

# Communications Law Bulletin

## Special Art Industry Edition

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## Editors' Note

It is axiomatic that art divides people. To the George Bernard Shaws of the world: "Without art, the crudeness of reality would make the world unbearable". On the other hand, Oscar Wilde aficionados proclaim: "All art is useless".

Like it or not, art intersects all avenues of life – including the legal world. In this special edition of the CLB, we dive into some of the most pertinent legal and ethical issues confronting the art community. In the following pages, we cover not just artists creating art, but museums acquiring and displaying art, foundations supporting artists, a government initiating a new roadmap for Australian artists and the lawyers who navigate the legal channels within the artistic community.

Notably, this edition is being written at a time when Australia's art scene is getting a fresh coat of paint with its new national culture policy, *Revive*, being implemented. We hear from the Minister for Employment and Workplace Relations and Minister for the Arts, **the Hon. Tony Burke MP** in his discussion with **Ashleigh Fehrenbach** about *Revive* and how it is setting the course for Australia's art sector for the next five years. **Jane Owen** (Bird & Bird) continues the conversation and takes us through the recommendation of the Art Council in *Revive* to introduce specific legislation protecting ICIP following the recommendation of the Productivity Commission.

**Marlia Saunders** and **Amelia Causley Todd** (Thomson Geer) examine the Supreme Court of the United States' *Andy Warhol* decision. **Nick Kraegen** and **Kelly Choo** (Baker & McKenzie) walk us through the latest developments in AI and art. And **Dougal Phillips** (BHF) investigates current trends in litigating value and transparency in the visual art industry.

We also feature Head of Legal and Operations at Arts Law Centre of Australia, **Katherine Giles** speaking to colleague and outgoing CEO **Robyn Ayres**, on the inspiring work accomplished by Arts Law Centre and Robyn's incredible 20-year tenure at the organisation. **Chloe Hillary** (Australian Government Solicitor and currently a secondee at Arts Law Centre) follows up with an intriguing piece about the start of the art centre movement and Papunya Tula Artists.

If that wasn't enough, you have more exciting interviews in this special edition to look



Ashleigh Fehrenbach



Eli Fisher

forward to. CAMLA YL Chair **Belyndy Rowe** (Bird & Bird) interviews General Counsel of The National Gallery of London, **Richard Barnett**, where they discuss the legal intricacies involved in running a gallery, cross-border partnerships and his favourite artwork in the gallery. **Ashleigh Fehrenbach** sits down with artist and IP lawyer at HSF London, **George McCubbin** about his life and work in London and how he balances his successful dual careers.

Turning now to the social calendar, on 31 August 2023 many of our readers joined us at Sky Phoenix in Sydney for one of the most hotly anticipated events on the social calendar, the CAMLA Cup. CAMLA Young Lawyers' **Belyndy Rowe** (Bird & Bird) and **Erin Mifsud** (IP Australia) report on what was a hugely entertaining evening.

We have plenty left on the CAMLA agenda for 2023 – about ten seminars and events before the end of the year, spanning such topics as Generative AI, social media, live performances, sport, misinformation and the Online Safety Act. And, of course, CAMLA is pleased to confirm that on 16 November 2023, it will be holding its **Annual Oration** at Ashurst Ballroom. You are invited to hear a keynote address from **Nick McKenzie**, one of Australia's most decorated investigative journalists and a key defendant in the defamation case of the century. Registration details will follow on the CAMLA website soon.

Special editions of the CLB are just that: special. This one is no exception – we hope you enjoy it. Thank you to all our brilliant contributors.

**Eli & Ash**

# AI Art and Entertainment: Are we ready?

**Nick Kraegen**, Senior Associate, and **Kelly Choo**, Associate (Baker McKenzie), delve into the copyright concerns and complexities of AI-generated art and entertainment.

While lawyers and lawmakers soberly consider the myriad questions artificial intelligence (AI) poses, creators have taken to the streets.

In its latest strike, the Writers Guild of America West (WGA), among other things, seeks to keep AI from writing or rewriting literary material (that is, what a “writer” produces, including stories, treatments, screenplays, dialogue, sketches, and so forth), creating source material, and preventing certain material from being used to train AI.

There may be a similar stoush brewing in Australia: The Media Entertainment and Arts Alliance’s (MEAA) submission in response to the Australian Government’s discussion paper on ‘Safe & Responsible Artificial Intelligence in Australia’ urged regulation of the sector “be developed as a matter of urgency”, and said it had:

*...particular concern for our members working in journalism, content creation, design, screen performance, as voice-over artists and as musicians. These industries are all highly vulnerable to AI risks. It is conceivable that many of our members could be replaced by various versions of generative AI – and thus it is important that consent, copyright and the creativity of the individual are protected, and placed at the heart of any regulation.<sup>1</sup>*

That is an understandable concern in light of generative AI’s capabilities. If, however, the commercial art and entertainment industries move as quickly to the heavy use of AI in creating their products as these concerns imply, they are likely to find significant challenges in navigating the current copyright landscape.

This article explains the principal areas of complication and uncertainty for AI-generated art and entertainment, being generative AI’s controversial origins, significant incongruities with existing copyright law, and variable reception in the global copyright landscape. It then proposes some legal and commercial implications of a sudden shift to widespread use of AI-generated art and entertainment content.

## AI vs the humans

The controversy of AI-generated creative material is as much about where it came from as where it is used. Even casual observers will know there are a number of fights brewing and ongoing around the data (which, in this case, includes copyright works) used to ‘train’ AI.<sup>2</sup>

A number of individuals and businesses around the world have already brought proceedings against the creators of generative AI, alleging their content has been used in the course of training, and that the creation and ongoing use of the technology infringes their copyright. The various proceedings concern a range of different material, including photographs,<sup>3</sup> art,<sup>4</sup> computer code,<sup>5</sup> and literary material.<sup>6</sup>

One class action against OpenAI, in which comedian and author Sarah Silverman is a lead plaintiff,<sup>7</sup> alleges that in the course of creating ChatGPT, OpenAI infringed the rights of authors by training the large language model on texts of their books.

The claim is framed in a number of ways, including unjust enrichment, negligence and unfair competition. But as to copyright infringement, it alleges OpenAI has, without authority, made copies of the books, made derivative works, publicly displayed copies (or derivative works), and/or distributed copies (or derivative works). Interestingly, the plaintiffs contend that the AI engine itself infringes the rights of authors because it constitutes a derivative work of the plaintiffs’ work. It also alleges every output of the engine constitutes an infringing derivative work of the plaintiffs’ work.

## AI-generated creations: novel, not original – copyrightable?

Existing copyright law in Australia is incongruous with AI-generated works and other subject matter in significant and fundamental ways.

There is a growing consensus, at least in Australian commentary, that even though generative AI produces material similar to human-made literary, dramatic, musical

1 Media Entertainment and Arts Alliance, ‘Safe and Responsible AI: Submission of the Media Entertainment and Arts Alliance (MEAA)’ (PDF, 1 August 2023) <<https://www.meaa.org/download/meaa-submission-on-safe-and-responsive-ai-in-australia/?wpdmdl=49210&refresh=64f6c1b0cd17e1693893040>>.

2 For a helpful explanation of what this process entails, see e.g., Christoph Schuhmann et al, ‘LAION-5B: An open large-scale dataset for training next generation image-text models’ (2022) 36<sup>th</sup> Conference on Neural Information Processing Systems Track on Datasets and Benchmarks <<https://arxiv.org/abs/2210.08402>>; Tinting Qiao et al, ‘Learn, Imagine and Create: Text-to-image generation from prior knowledge’ (2019) 33<sup>rd</sup> Conference on Neural Information Processing Systems <<https://dl.acm.org/doi/10.5555/3454287.3454367>>; Alana Kushnir and Mia Schaumann, ‘Friend or foe? How artificial intelligence is challenging the law’s approach to art’ (2022) 35(8) *Intellectual Property Law Bulletin* 141.

3 Getty Images (US) Inc v. Stability AI Inc, U.S. District Court for the District of Delaware, No. 1:23-cv-00135 (‘Getty Images’).

4 Andersen v. Stability AI Ltd, U.S. District Court for the Northern District of California, No. 3:23-cv-00201.

5 DOE 1 et al v. GitHub, Inc. et al. U.S. District Court for the Northern District of California, No. 3:22-cv-06823.

6 Tremblay et al v. OpenAI, Inc. et al, No. 4:23 Civ. 3223 (N.D. Cal Jun. 28, 2023); Silverman et al v. OpenAI, Inc. et al, No. 3:23 Civ. 3416 (N.D. Cal Jul. 7, 2023); Kadrey et al v. Meta Platforms, Inc., No. 3:23 Civ. 3417 (N.D. Cal Jul. 7, 2023).

7 Silverman et al v. OpenAI, Inc. et al, No. 3:23 Civ. 3416 (N.D. Cal Jul. 7, 2023).

or artistic work, copyright is unlikely to subsist in material merely ‘generated’ without substantially more human involvement.<sup>8</sup>

The key reason for that is section 32 of the *Copyright Act 1968* (Cth) (Act), which provides that copyright only subsists in “original” works. ‘Originality’ does not require that an idea itself be novel, but rather that it is not copied from another work, originating instead from its author exercising intellectual effort in reducing the work to material form.<sup>9</sup> Put another way, originality and authorship are “correlatives” in copyright, because authors bring into existence works the Act protects, and so “originality means that the creation (that is the production of the work) required some independent intellectual effort”.<sup>10</sup>

Those principles have emerged in a line of case law that moved away from subsistence of copyright in matter developed through substantial effort, though without an identifiable author, to prioritising the existence of an author and his or her intellectual effort.<sup>11</sup> Relevantly, they therefore developed as part of a trend toward human contribution as key element of subsistence. Notably, at a user level, generative AIs are capable of producing substantial outputs with almost no human labour or intellectual effort.

