom? What of universal rights to knowledge? What will happen to the international flow of information? To try to answer these is a whole other paper but it is worth registering how profoundly Euro-centric these questions are. They assume that freedom of all forms of knowledge is the *Grundnorm* of the current debate, irrespective of what indigenous interests might be compromised in the process. At the same time they ignore that indigenous peoples have not been nor are they the mad hoarders or terrible guardians of treasure piles as imagined in fantasy novels. Rather, they have consistently shared information of all kinds in circumstances they deem appropriate. In the language of the international documents in this area, this is their right. True there may be a corresponding duty to share appropriately yet if we outsiders expect some right to share in aspects of that information then we, too, must accept the responsibilities concomitant to its telling.

I must say I feel some pessimism about the willingness of appropriators to regulate their behaviour – and this is to some extent irrespective of any actual reform. We still have opportunistic commercialists, self-authorising primitivists, aggressive appropriators, new-age spiritualists – the visual arts is still populated with the inheritors of Gauguin's project.[62] What is needed as much as legal and political reform is social and philosophical reform, so that unauthorised appropriation of indigenous cultural heritage is simply not acceptable practice for artists and designers (or academics) – whatever type of work they (we) engage in.

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[62] In the New South Wales Ministry of the Arts *Discussion Paper; Indigenous Arts Protocols* (Sydney: Ministry of the Arts, Indigenous Arts Reference Group, 1998) five principles were enumerated. Even though these principles are, at best, haphazardly observed by non-indigenous people they remain important indicators of appropriate behaviour. They are:

1. respect for the culture of the indigenous peoples of Australia;
2. the recognition that Aboriginal cultural heritage, including cultural expression, is the intellectual property of Aboriginal people;
3. protection and correct management of cultural heritage is crucial;
4. the benefits of that heritage ought to go to its first owners;
5. Government support is required with respect of these issues.

List of images shown during the delivery of the paper at the Art Panel of the Conference:

Cover of *GQ* magazine showing Eric Cantona with drawn-on moko.
Interior of *Te Hau ki Turanga* of Ngati Kaipoho, c.1842, showing kowhaiwhai panelling, Te Papatongarewa; the Museum of New Zealand.
Hoe (paddles), late eighteenth century, showing koru decoration, British Museum.
Lintel at a marae in Papakura, carved and painted wood, c.1990.
Photograph of Guide Georgina and Guide Eileen, Whakarewarewa, Rotorua, c. 1920s.
Dick Frizzell: *Grocer with Moko*, 1992, oil on canvas.
Paul Gauguin: *Manao Tupapau (The Spirit of the Dead Keeps Watch)* 1892, oil on canvas, Albright Knox Art Gallery.
Paul Gauguin: *Le Grand Boudha*, 1899, oil on canvas, Pushkin Museum.
Gottfried Lindauer: *Rewi Manga Maniapoto*, 1882, oil on canvas, Auckland Art Gallery.
Moontide: Promotional brochures for women's swimwear featuring designs based on koru motifs, 1998, 1999.
Adrian Piper and Brenda Croft: *Conference Call*, 1992, installation with sound recordings of language learning tapes and transparencies in light boxes, Art Gallery of New South Wales.
Poco Robanne: Paris haute couture show, January 1998.
Gordon Walters: *Geneaology II*, 1969, acrylic on canvas, Manawatu Art Gallery.

Additional images:
Hei tiki, carved pounamu (nephrite), Auckland Institute and Museum.
Nukuoro (goddess figure from the Caroline Islands), carved wood, Auckland Institute and Museum.
Georg Baselitz: *Rebel*, 1965, oil on canvas, Tate Gallery.
Gordon Bennett: *Nine Ricochets (Fall Down Black Fella, Jump Up White Fella)*, 1990, oil and acrylic on canvas and board.
Dick Frizzell: *Goofy Tiki*, 1992, enamel on wood relief.
Tim Johnson: *Yuendumu*, 1988, acrylic on linen.
Albert Namatjira: *Heavitree Gap*, 1952, watercolour on paper.
Royal Doulton "Maori art" cup saucer and plate, c.1930.
Imants Tillers: *The Nine Shots*, 1985, oil stick and acrylic on canvas boards.
Clifford Possum Tjapaltjarri: *Possum Dreaming*, 1979, acrylic on canvas.
Gordon Walters: *Kahukura*, 1968, acrylic on canvas, Victoria University Wellington.
Gordon Walters: *Tahi*, 1967, acrylic on canvas.