In *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (*Phone Directories*), Perram J gave a detailed explanation of what an author doing something original means in the context of computer-assisted creation:

*...care must be taken to ensure that the efforts of that person can be seen as being directed to the reduction of a work into a material form. Software comes in a variety of forms and the tasks performed by it range from the trivial to the substantial. So long as the person controlling the program can be seen as directing or fashioning the material form of the work there is no particular danger in viewing that person as the work’s author. But there will be cases where the person operating a program is not controlling the nature of the material form produced by it and in those cases that person will not contribute sufficient independent intellectual effort or sufficient effort of a literary nature to the creation of that form to constitute*

*that person as its author: a plane with its autopilot engaged is flying itself. In such cases, the performance by a computer of functions ordinarily performed by human authors will mean that copyright does not subsist in the work thus created.*<sup>12</sup>

It is not hard to imagine a situation in which an artist or writer – or perhaps even a film executive – utilises an AI engine in a much more nuanced and detailed way than simply requesting an articulation of a very high level idea, such that they may be “seen as directing or fashioning the material form of the work”.<sup>13</sup> An artist named Jason Allen, for instance, controversially placed first in last year’s Colorado State Fair art competition with an artwork he created over the course of 80 hours’ effort using Midjourney and Photoshop.<sup>14</sup>

Diving deeper into the mechanics of the Act reveals more incongruity and thorny questions. For example, while copyright subsistence in ‘subject matter other than works’ (sound recordings, cinematograph films, broadcasts and published editions of works) is not subject to an express originality requirement, the application of the Act’s subsistence provisions to AI-generated matter of this kind is still not straightforward and merits closer examination.

While copyright subsists in, for example, cinematograph films made by a ‘qualified person’, films made in Australia, or films first published in Australia,<sup>15</sup> the ‘maker’ of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken,<sup>16</sup> and, subject to contract, the maker of the film is the first owner of the film.<sup>17</sup> Sound recordings are subject to similar provisions, though with the added complication that:<sup>18</sup>

- a) a sound recording, other than a sound recording of a live performance, shall be deemed to have been made at the time when the first record embodying the recording was produced; and
- b) the maker of the sound recording is the person who owned that record at that time,

where “record” “includes a disc, tape, paper, electronic file or other device in which sounds are embodied.”<sup>19</sup>

8 See e.g., Andrew Wiseman and Bryanna Workman, ‘Copyright in the age of artificial intelligence and authorless works’ (2019) 32(3) *Intellectual Property Law Bulletin* 34; Sharon Givoni and Fiona Ng, ‘A world of pure imagination? Originality in the digital age’ (2022) 24(1) *Internet Law Bulletin* 183.

9 *Apple Computer Inc v Computer Edge Pty Ltd* (1986) 161 CLR 171, 182–3.

10 *IceTV Pty Ltd & Anor v Nine Network Australia Pty Ltd* (2009) 254 ALR 386 at 395.

11 *Cf Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* (2002) 192 ALR 433, *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386, *Phone Directories*, *Primary Health Care Ltd v Commissioner of Taxation* (2010) 267 ALR 648.

12 *Phone Directories* [118].

13 *Ibid.*

14 Kevin Roose, ‘An A.I.-Generated Picture Won an Art Prize. Artists Aren’t Happy’, *The New York Times* (online, 2 September 2022) <<https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html>>.

15 Act s 90.

16 Act s 22(4).

17 Act s 98.

18 Act s 22(3).

19 Act s 10.



These frameworks are simply not equipped to engage with AI-generated content. Who has ‘made the arrangements’ necessary for the making of a generated film, and even who ‘owns’ the medium in which a generated sound recording is first embodied are potentially complex factual and legal matters. As in the case of works, they leave the question of copyright subsistence and ownership in AI-generated instances of these materials open to interpretation and debate.

## A global question

Turning to the international copyright position for generative AI, there are at least two important factors at play.

First, a key principle in most international treaties is the ‘national treatment’ of copyright rights.<sup>20</sup> In other words, rights of foreign nationals in copyright works and materials created in those countries are afforded the same recognition and protections of works created within party jurisdictions. As part of that recognition, the same rules governing subsistence, ownership and infringement of copyright generally apply for the purposes of resolving whether and how that material will be protectable, or indeed whether its creation or use infringes copyright.

That being the case, and with no international treaty governing AI training or the copyright status of AI-generated works, the copyright status of AI and its output is as varied globally as the individual quirks and features of the copyright laws of countries around the world.

Secondly, the status of copyright protection in AI-generated material in the rest of the world is somewhat varied. In the UK, section 9(3) of the *Copyright, Designs and Patents Act 1988* specifically allows computer generated works to benefit from copyright protection, and provides “the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken”, though there are doubts as to whether this confers full protection on AI-generated works.<sup>21</sup> Similar provisions exist in Ireland and New Zealand.<sup>22</sup> In the US, a sufficient degree of human authorship is still required for works to obtain copyright protection. So much was apparent in the US Copyright Office’s decision in February 2023, where an application to register a comic book was revoked, to the extent that the images contained in the comic book were AI-generated by Midjourney.<sup>23</sup> Although the EU approach is similar to that of the US, with no express protection being

granted for computer-generated works, the EU’s proposed ‘AI Act’ would force companies deploying generative AI to disclose copyright material used to develop systems.<sup>24</sup>

From this, it is clear that generative AI and its works are going to get a slightly different reception wherever they go in the world today. These variations may become more or less significant as jurisdictions proceed to introduce piecemeal legislative responses to AI.

## Is clarity coming?

In the past year, the Australian Government has announced reviews into the copyright enforcement regime and the regulation of AI in Australia.<sup>25</sup> These reviews garnered submissions from industry groups, with wide-ranging views put forward on the role of AI in the art and entertainment sectors, in particular, and the ways in which it could (or arguably should) be regulated in Australia. It is likely that a range of general and sector-specific regulations will be impacted, with possible reform in Australia that follows the progression of other nations around the globe, but there is no clear timeline on that reform as at today.

## The technology and the controversies are here, but the reforms and international consensus are not. What does that mean?

So as AI art and entertainment continue to outpace the very area of law designed to protect those industries’ interests, how do content creators and users operate in this new world?

First, where achieving copyright ownership in content is a priority, it may be necessary to take components of AI-generated art and then have them assembled or further ‘worked on’ by human authors to result in the creation of copyright subject matter. AI-generated works might also achieve some protection where adapted or embodied in other subject matter – as David Brennan puts it, “[I] oosely and metaphorically, Part III works are the wines of copyright created by vigneron (authors) and Part IV subject matters are the wine bottle of copyright put out by wineries (producers).”<sup>26</sup> An example of that might be if WGA lose their fight, and movies (cinematograph films, protected subject matter under Part IV of the Act) are made in the traditional fashion, but using AI-generated scripts, so that the resulting content is at least protectable as a cinematograph film. Another example might be a performer’s rights in a performance and recording of an AI-composed musical work.

20 See, for example, Berne Convention for the Protection of Literary and Artistic Works, Article 5(1).

21 Sharon Givoni and Fiona Ng, ‘A world of pure imagination? Originality in the digital age’ (2022) 24(1) *Internet Law Bulletin* 180, 183.

22 For the position in Ireland, see section 21(f) of the Copyright and Related Rights Act, 2000. For New Zealand, see Copyright Act 1994 section 5(2)(a).

23 United States Copyright Office, ‘Zarya of the Dawn (Registration # VAu001480196)’ (PDF, 21 February 2023) <<https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>>.

24 European Parliament, *EU AI Act: first regulation on artificial intelligence* (Web Page, 14 June 2023) <<https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>>.

25 Australian Government Attorney-General’s Department, *Copyright enforcement review 2022-23* (Web Page) <<https://www.ag.gov.au/rights-and-protections/copyright/copyright-enforcement-review-2022-23>>; Australian Government Department of Industry, Science and Resources, *Supporting responsible AI: discussion paper* (Web Page) <<https://consult.industry.gov.au/supporting-responsible-ai>>.

26 David Brennan, *Copyright Law* (Federation Press, 2021) 78.

Such protection, however, is not necessarily complete. Where, for example, a person wishes to allege that a film has ‘copied’ from their film in terms of replicating its base plot, characters, dramatic situations and so forth, they would likely need to rely on the underlying literary material from which their film was created, unless there has been an actual copying of the audiovisual material from their film.<sup>27</sup> Similarly, the musician described above may wish to restrain unauthorised performances or re-recordings of ‘their’ musical work. If the underlying literary or musical material were AI-generated, however, copyright subsistence issues may arise and prevent the filmmaker or musician from restraining the unauthorised ‘replications’.

Secondly, difficulty in asserting exclusive rights in artistic or entertainment material created using generative AI may dictate the way it is commercialised.

It is useful for copyright owners or licensees to assert copyright rights where exclusivity of access to content (as in the case of SVOD services) or the scarcity or uniqueness of material in the hands of the user or owner (as in the case of visual art) is key to its value. If a party’s ownership rights in AI-generated or assisted content are uncertain, these distribution models may be less attractive because the ability to enforce against unauthorised use is more limited. This issue and others might also incentivise those who commercialise art and entertainment to resist the temptations of incorporating AI-generated content (much in the same way that software developers with the ambition of commercialising their works have resisted incorporating open source software) lest it undermine their ability to license the work commercially.

In the alternative, however, content is also commonly distributed today on an advertising-supported basis, or as part of a broader commercial strategy to build an audience which can be leveraged for other commercial opportunities (social media content creators and influencers, for instance). The cost of enforcing rights in content commercialised on that basis may well outweigh any benefit of doing so given that in most cases its original source is the most convenient and cost-effective form of access to it anyway, or the fact that the majority of its value is realised within a short period after its release. So, the value in ‘rights-light’ AI content may be most efficiently realised through these models, rather than the ones that rely on controlling access to works (and enforcing against unauthorised use). However, whether this is the preferred use and distribution of content by today’s content businesses is a different question.

Thirdly, it is hard to understate the potential impact of an inconsistent international approach giving rise to patchy recognition of rights in AI-generated content, or safe-harbours for platforms themselves.

To start with, it may impede the deployment of generative AI systems in some jurisdictions where liabilities potentially arise as a result of the use of training data to build the system.

Indeed, if Sarah Silverman’s ‘derivative works’ argument discussed above gains traction, it might make it difficult to distribute AI-generated content at all in some jurisdictions.

Most obviously, however, an inconsistent international approach also exposes content created by or with the assistance of generative AI systems to unauthorised use in jurisdictions offering lesser protections for that material. This is particularly challenging considering the global nature of content businesses today, that roll out their services and business models accordingly. Inconsistent treatment of AI around the world is likely to force those businesses to either offer bespoke jurisdiction-specific services or adopt a minimum standard for their service (that is, adopting the position required in the most conservative jurisdiction). Both options are inefficient.

Fourthly, and as a consequence of the way generative AI tools are built, there is some indication that they appear to be capable of ‘content replication’ (producing content substantially identical to pieces of content appearing in their training datasets). A 2022 study of diffusion models for text to image generation identified a risk that these models “might, without notice, reproduce data from the training set directly, or present a collage of multiple training images.”<sup>28</sup> A less extreme but notable example of replication is in Getty Images’ case, where images Stable Diffusion generated are alleged to have contained modified versions of Getty Images’ watermark and credit information.<sup>29</sup>

Obviously, reproducing or recommunicating substantial parts of content would run the risk of an infringement claim from a copyright owner, with the potential value of such a claim increasing with the scale of the use.

Finally, while those challenges are contended with in the short to medium term, AI-generated art and entertainment may ultimately take a very different form. Some have suggested the ‘end game’ of AI-generated art and entertainment is content entirely bespoke to the user, provided on a one to one basis between the user and the engine. While generative AI capable of doing that would obviously be invaluable (and potentially terrifying), there may be a much more limited value in asserting exclusive rights in the content it creates, because its value is to a specific individual and not of broad commercial appeal. Given the likely high commercial value of such technology, the rights of owners of any data or content used to train it become an even more important and challenging question.

## Conclusion

While the concerns of artists, writers and other creators about the rise of generative AI are entirely understandable, it must also be acknowledged that AI art and entertainment today finds itself adrift in a rocky copyright landscape, both in Australia and globally. Those turning to generative AI to supply their creative needs may well find it a more complicated source of creative content than hoped – even compared with humans!

27 As was the case in *Zeccola v Universal City Studios Inc* (1982) 46 ALR 189.

28 Gowthami Somepalli et al, ‘Diffusion Art or Digital Forgery? Investigating Data Replication in Diffusion Models’ (PDF, 12 December 2022) <[https://openaccess.thecvf.com/content/CVPR2023/papers/Somepalli\\_Diffusion\\_Art\\_or\\_Digital\\_Forgery\\_Investigating\\_Data\\_Replication\\_in\\_Diffusion\\_CVPR\\_2023\\_paper.pdf](https://openaccess.thecvf.com/content/CVPR2023/papers/Somepalli_Diffusion_Art_or_Digital_Forgery_Investigating_Data_Replication_in_Diffusion_CVPR_2023_paper.pdf)>.

29 Getty Images (n 3).



## CLB Special Art Edition

### Interview with The Hon Tony Burke MP

The Hon **Tony Burke** MP was sworn in as Minister for Employment and Workplace Relations and Minister for the Arts on 1 June 2022. He is a member of the Australian Labor Party (**ALP**) and has served as MP for Watson since 2004. The Minister held cabinet positions in the governments of Kevin Rudd and Julia Gillard from 2007 to 2013. Taking a look back, Tony Burke completed his combined arts law degree at Sydney University and has long held a keen interest in music. **Ashleigh Fehrenbach** (co-editor of the CLB and Senior Associate at RPC) interviewed Tony to discuss his role as Minister and the Government's new national culture policy, *Revive*, which is setting the course for Australia's art sector for the next five years.

**ASHLEIGH FEHRENBACH:** Minister, it is a pleasure to interview you for this special edition of the CLB, focussing on the intersection of art and the law. Before we formally kick off, could we get a snapshot into a day in the life in your role as both Minister for Employment and Workplace Relations and Minister for the Arts?

**THE HON TONY BURKE MP:** The best days start with three things: coffee, music and poetry. Although more often than not, one of those three gets delayed because I'm doing interviews or attending events.

Beyond that the key feature of my day is that there is never a routine. If Parliament is on, there are endless tactics meetings and procedural decisions to be made. If it's not a sitting day, I spend about half my time on the road – the other half either working in my electorate or taking meetings in my Sydney office. But no matter how the day is constructed I always make sure that I find time for poetry and music – listening to it and playing it.

**FEHRENBACH:** Did you enjoy studying law? Do you think your legal background has influenced your decision-making as Minister?

**BURKE MP:** Law wasn't my first choice. I actually spoke to my careers adviser at school about becoming a theatre director. The careers adviser lied to me and told me there were no such courses – and it wasn't until I was Minister for the Arts three decades later that I was making a speech at NIDA and realised there was in fact a theatre director course there I could have done.

Some of what I studied in law though I still use routinely. Areas like copyright, industrial law, constitutional law and administrative law – in one way

or another those courses still have a practical impact every week.

**FEHRENBACH:** Tell us about *Revive*, Australia's new national culture policy. How did this initiative come about?

**BURKE MP:** The last time Australia had a national cultural policy was ten years ago when Labor was last in government. I was the Arts Minister responsible for implementing it. We lost government in 2013 and that cultural policy was abandoned, with nothing to replace it.

Coming back into government last year I committed to delivering a new National Cultural Policy based on that abandoned 2013 national cultural policy, which was called *Creative Australia*.

Our new cultural policy, *Revive*, is that policy. It's a five-year plan to renew and revive Australia's arts, entertainment and cultural sector, following the most difficult period for the sector in generations.

*Revive* adopts five pillars as policy focuses: First Nations first; A place for every story, a story for every place; Centrality of the artist; Strong cultural institutions; and Engaging the audience.

We knew Australians were invested in the new cultural policy so we held an extensive public consultation process all around Australia and received over 1,200 submissions.

I appointed five expert Review Panels and an overarching National Cultural Policy Advisory Group to identify key issues and themes raised throughout the consultation process and to provide sector-led expertise across the full remit of the five pillars. As the Prime Minister said at the launch of *Revive* in January this year, *Revive* very much came from the sector itself.

**FEHRENBACH:** How will *Revive* ensure that Australia's laws are fair and supportive of artists' rights?

**BURKE MP:** The second pillar of *Revive*, 'centrality of the artist' demonstrates the Government's commitment to supporting the artist as a worker.

This pillar focuses on providing safer workplaces for everyone in the sector and recognises that fair pay and conditions for arts and cultural workers are essential.

It's why we established Creative Workplaces, a body chaired by Kate Jenkins AO, which will provide advice on issues of pay, safety, codes of conduct and welfare across the sector. Since the launch of *Revive*, the Government has also:

- Expressly prohibited sexual harassment in the Fair Work Act 2009.
- Established a new sexual harassment jurisdiction in the Fair Work Commission. Workers now have a choice whether to make complaints about workplace sexual harassment to the Fair Work Commission or the Australian Human Rights Commission.
- Introduced a positive duty in the Sex Discrimination Act 1984 that requires employers to take reasonable and proportionate measures to eliminate certain forms of unlawful sex discrimination, including sexual harassment, as far as possible.

**FEHRENBACH:** The *Creative Australia* Act came into effect recently on 24 August. What are you most looking forward to as part of that legislation and the *Creative Australia* Initiative?

**BURKE MP:** The establishment of *Creative Australia* is a significant milestone achieved under *Revive* and has been delivered just 7 months after the National Cultural Policy was released.

Creative Australia is not simply the next chapter when it comes to the arts and culture in Australia; it's a different way of doing things.

The new legislation has expanded the entity's functions to include philanthropic and private sector support for the arts as well as the creation of significant new work areas - Music Australia and Creative Workplaces.

Music Australia will deliver targeted support and investment to empower Australia's contemporary music industry to rebuild and realise its local and global potential.

This responds directly to calls for change from the sector - delivering dedicated support to grow Australia's contemporary music industry.

The other new body is Creative Workplaces - which will raise and set workplace standards across all art forms, with organisations seeking Government funding being expected to adhere to these standards.

There is still more to be delivered by Creative Australia and the next priority will be establishing a First Nations body in 2024, following extensive consultation with the First Nations arts and culture sector.

**FEHRENBACH:** Can you tell us a bit about the proposed streaming legislation and what it means for Australian content?

**BURKE MP:** Under *Revive*, the Government has committed to introducing an Australian content obligation on streaming platforms to ensure continued access to local stories and content.

The Minister for Communications, Michelle Rowland and I are conducting consultations with the industry.

We want more Australian stories to be told.

At the moment, in Australia, if you're watching free-to-air TV there are content obligations on Australian content. If you pick up the remote and flick over to commercial TV there are content obligations on Australian content. If you flick over to pay TV, there are content obligations on Australian content. But the second you pick up the remote and turn on a streaming platform - there are no content obligations on Australian content.

That will change. From the 1<sup>st</sup> of July next year there will be Australian content obligations on streaming platforms.

That will mean more Australian stories being told - both here at home, and overseas.

**FEHRENBACH:** Last but not least, what is your favourite piece of art work in Parliament House?

**BURKE MP:** There's an Arabic word cloud painting in my Parliament House office by Hossein Valamanesh, who only passed away last year. It's really personal for me.

When I was Immigration Minister at the end of the Rudd Government I was determined to get all unaccompanied children out of the detention centres. There were 400 when I took on the job and it wasn't until the day before the 2013 election that I was able to get the last ones out.

A couple of months after that, a word cloud was sent to me by the adviser who'd done all that work, Brad Chilcott, of all the names of the kids we got out of detention.

This artwork matches that - but the only word, in Arabic, is love, written over and over again. Some of those kids still stay in touch with me and I think about them every time I look at this painting.

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# Fair Use and the Artwork Formerly Known as ‘Orange Prince’

**Marlia Saunders** (Partner) and **Amelia Causley Todd** (Associate), Thomson Geer, summarise the US Supreme Court’s recent Andy Warhol decision.

In May 2023, the Supreme Court of the United States (**SCOTUS**) in *Andy Warhol Foundation for Visual Arts, Inc v Goldsmith et al* ruled by a 7-2 majority that a licence granted to the publisher of Vanity Fair of an Andy Warhol artwork based on an earlier photograph of Prince taken by Lynn Goldsmith was not protected by “fair use”.

While the judgment is replete with dramatic flourishes, stinging (and somewhat personal) critiques and a lecture in contemporary art appreciation, the key principle confirmed by the case is that where the “purpose and character” of the allegedly infringing use is the same as that of the original work, this is a factor which weighs against fair use being established.

## Background

### Facts

In 1981, Lynn Goldsmith (**Goldsmith**), a professional photographer, was commissioned by Newsweek to photograph Prince Rogers Nelson, an “up and coming” musician. Newsweek published an article about Prince, along with Goldsmith’s photograph. In 1984, Goldsmith granted a limited licence to Vanity Fair for use of one of her photographs of Prince as an “artist reference for an illustration” on a one-time use basis, for a fee of \$400.

Andy Warhol was hired by Vanity Fair to create the illustration, a purple silkscreen portrait of Prince. Warhol’s purple silkscreen portrait appeared in Vanity Fair’s November 1984 issue. Goldsmith was credited for the “source photograph”.

Unbeknownst to Goldsmith, Warhol then used her photograph to create a series of portraits of Prince (known as the “Prince Series”) comprised of 13 silkscreen prints and 2 pencil drawings, including “Orange Prince”.

Warhol died in 1987. The Andy Warhol Foundation for the Visual Arts, Inc (**AWF**) is his successor in title and owner of the copyright subsisting in his works. Prince died in 2016 and Condé Nast (Vanity Fair’s parent company) obtained a licence from AWF to use Orange Prince for a special edition magazine to commemorate Prince.

When Goldsmith saw Orange Prince on the cover of Vanity Fair, she notified AWF of her belief that it had infringed her copyright. AWF then sued Goldsmith for a declaratory judgment of noninfringement, or in the alternative, fair use. Goldsmith counterclaimed for infringement.



Vanity Fair, November 1984. Illustration by Andy Warhol (1984). Source photograph by Lynn Goldsmith. Article written by Tristen Vox.

### Fair use

Section 107 of the US Copyright Act (1976) provides that fair use of a “copyrighted work” does not constitute infringement. The section provides for four “fair use factors” which must be considered in determining whether the use made of a work amounts to fair use, namely:

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.

### The road to the SCOTUS

At first instance, the District Court granted AWF summary judgment on its defence of fair use. The Court of Appeals for the Second Circuit reversed its decision and found that all four use factors favoured Goldsmith.

AWF appealed on the question of the first of the fair use factors. Before the SCOTUS, the only question was whether “the purpose and character of the use [of Goldsmith’s photograph], including whether such use is of a commercial nature or is for nonprofit educational purposes” weighed in favour of AWF’s commercial licensing of Orange Prince to Condé Nast.

## The decision

### Summary

The majority of the SCOTUS (in an opinion written by Justice Sotomayor, Justices Thomas, Alito, Kavanaugh and Coney Barrett agreeing) and Justice Gorsuch (in a separate opinion with which Justice Jackson agreed) held that the first fair use factor did not favour AWF's licence of Orange Prince to Conde Nast because the licence was granted for substantially the same purpose as the purpose for which Goldsmith's original photograph was created: to depict Prince in magazine stories about Prince.

### AWF's argument

AWF contended that the Prince Series works were "transformative" because the works conveyed a different meaning or message than Goldsmith's original photograph and that the first factor therefore weighed in its favour. AWF argued that Orange Prince is a comment on the "dehumanising nature" and "effects" of celebrity and therefore is justified.

### The majority

The crux of the majority's opinion was that the relevant use in issue was the licensing to Condé Nast – not Warhol's creation of the Prince Series. The majority expressed no opinion as to whether the creation, display or sale of any of the original Prince Series works amounted to copyright infringement.

The majority disagreed with AWF's characterisation of the first fair use factor, stating that it "focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism", citing *Campbell v Acuff-Rose Music, Inc* (**Campbell**, the "Pretty Woman" case). Although a new meaning or message might be relevant to determining whether the new use has a different character or purpose, it is not determinative.

Citing *Campbell*, the majority held that the central question asked by the first factor is whether the use "merely supersedes the objects of the original creation... (supplanting the original), or instead adds something new, with a further purpose or different character", and to what extent the use in issue has a purpose or character different to the original.

In their analysis of "purpose", the majority turned their minds to the purposes listed in s 107 as constituting fair use (criticism, comment, news reporting, teaching, scholarship, research) and noted that all contemplate use of an original work for a different purpose than the original work itself. The majority also considered that *Campbell* made it clear that whether the intended use is commercial or not for profit is to be weighed against the other purpose(s) of the use.

*Campbell* also demonstrates that the first factor relates to any "justification" for the challenged use. The majority considered there were two ways to approach justification. First, a broad one: a use that furthers the goal of copyright, namely to promote the progress of science and the arts, without diminishing the incentive to create is justified. Second, a narrow one: where copying is reasonably necessary to achieve the user's new purpose, a use is justified.

According to the majority, an independent justification like this is particularly relevant to assessing fair use where an original work and copying use share the same or highly similar purposes, or where wide dissemination

of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it.

The majority determined that the purpose of celebrity photographs could be to accompany stories about a celebrity or serve as a reference for an artist. They noted that these licences are how photographers make money and provide an economic incentive to create original works. Here, it was found that AWF's licensing of Orange Prince shared the objectives of Goldsmith's original photograph, even if the two were not perfect substitutes. Given they shared substantially the same purpose and that AWF's use of Goldsmith's photograph was commercial, the majority found that the first factor did not weigh in favour of AWF.

The majority was concerned to ensure that author's exclusive rights in their works were not limited by an overly broad concept of "transformative" use. It found that adopting the approach proposed by AWF (that by adding new expression to the photograph Warhol had made transformative use of it) would narrow the copyright owner's exclusive right to create derivative work because it "would swallow the copyright owner's exclusive right to prepare derivative works". Therefore, to preserve authors' rights to create derivative works, "the degree of transformation required to make "transformative" use of an original must go beyond that required to qualify as a derivative". The exclusive right to create derivative works forms part of the policy balancing act of the Copyright Act: to balance the benefits of incentives to create against the costs of restrictions on copyright.

The majority opinion points out that in situations such as these (as well as where a musician wishes to sample the work of another, or a filmmaker wishes to adapt a play into a film) the usual practice is to obtain a licence.

Ironically, in one of the authorities relied on by the majority – *Google LLC v Oracle America, Inc* – SCOTUS used Warhol's "Campbell's Soup Cans" series as an example of transformative, and therefore fair, use. This juxtaposition perhaps best illustrates the majority's point. The two situations are easily distinguishable by looking at the purpose of the two uses:

- AWF's use of Goldsmith's photograph in licensing Orange Prince to Condé Nast was for the same purpose as the creation of Goldsmith's photograph, namely inclusion in a magazine; whereas
- Warhol's use of the Campbell's Soup Cans in his work was to create an artistic commentary on consumerism, which was different to the purpose of the Campbell's logo to advertise soup.

Had the majority been concerned with Warhol's creation of the Prince Series, this may not have shared the same purpose as Goldsmith's photograph, and could have constituted fair use as an artistic commentary on fame and consumerism. However, it was AWF's licensing of Orange Prince that was in issue, which had a radically different purpose from Warhol's treatment of Goldsmith's photograph in Orange Prince and, crucially, a substantially similar one to Goldsmith's original photograph.

### Gorsuch's (Jackson agreeing) decision

Justice Gorsuch provided a succinct concurring opinion (with which Justice Jackson agreed).

Justice Gorsuch stated the first factor "trains our attention on the particular use under challenge", in this case AWF's licensing of Orange Prince to Condé Nast.

He pointed to “three contextual clues” that confirmed this reading.

First, the statutory preamble indicates that the court must examine the purpose of the particular use under challenge, not the artistic purpose underlying a work. It “instructs courts to assess whether the person asserting a fair-use defence seeks to “use” a copyrighted work “for purposes such as criticism, comment, news reporting, teaching... scholarship or research.”” (Emphasis in original).

Second, derivative works that transform or adapt an original work are expressly protected in the Copyright Act. A transformation of the message of a “copyrighted work” cannot by itself be fair use of the original.

Finally, the fourth fair use factor asks courts to enquire whether the challenged use would be treated as a “market replacement” or a “market complement” of the original work by consumers. As the four factors are not to be treated in isolation, considering s 107 as a whole, “the statute proceeds from step to step, asking judges to assess whether the challenged use (as revealed by its purpose, character, amount of source material used, and effect) serves as a complement to or a substitute for a copyrighted work”.

In summarising, his Honour stated:

Instead, the first fair-use factor requires courts to assess only whether the purpose and character of the *challenged use* is the same as a protected use. And here, the undisputed facts reveal that the Foundation sought to use its image as a commercial substitute for Ms. Goldsmith’s photograph. Of course, competitive products often differ in material respects and a buyer may find these differences reason to prefer one offering over another. But under the first fair-use factor the salient point is that the purpose and character of the Foundation’s use involved competition with Ms. Goldsmith’s image. To know that much is to know the first fair-use factor favours Ms. Goldsmith. (Emphasis in original.)

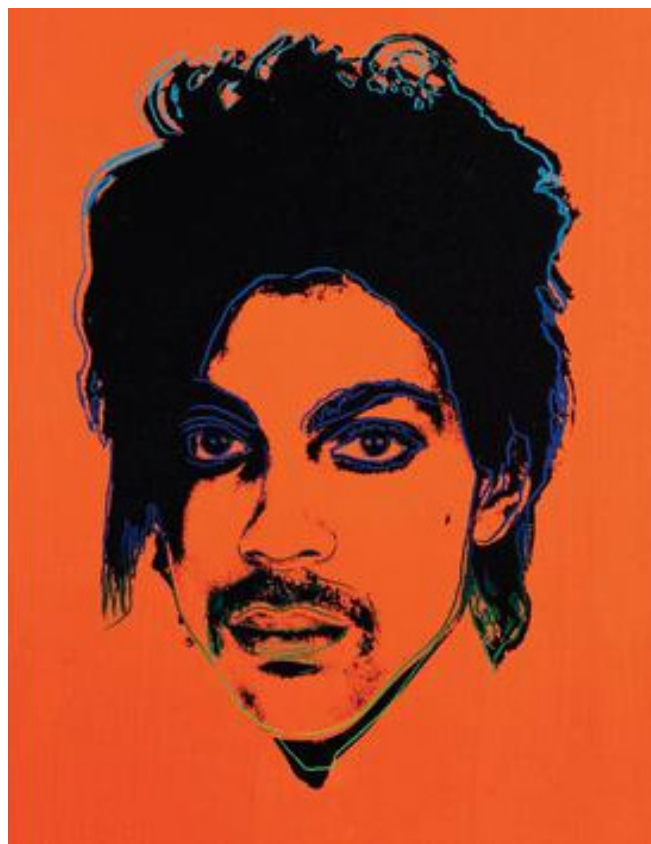
Justice Gorsuch suggested that certain other uses of Orange Prince by AWF may constitute fair use (such as displaying Orange Prince in a not-for-profit museum or including it in a for-profit book commenting on twentieth century art).

#### **Dissent – Justice Kagan (Chief Justice Roberts agreeing)**

That Justice Kagan elects to refer to AWF as “Warhol” in her dissent is a sign of what’s to come: an impassioned dissent that covers art criticism and art history, and appears to take the suggestion that AWF’s conduct should be critiqued as a personal affront to Warhol himself. Justice Kagan describes the majority’s analysis of whether AWF’s licensing of Orange Prince to Condé Nast is transformative as “the majority’s lack of appreciation for the way his [Warhol’s] works differ in both aesthetics and message from the original templates”.

Crucially, Justice Kagan does not address what is the starting point in both the majority and Justice Gorsuch’s opinions: that the challenged use in question is AWF’s licensing of Orange Prince to Condé Nast, not Warhol’s creation of the Prince Series itself. Her sole focus is whether Warhol’s treatment of Goldsmith’s photograph in Orange Prince shares a purpose and character with Goldsmith’s original photograph. It is understandable then why the dissent differs so virulently from the majority.

As a result, much of her analysis and defence of Warhol’s methods, are, respectfully, irrelevant to the consideration of whether the first fair use factor should weigh in AWF or



“Orange Prince” by Andy Warhol (1984). Source photograph by Lynn Goldsmith.

Goldsmith’s favour. Justice Kagan’s focus is on Warhol’s use of Goldsmith’s photograph in the *creation* of Orange Prince, rather than AWF’s use of Goldsmith’s photograph in licensing Orange Prince to Condé Nast.

A glaring omission from Justice Kagan’s dissent is the consideration of Goldsmith’s rights as a creator. Had the dissent been as interested in protecting Goldsmith’s rights as it is in protecting Warhol’s legacy, the opinion may have fallen differently. The question has to be asked: if it were another artist, less well-known and less popular than Warhol, would Justice Kagan have leapt so valiantly to their defence?

#### **Conclusion**

Whether by chance or strategy, Goldsmith’s case arrived in the SCOTUS in the perfect vehicle for the rights of authors to be upheld. Ironically, it is the highly emotive dissent which waxes lyrical about artistic and creative value that does more to undermine the rights of creators. As stated by the majority, to hold the first factor in favour of AWF “might authorise a range of commercial copying of photographs to be used for purposes that are substantially the same as those of the originals”.

The Court of Appeals’ decision finding that fair use was not made out was affirmed by the SCOTUS.

The matter had been remanded by the Court of Appeals for further proceedings consistent with its opinion, which we expect to proceed following the SCOTUS’ decision.





## A Creative Career

Interview with Arts Law's CEO Robyn Ayres

**Robyn Ayres**, CEO of the Arts Law Centre of Australia (**Arts Law**), and **Katherine Giles**, Head of Legal and Operations at Arts Law, discuss Robyn's upcoming retirement and 20-year tenure in the role.

*Arts Law was established in 1983 with support from the Australia Council and is Australia's only national community legal centre for the arts. Arts Law is unique in its role working across the arts and the law, and provides legal advice, professional development, and other resources to creators that they could not otherwise afford. Arts Law assists individual arts practitioners, including visual artists, craft practitioners, authors, performers, musicians, composers, screen creators, filmmakers, actors, dancer choreographers, game creators, and designers as well as arts organisations including peak bodies, theatre companies, festival organisers, artist-run initiatives and Aboriginal and Torres Strait Islander artists and arts centres, community development artists and artists with disability as well as the organisations which support Australian artists. The breadth of legal issues Arts Law provides advice on includes copyright, moral rights, trade marks, contracts, business structures, governance, insurance, defamation, censorship, privacy, confidential information, employment, debt, and wills and estates management.*

*The Australia Council is a major public funder of Arts Law, and support is also received from the Commonwealth Attorney General's Department and Department of Infrastructure, Transport, Regional Development, Communications and the Arts, and, since 2013, from all other State and Territory Governments. In 2004, with seed funding from the Australia Council, Arts Law established Artists in the Black. This tailored service provides culturally appropriate legal advice, professional development and resources to Aboriginal and Torres Strait Islander creators and creative organisations.*

**KATHERINE GILES:** I first met you back in 2002 when you started in the role of Executive Director (now a CEO role). The Arts Law office was in The Gunnery in Woolloomooloo, and it was a much smaller organisation with a team of about 7 staff. That number has more than doubled since then, and the breadth of the services provided by Arts Law has also grown. What do you remember from those early days when you arrived at Arts Law?

**ROBYN AYRES:** It was a bit of a baptism by fire. On my first day, 2 September 2002, it was also my first Arts Law board meeting. So, I went straight into the board meeting. I had met the staff the week before, but the first day was spent preparing for the board meeting. Everyone was lovely and excited to have their new Executive Director in the role, but there was also a lot to sort out as Arts Law had been without an Executive Director for 6 months. There were a lot of finance and governance processes and procedures to put in place. These are the issues that a lot of arts organisations deal with day-to-

day, and I have used what I have learnt from all the challenges over the years in this area to assist and benefit the arts community, and arts organisations and other organisations, that also deal with these issues on a day-to-day basis.

**KATHERINE:** Before you arrived at Arts Law you were a lawyer with the Royal Commission into Aboriginal Deaths in Custody (1988-1991), a Public Interest lawyer at the Aboriginal Legal Service WA (1993-1998) and then the Executive Director of the Mental Health Law Centre WA (1998-2002). When you saw the role at Arts Law, what drew you to it?

**ROBYN:** I wasn't looking for a change at that time. Quite a few friends brought the role to me, and I was drawn to it because I was very involved in the arts community in Western Australia. My husband Andrew Leslie is an artist, and at the time I was also on the board of an arts organisation. So, it seemed like a lovely way to bring together my love of the arts, and the skills and ability I had built running and managing an organisation.

**KATHERINE:** Arts Law was established in 1983 and will celebrate its 40<sup>th</sup> birthday next year. How much do you think Arts Law has changed in the 20 years you have been there?

**ROBYN:** It has changed in lots of ways, but in other ways it is still providing the same core services. The focus is still on 'artists first' and ensuring that artists get the best possible advice given it is a very lean organisation. Of course, it is not like going to a silver service law firm but that focus on providing artists with quality advice is at the core. Some of the ways the service is delivered has changed. We don't have in-person volunteer lawyer advice service on a Monday night; it is now a document review service that volunteer lawyers provide over the phone at a time that works for them. But we still do the education/professional development and advocacy work, and the publications work in the form of resources such as information sheets, guides and template contracts. The big change was in 2004 establishing the Artists in the Black service. The service came out of the recognition at Arts Law, and via discussions with Australia Council, the Aboriginal and Torres Strait Islander Commission (ATSIC), and stakeholders within the Aboriginal and Torres Strait Islander community, about Arts Law setting up that sort of service. The Artists in the Black service was a pilot, and now 20 years later the Artists in the Black clients are now 30-35% of Arts Law's client base. And the service has had a big impact on the outcomes for Aboriginal and Torres Strait Islander artists and arts organisations in Australia.

**KATHERINE:** Shane Simpson set up Arts Law in the early 1980s, and when I read the account he has written of founding Arts Law and the work the Arts Law team undertook in those early days, it is still very similar to the work Arts Law does today: thousands of telephone legal advices per year; delivering professional development and education sessions;



developing resources such as template contracts and information sheets; advocacy and public policy reform; and the ongoing work that goes into the search for funding and support.

**ROBYN:** Yes, all those core elements are there, and they are the core issues for all community legal centres (CLCs). Arts Law is a classic CLC model organisation in many ways. It's just that Arts Law is the only CLC in Australia that focuses on the arts and protecting the rights of Australia's creators. I used to laugh with Shane Simpson that Arts Law really was established on the smell of an oily rag, and it's a bit sad how extensive our reach is geographically now and in terms of the number of artists we assist and the arts issues we cover, and yet Arts Law is still running on the smell of an oily rag. We could reach a lot more artists if Arts Law were better funded.

We have had to use internal resources to work out how we can help ourselves and increase our capabilities for fundraising and income earning. This has also included increasing the pro bono support for Arts Law. When I started, we already had over 100 pro bono lawyers, and it was much more than we had at the WA Mental Health Legal Centre. But over the years that base has grown, and we now have over 350 pro bono lawyers – and engagement from sole practitioners to big law firms, who all want to provide support for Arts Law and Artists in the Black. This reflects the increased engagement and particularly the support for Aboriginal and Torres Strait Islander artists.

Financially, donors have grown from 'Guardian Angels' into 'Arts Law Allies'. This was with the help of Her Excellency Margaret Beazley (the immediate past President of the board of Arts Law), who has also maintained her status as a donor and an Ally and is keen to see us grow our income. We have also worked on attracting money from philanthropists. The George Brandis cuts to Australia Council funding in 2015 when he was Minister for the Arts, had a big impact on Arts Law. We had to do some soul searching about our funding base and looked at other ways to support the important work that Arts Law does, for example the outreach trips to deliver face-to-face services to artists.

**KATHERINE:** For many years Arts Law's office was in The Gunnery building in Woolloomooloo, which also housed Artspace, Biennale of Sydney and Museums and Galleries of NSW. During the pandemic, Arts Law was forced to move from The Gunnery to make way for redevelopment of the site into an Artspace gallery and moved into the

1970s annex adjoining the Registrar-General's building (also known as the 'old' Land Titles Office). With the announcement in 2022 that the 1970s annex will be pulled down to make way for a memorial for The Queen, Arts Law moved again in February 2023 to the Haymarket Creative office space set up Create NSW in the former offices of the UTS Law Faculty. This space is only available until 2026 when Arts Law will be forced to move again! I landed back at Arts Law in December 2022, and we moved in February 2023 – that was an exhausting exercise and I still have some excess office furniture that doesn't fit in the new office stored in my garage. Are you hopeful that Arts Law will have a permanent office space again in the future?

**ROBYN:** We had a stable home for most of the time I was CEO, and it was very sad that we had to move out of our long-term home at The Gunnery and since then the NSW Government hasn't been able to assist us with finding long term secure accommodation. That is an increased stress for the organisation, and each time we move there is a massive increase in rent – over a short period of time. There is a real need for Arts Law to have a long-term stable home so that we can focus on doing what we have been established to do.

**KATHERINE:** Arts Law is unique in Australia and internationally as a CLC as it provides legal advice to creators and creative organisations all around Australia in all arts sectors.



Lara Yash (AITB Paralegal), Katherine Giles (Head of Legal and Operations), Robyn Ayres (CEO, Arts Law) at the Yabun Festival 26 January 2023. Photo: Jeremy Heddle

**ROBYN:** Yes, Arts Law is so unique and other countries have huge admiration for Arts Law as a service, in part because we have a First Nations advice service. While in the United States there are organisations like New York Volunteer Lawyers for the Arts, there is nothing like the scope of Arts Law. And so, we have had visitors and interns that have come from overseas to see the model and how Arts Law works. We even had a French intern who came here and has since established a similar service le Barreau des Arts in Paris, and we have hosted a representative from the Canadian



Outreach trip with Utopia Art Centre and Desert February 2023. Shane Simpson and Robyn Ayres talking to artists Josie Kunoth and Dinni Kunoth. Photo by Sophia Lynn of Utopia Art Centre

Artists' Representation/Le Front des artistes canadiens (CARFAC), a not-for-profit organisation that acts as a voice for Canada's professional visual artists.

**KATHERINE:** In 2004 you established the Artists in the Black (AITB) service at Arts Law, with a focus on providing a legal advice service specifically for Aboriginal and Torres Strait Islander artists and arts organisations. I remember when Arts Law's Aboriginal staff members Blanch Lake (the first AITB Coordinator), and Samantha Joseph (AITB Lawyer), came up with the name 'Artists in the Black' from the phrase 'in the Black' meaning to be profitable/making a profit. The idea being that the service would support artists to build sustainable, profitable arts practices. I also remember when in 2006, AITB was approached by the Association of Northern Kimberley and Arnhem Aboriginal Artists (ANKA), one of the peak Aboriginal art centre bodies, to provide information to the Aboriginal arts centres in the Northern Territory and Kimberley about the benefits of artists having Wills. The request arose from problems art centres and the families of artists were experiencing after an artist had passed away. The lengthy delay in distributing estates, and the complexity of the legal issues the arts centres were dealing with led ANKA to make the request. Often the arts centres had no clear instructions regarding an artist's estate – and how to deal with artworks left with the art centre, licences the artist had entered into, and any payments received by the art centre for the sale of artworks or licensing fees. Skip now to 2023, and in the last year Arts Law and AITB have visited 32 arts centres and prepared 248 Wills. The Wills program has also been accompanied with amazing amount of advocacy on the issue of intestacy laws and the Public Trustees Offices. This is an amazing legacy.

**ROBYN:** We did our own research to present this at an ANKA conference, and after that everyone wanted Arts Law to come and prepare Wills for the artists. That was the genesis. The first Wills outreach trip we thought we would be lucky to do 5 Wills, but we did 25 Wills. That outreach trip was undertaken with two young pro bono lawyers who came with me on the trip from a law firm. They were a great help with the work. At the ANKA conference, Patricia Adjei (Arts Law's AITB Solicitor at the time) gave a Wills presentation, and when she stood up and spoke as a First Nations lawyer you could feel the pride in the room – a First Nations lawyer talking about the service. It has always been a goal to develop this First Nations workforce. The Wills work has enabled us to have a lot of other conversations about issues that affect artists, and to develop connections

with the artists in communities and arts centres. Delwyn Evered (at Arts Law from 2001-2017) also helped, including with Arts Law's 'Adopt a Lawyer' program, which became an important way to increase the support to arts centres.

**KATHERINE:** The Board of Arts Law play such an important role in running Arts Law. In Shane Simpson's history of the founding of Arts Law he reminisces about visiting Justice Michael Kirby to ask him if he would be on the board of Arts Law as the first President and Chair of the board: *'The only time Justice Kirby could see me was 5 am before he raced off for a flight inter-state. Unlike the good judge, I am not at my best at that time! However, having read the brief he was intrigued, he asked searching questions and, after some days of reflection, agreed to be the first President of the Arts Law Centre of Australia.'* Over the last 20 years you have worked with a number of different dedicated board members, and the President has always been a NSW Supreme Court Judge.

**ROBYN:** I have worked with Supreme Court Justices David Levine, George Palmer and Her Excellency the Honourable Margaret Beazley, who is currently the Governor of New South Wales. The current President is Justice John Sackar, who is also a Judge of the Supreme Court of New South Wales. The President of the board of Arts Law has always been a Supreme Court judge, and Justice Peter Heerey, a Judge of the Federal Court of Australia, was Deputy President for several years. Having this leadership has been incredibly important for Arts Law. One of the goals has also been to diversify the board, so that it is not just made up of lawyers, but also people with a diverse range of skill sets and creative people from different parts of Australia. I have also worked on ensuring there are First Nations directors on the board, and Arts Law now has three First Nations directors – currently Tina Baum, Bobbi Murray and Brian Robinson.

**KATHERINE:** You have also worked on the Fake Art Harms Culture campaign with the Indigenous Art Code and the Copyright Agency. In January 2023, the Federal Government launched the *National Cultural Policy – Revive: a place for every story, a story for every place*. The Revive Policy includes an explicit commitment to develop stand-alone Indigenous Cultural and Intellectual Property (ICIP) legislation. What are the next steps beyond this commitment?

**ROBYN:** Arts Law has been pushing for ICIP laws for a long time, and it has been on the agenda ever since I started at Arts Law. When Richard Alston was Minister for Communications,

Information Technology and the Arts (1996-2003), there was a push for Indigenous moral rights, but it was a complicated model. The Fake Art Harms Culture campaign was an opportunity to tackle the widespread sale of fake art that has the 'look and feel' of being Indigenous but has no connection to Aboriginal and Torres Strait Islander communities. The campaign also highlights the exploitation and misuse of Indigenous culture through what some artists all 'fake deals', where there is an authentic connection between the art and the goods being produced, but the arrangement with the artist is exploitative.

It is so great that Patricia Adjei has been appointed to the position of Director, Visual Arts and Design Policy at the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, where she will work on the development of stand alone ICIP legislation. This is a legacy of her time at Arts Law as a Solicitor. The introduction of the ICIP legislation needs to be properly funded, with an education package that needs to go with it, and support for Indigenous communities to access those ICIP rights. Work also needs to go into training so that people who want to engage with Aboriginal and Torres Strait Islander people are also educated about the importance of these rights. Arts Law is already doing fantastic work supporting and providing professional development to organisations. Hopefully the ICIP legislation will introduce accessible laws that can make it easy for Aboriginal and Torres Strait Islander peoples and communities to have proper protection and respect for ICIP. So much work has gone into this over the last twenty years, and it started with people like Sally McCausland when she was at Arts Law.

**KATHERINE:** Got any plans for 2024?

**ROBYN:** I'm very open to whatever comes next, and I have no definite plans. I'm going to breathe, and walk, and travel. I want to find ways to be useful with everything I have learned over the last little while by making myself available to assist other organisations and arts organisations.

I have loved it. That is why I have stayed. It is hard to step down because I have loved the work and loved the people I have worked with, but I'm also leaving the organisation in great shape, and with a great team. It's an exciting time.

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# Australian Government Poised to Introduce a New *Sui Generis* Legislative Regime to Protect and Enforce Rights in Indigenous Cultural Intellectual Property

**Jane Owen**, Partner (Bird & Bird), examines the new Revive policy and the impact it is likely to have on indigenous cultural intellectual property.

## Introduction

After numerous reports and recommendations through successive governments regarding the need to protect the valuable cultural assets of Australia's indigenous population,<sup>1</sup> the Australian Government has announced its intention to introduce a standalone legislative regime for the protection of indigenous cultural and intellectual property (ICIP). The decision was announced in February 2023 as part of the Australian Council for the Arts' 5 year plan, "Revive"<sup>2</sup>. While at the time of writing, no Bill has been presented to Parliament, the promised introduction of the legislation is an endorsement of the comprehensive framework for fit-for-purpose standalone legislation, as part of a wider plan to protect ICIP.

The proposal in Revive is to adopt the recommendations proposed by the Productivity Commission in its study report, *Aboriginal and Torres Strait Islander visual arts and crafts*, Study Report, Canberra 2022 (**Productivity Commission Report**), released in November 2022. The recommendations of the Productivity Commission responsive to its Terms of Reference extend beyond those addressing the problems of inauthenticity in the arts and craft markets for indigenous product, to a broader recommendation that specific legislation be introduced as part of a multipronged approach to protecting ICIP.<sup>3</sup> Through such legislation Australia would move to meet its obligations to implement principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australian law.<sup>4</sup>

Following the publication of "Revive", IP Australia also released its final report, *Scoping Study on Standalone Legislation to Protect and Commercialise Indigenous Knowledge*, published in July 2023 (**IP Australia Report**). In the IP Australia Report, IP Australia endorses the recommendations of the Productivity Commission Report for standalone legislation to protect ICIP, and IP Australia makes some additional recommendations, in particular

directed to protection of genetic resources embodying indigenous cultural knowledge.

This article explores the background to the drive to develop a new legislative regime for ICIP through a brief examination of some of the earlier attempts of Australian courts and regulators to address the protection of ICIP in Australia's current intellectual property legal framework. It also explains the drivers behind the recommendation of standalone *sui generis* legislation and summarises the key features of the proposed new legislative framework proposed by the Productivity Commission and endorsed by the Arts Council of Australia, as adopted and modified in the IP Australia Report.

## The nature of ICIP and its incompatibility with the current legislative regime

From reviewing the series of Australian cases concerning cultural appropriation of indigenous assets in Australia, it is demonstrably clear that the current intellectual property regime in Australia is inapt to capture and protect within it, by providing suitable recourse against unauthorised use, all of the aspects of the property rights comprising ICIP.

Comparing the broad notion of ICIP and the ways in which it may be distilled into a material form, copyright is the most closely aligned protection system which might provide some assistance in enforcing rights against incidents of appropriation. However, copyright is unable to adequately assist in the prevention and forced cessation of unauthorised use of ICIP.

Firstly, the subject matter in which copyright will subsist is not on all fours with ICIP. The notion of ICIP extends beyond the definitions of artistic and literary works enshrined in the *Copyright Act 1968* (Cth)<sup>5</sup>: it encompasses a wider notion of cultural expression which may extend to languages, dance, knowledge, knowledge systems, foods and fibres, stories, narratives, designs, iconography, song, music, medicines,

1 Australian Law Reform Commission's Report on Recognition of Aboriginal Customary Laws 1986; Attorney General's Department "Stopping the Rip-offs" Issues Paper 1994; Report of the Senate Standing Committee on Environment Communications and the Arts: 'Securing the Future: Australia's Indigenous Visual Arts and Crafts Sector' 2006; and House of Representatives Standing Committee on Indigenous Affairs inquiry: The Growing presence of inauthentic Aboriginal and Torres Strait Islander "style" art and craft products and merchandise for sale across Australia' 2018.

2 Commonwealth of Australia 2023, Revive: a place for every story, a story for every place – Australia's cultural policy for the next five years.

3 Productivity Commission Report, p 161.

4 Australia formerly supported the UNDRIP in 2009.

5 *Copyright Act 1968* (Cth), s 10.



cultural protocols, dreaming and creation.<sup>6</sup> However, the boundaries of ICIP have not been defined or its limits appropriately explored.

Even for the World Intellectual Property Organisation (WIPO), the definition of the assets encompassed by the term “cultural asset” is not yet the subject of agreement. In its current working definition of traditional cultural expression, WIPO’s Intergovernmental Committee has not settled on a definition and in the current draft has retained square brackets for matters which are not the subject of agreement or fixed definition:

*Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.*<sup>7</sup>

Added to the complexity of identification of the subject of the rights, the term of protection is also inconsistent with copyright protection. In many ways it is the ancient foothold of traditional cultural expression which is intrinsic to its value to Indigenous populations. While copyright is time limited (to the reference point of the life of the author or date of publication),<sup>8</sup> it is incongruent to limit the term of protection of ICIP by reference to a publication date or the lifespan of any individual. It is not one individual author who can lay claim to ownership of such assets.

The association of cultural assets to a community at large is directly connected to the vexed issue of identification of a specific owner or author with the appropriate proprietary rights to have standing to sue for misuse of the property. By their very nature, cultural assets are the “property” of communities as custodians, and in the case of indigenous communities in Australia, arise directly from the community members’ relationship with, or traditional ownership of, the land with which the cultural asset or community custom is associated<sup>9</sup>.

### **How have Australian Courts grappled with this incompatibility?**

The case of *Bulun Bulun & Anor v. R & T Textiles Pty Ltd*<sup>10</sup> exemplifies the inability of copyright law to provide solutions for the appropriation of cultural assets of a community, distinct from an artist’s individual allegations of copyright infringement.

This case arose from the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr. John Bulun Bulun, that subsisted in his artistic work “Magpie Geese and Water Lilies at the Waterhole”.

The applicants in the Federal Court proceedings were both the artist, Mr Bulun Bulun and Mr George Milpurruru as a member of the Ganalbingu people, of Arnhem Land in the Northern Territory. Mr Bulun Bulun sued in his capacity as legal owner of the copyright subsisting in the artistic work under the *Copyright Act 1968*, while Mr. Milpurruru brought the proceedings in his own capacity and as a representative of the Ganalbingu people, claiming that the Ganalbingu people were the equitable owners of the copyright subsisting in the painting.

Mr. Milpurruru’s action was in essence a test case as to whether the Australian courts and legal system would recognise the notion of communal ownership in traditional ritual knowledge and in particular their artwork intellectual property rights (the respondents admitted infringement of Mr. Bulun Bulun’s copyright, and that claim was not in contest in the judgment).

The basis for Mr Bulun Bulun’s claim to standing and connection of the waterhole (the subject matter of the infringed artwork), to the traditional ritual knowledge embodied in the artwork was explained on the following basis. The Ganalbingu people are divided into two groups according to their geographic distribution. Mr. Bulun Bulun was the most senior person of the “bottom” Ganalbingu. He was second in seniority to Mr. Milpurruru, who was a “top” Ganalbingu. The waterhole depicted in Mr. Bulun Bulun’s painting was Djulibinyamurr which was the principal totemic well for the artist’s clan. It was described as the place from which Barnda, the long-necked turtle creator ancestor of the Ganalbingu people, emerged. In his evidence Mr. Bulun Bulun explained that his ancestors were granted responsibility by Barnda to maintain and preserve all of the Mayardin (corpus of ritual knowledge) associated with the Ganalbingu land. Part of the artist’s responsibility as “Djungayi” or manager of the Mayardin, was to create paintings in accordance with the laws and rituals of the Ganalbingu people.

Mr Bulun Bulun asserted that the unauthorised reproduction “threatens the whole system and ways that underpin the stability and continuance of [the artist’s] society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor.”<sup>11</sup> He explained further in his evidence that all of the traditional owners of the Ganalbingu land would have to agree on any exploitation of art works depicting sacred sites such as the waterhole.

The Court did not find that a trust was established, so that the Ganalbingu people could be the owners of equitable title in the copyright in the artwork. It did however find that a fiduciary relationship existed between Mr Bulun Bulun, the artist, and the Ganalbingu people, arising from the trust and confidence by his people that his artistic creativity would be exercised to preserve the integrity of the law, custom, culture and ritual knowledge of the Ganalbingu.

6 Dreaming Art Creative Consultancy submission to Productivity Commission p 8, cited at page 170 of the Productivity Commission Report.

7 WIPO, The Protection of Traditional Cultural Expressions: Draft Articles Facilitators’ Rev. (June 19, 2019).

8 *Copyright Act 1968* (Cth), s 33.

9 See the in-depth explanation of the manner in which the rights of the traditional owners of Ganalbingu country in *Bulun v Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA (3 September 1998), explained further in this article.

10 [1998] FCA 1082 (3 September 1998).

11 *Ibid*



The fiduciary obligation imposed on Mr. Bulun Bulun was “not to exploit the artistic work in such a way that is contrary to the laws and custom of the Ganabingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.”

However, the Court ruled that the rights of the Ganabingu people were confined to a right in personam against Mr. Bulun Bulun to enforce his copyright in works against third party infringers. Had Mr. Bulun Bulun failed to take action to enforce his copyright, the beneficiaries might have been able to sue the infringer in their own names as the beneficiaries of the fiduciary obligations owed to them by Mr. Bulun Bulun. As Mr Bulun Bulun had taken the infringement action, the Court dismissed the representative action of Mr. Milpurruru against the respondents.

None of the *Copyright Act, Patents Act 1990 (Cth)* or *Designs Act 2003 (Cth)* provides for the concept of this type of communal ownership. Rather, each requires a human inventor or creator (an issue most recently explored in full in respect of whether an artificial intelligence system could be named as an inventor of the invention the subject of a patent application, with the Australian Courts holding that that a “person” under s 15 of the *Patents Act* excluded such entities).<sup>12</sup>

### **How bodies or principles of use have been developed as an attempt to fill the void of express legislation for dealing with traditional ownership and rights ICIP**

Given this misalignment, the amorphous concept of “cultural appropriation” has been asserted in relation to unauthorised use of cultural assets, but not often pursued in the litigious forum. For example, whilst there was outcry in the press regarding the use of indigenous art work by major commercial figures such as Villeroy & Boch<sup>13</sup> and Berlei,<sup>14</sup> these matters did not appear to progress past this expression of outrage. No direct claims of copyright infringement appear to have been filed suggesting that, in these circumstances, there was little available recourse in respect of this appropriation other than public expressions of disapproval. The term “cultural appropriation” is used as a catchall to express the socially unacceptable nature of such acts, but perhaps this lack of exactitude is indicative of the inability to label the acts with a specific infringement or tortious wrongdoing.

To fill this legislative void, and to foster respectful, consensual and appropriate use of ICIP, the Arts Council of Australia has developed and published guidelines for obtaining consent and appropriate terms of consent for use of ICIP.<sup>15</sup>

The New South Wales government has likewise produced its own guide.<sup>16</sup> The rationale for its “ACIP” protocol was expressed in the following way:

In the absence of protection for cultural and intellectual property rights under Australian laws, Aboriginal Affairs NSW (AANSW) has developed an Aboriginal Cultural and Intellectual Property Protocol as part of its commitment to upholding Aboriginal peoples’ rights to their heritage, knowledge and cultural expressions.

This Protocol sets a standard for how AANSW engages with Aboriginal people and communities in regard to their cultural and intellectual property, and what we expect from the organisations we fund and suppliers we engage in this respect.<sup>17</sup>

The fundamental tenant of the protocols is to embody the following 10 principles<sup>18</sup> in any dealing with ICIP subject matter:

- Respect
- Self-determination
- Communication, consultation and consent
- Interpretation and authenticity
- Cultural integrity
- Secret, sacred and privacy
- Attribution
- Benefit sharing
- Maintaining Aboriginal culture
- Recognition and protection

One of the key principles is obtaining free and prior informed consent for use of ICIP from Aboriginal peoples. This involves collaboration and co-design, negotiation and informing owners and custodians about the implications of consent.

### **Do these declarations of guidelines for use and respect of ICIP work in practice?**

While the guidelines published by governmental and other bodies directing appropriate use of cultural assets, as they do not rise above a recommendation of good practice, their application is ad hoc and even following appropriate guidelines gives rise to the risk of falling foul of cultural rights.

For example, as there is no blueprint for obtaining free and prior informed consent for use of ICIP from Aboriginal peoples, there can be a risk that any such consent is not given in accordance with specific Indigenous custom or by someone authorised to give the consent.

12 *Commissioner of Patents v Thaler* [2022] FCFC 62.

13 ‘Devoid of any type of cultural value’: *Villeroy & Boch criticised for ‘misuse’ of Aboriginal art*, Sydney Morning Herald 4 August 2019.

14 ‘*Berlei Australia apologises for cultural appropriation*’, National Indigenous Times 9 April 2021.

15 Protocols for using First Nations Cultural and Intellectual Property in the Arts, Arts Council of Australia 2019.

16 Aboriginal Affairs NSW Aboriginal Cultural and Intellectual Property Protocol, 2019.

17 <https://www.aboriginalaffairs.nsw.gov.au/our-agency/staying-accountable/aboriginal-cultural-and-intellectual-property-acip-protocol/>.

18 These are the ten True Tracks® Principles were created by Terri Janke and Company Lawyers.

An example of the potential failure of seeking appropriate consents to use is *Jabree Ltd v Gold Coast Commonwealth Games Corporation* (the Borobi trade mark case).<sup>19</sup>

“Borobi” was the official mascot of the 2018 Gold Coast Commonwealth Games. ‘Borobi’ originates from the indigenous Australians Yugambeh language and translates into English language to mean ‘koala’. The Yugambeh community is from the Gold Coast region in Queensland.

The “Borobi” mascot design was created by an Indigenous artist from the Kalkadoon people from the Mount Isa area in Queensland, represented graphically (and the subject of a distinct trade mark application) in this form (and other forms): the form depicted on the right (and other forms).

The Gold Coast Commonwealth Games Corporation (the trade mark applicant) promoted the Commonwealth Games by means of a “faux” dreamtime story revolving around the Borobi character, which regaled the reader with Borobi’s special characteristics, including his unusual paw markings and his missing second thumb, which caused him to spend more time on lower branches where he watched surfers ride waves, “and the more he watched the more he dreamed of learning to surf”, and indeed he did learn to surf according to the story.

The story went on:

*“As he walked up the beach, an elder approached Borobi. He explained that he’d been following Borobi’s pawprints, which had intricate patterns that spoke of a great gathering. The circles represented a large meeting place the dots were spectators and the lines symbolised the athletes’ journey”.*<sup>20</sup>

The opponent of the trade mark application for BOROBI in this case (Jabree Ltd) was a registered cultural heritage body for the Gold Coast region under the *Aboriginal Cultural Heritage Act 2003* (Qld). Jabree Ltd was established in 2010 to support the Gold Coast Native Title Claim Group and traditional owner community for the purpose of assisting with the most recent Gold Coast native title claim, and as the Aboriginal cultural heritage body for the Gold Coast region, to manage and protect the Yugambeh people’s cultural heritage.

The Applicant gave evidence that it had conferred with Yugambeh community elders in both formal and informal meetings about the use of the proposed mascot and the use of an Aboriginal word as the name of the mascot, and that the members with which it conferred fully supported the use of the work “Borobi” as the name of the mascot.

The Opponent however claimed that the Applicant had failed to observe the decision-making process of the claim group to be followed with the Yugambeh community. The Opponent also claimed that the use of a word belonging to an Aboriginal language without proper consultation is a misappropriation of Aboriginal intangible cultural heritage.



The key ground of opposition was under Section 42(a) and (b) of the *Trade Mark Act 1995* (Cth): the trade mark consists of scandalous matter or that its use would be contrary to law.

Given the mark being a single word, albeit in Yugambeh language, outside of the difficulties of establishing an author or a work from which a reproduction was made, copyright subsistence could not have been established to form the basis of a copyright work and its misuse comprising copyright infringement, “contrary to law”, pursuant to Section 42(b). The single word would be too insubstantial to attract the protection of copyright, and even if this was not the case, the term of protection would have long since expired.

Rather the argument was put on the basis of the use of the mark the subject of the application would give to representations of approval or association amounting to a contravention of section 19(1)(h) of the *Australian Consumer Law*.<sup>21</sup>

While the Delegate was sympathetic to the opponent’s claims, she was not satisfied that the adoption of BOROBI was in any way shameful, offensive or shocking, or that there were any representations of approval or association that would give rise to a contravention of section 19(1)(h) of the *Australian Consumer Law*. In relation to the latter finding, the Delegate noted specifically that she was “empathetic with the Opponent’s position and the sensitivity of this matter, however, this area of law is clear that the filing of a trade mark application does not require consultation with any party.”<sup>22</sup>

<sup>19</sup> *Jabree Ltd v Gold Coast Commonwealth Games Corporation* [2017] ATMO 156 (14 December 2017).

<sup>20</sup> *Ibid* paragraph 17.

<sup>21</sup> *Competition & Consumer Act 2010* (Cth) Schedule 2.

<sup>22</sup> [2017] ATMO 156 at paragraph 50.

The Borobi trade mark case demonstrates that, absent specific regulation governing both the appropriate subject matter for trade mark registration, and a protocol which is known and followed for consultation with the *accepted* cultural custodians of the subject matter, there is limited ability for indigenous challenge to the appropriation of Indigenous language, or other cultural assets, as trade marks.

Of note in this respect is that pursuant to the New Zealand trade mark process, the New Zealand *Trade Marks Act 2002* contains provisions that prohibit the registration of trade marks where it would be likely to offend the Māori community.<sup>23</sup> An advisory committee has also been established, consisting of members who have knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture). Any trade mark application with Māori words or design elements is referred by the examiner to a Māori committee which has been established to advise whether a trade mark is derivative of a Māori sign or likely to be offensive to Māori, and for that reason refused.<sup>24</sup>

### Why not amend the current IP legislation to provide for the specific protection of ICIP Assets?

In the Productivity Commission Report, the Productivity Commission mused as to the options available for legislative change to strengthen ICIP protection as part of a framework to improve the gap in protection of ICIP. The options discussed were threefold: minor amendment to existing legislation, more extensive amendments or the introduction of dedicated *sui generis* legislation.

However, its finding was that while “minor amendments to existing laws could improve protection”, “amendments of this type fill specific and narrow gaps in existing laws, rather than addressing broader objectives”.<sup>25</sup> Further, the Productivity Commission concluded that larger scale amendments are likely to be incompatible with the framework’s or objectives of existing legislation:

*Overall, in contrast to relying on amendments to the patchwork of existing legal mechanisms, dedicated legislation to protect tangible expressions of ICIP in visual arts and crafts has the potential to provide stronger, more fit-for-purpose protection for ICIP in visual arts and crafts and greater clarity around cultural rights for the broader Australian community, thus facilitating third party use and collaborations. It would also enable Australia to demonstrate its commitment to meeting its international obligations to recognise and protect ICIP.<sup>26</sup>*

Given the diametrically different construct of origination, term of protection and “ownership” of cultural assets, intuitively, the “going back to the drawing board” approach for the protection of ICIP is the correct course for Australia to take. Through this route, other intellectual property rights of individuals can be maintained or enforced contiguously to the enforcement of ICIP.

The concept of cultural assets, and their community ownership, and the appropriate identification of an “owner” vested with authority to grant consent can be enshrined in new legislation, to give all parties more clarity regarding dealings with ICIP.

### The proposed “new cultural rights legislation”

The foundation of the new legislation proposed by the Productivity Commission and endorsed in “Revive” is a formal recognition of the interests of Aboriginal and Torres Strait Islander groups in their cultural assets and ensuring they are empowered to control the use of the assets. The legislation is not proposed to prohibit use of cultural assets *per se* but to enable cultural owners to take action in relation to use without authorisation.

This legislation is proposed to be but part of the package of amendments which will be made to ensure that cultural assets are protected. No further exploration or elucidation of these amendments has been published.

### How will the legislation address the concept of “Cultural Asset”?

Distinct from traditional copyright notions of “works” being the subject of protection, the Productivity Commission’s proposal is that the concept of cultural assets to be protected will be driven by the determination of cultural input into the asset or work. This is a different way to look at the subsistence of a proprietary right. Rather than focussing on the protection of the creative output or expression, as in copyright works, the cultural content or idea behind an expression of the idea in an artwork will attract the protection of the new legislation.<sup>27</sup> Copyright law will continue to assist the artist or author in the protection of the creative output in the form of a copyright work.

Applying this in practice, if the circumstances of *Bulun Bulun & Anor v. R & T Textiles Pty Ltd* were litigated in the era of this new legislation, Mr Milpurruru’s claim against the infringer could have been run as an infringement of the ICIP in the cultural asset embodied and communicated in Mr Bulun Bulun’s artwork.

This notion of “cultural assets” gives the subject matter of the proposed legislation wide scope: the intention is that the phrase is inclusive rather than exclusive in definition. The recommendation is that the legislation set out criteria for assessing whether something is a cultural asset, such as strength of its connection to tradition or customer, akin to the concepts tested in cases under lands rights legislation.<sup>28</sup>

Key recommendations of the Productivity Commission in relation to the nature of the cultural assets and their identification include these characteristics:

- The asset must be inalienable – because the assets cannot be alienated from the traditional owners, consistent with the notion of custodianship rather than individual proprietorship.

<sup>23</sup> *Trade Marks Act 2002* (NZ), s 17(1)(c).

<sup>24</sup> *Trade Marks Act 2002* (NZ), s 177-199.

<sup>25</sup> Productivity Commission Report, p 151.

<sup>26</sup> Productivity Commission Report, p 159.

<sup>27</sup> Productivity Commission Report, p 177.

<sup>28</sup> Productivity Commission Report, p 177, referencing the *Native Title Act 1983* (Cth).

- They would not be the subject of the requirement of registration in any form.<sup>29</sup>
- The protection of a cultural asset would be unlimited by time: the consideration being the asset's connection to tradition and custom and the existence of the asset not being determined by when it begins or ends.<sup>30</sup>

#### **Who has standing to take action to enforce ICIP rights under the proposed legislation?**

The Productivity Commission proposes that the traditional owner is vested with standing to take action in respect of misuse of a cultural asset. However, this concept of owner is a broad one: a person, group or community who has ownership or custodianship of the cultural asset.

A key concept to be enshrined in the proposed legislation is the recognition of the ability of a community, comprising a group of individuals not necessarily organised into a known legal structure or legal identity such as a corporation or association, to own the cultural asset and take enforcement action against its misuse.

The Productivity Commission's recommendation is that the actions to enforce ICIP can be brought by individual(s) on behalf of the community in the form of a representative action, analogous to the standing granted under the *Native Title Act*<sup>31</sup>. It eschews a formal register of interests for community groups, to give them legal identity under the law, as the recommended approach, because of cost of establishment and maintenance and doubt as to the full participation of all communities in the registration activity<sup>32</sup>.

Standing would be demonstrated to the relevant Court or tribunal by the strength and nature of the claimant's connection with the cultural asset.

While numerous submissions are discussed in the Productivity Commission Report supporting the establishment or empowerment of a "cultural rights regulator" which could bring representative actions for misuse of ICIP, the conclusion of the Productivity Commission was that there was "insufficient evidence" to support the merit of this proposal at this time, over and above the grant of standing to representative members of the community connected to the cultural asset.<sup>33</sup>

#### **The proposed route to enforcement of ICIP rights**

The types of actions which may give rise to an infringement of a cultural asset are proposed in a very general way by the Productivity Commission.

The actionable "use" giving rise to infringement is described broadly as a use that comprises the "giving expression to a cultural asset". For example, the incorporation of a cultural asset into an artwork or product would result in a cultural expression would be an infringement.<sup>34</sup>

An actionable use is a use of a cultural asset without authorisation, and this is a matter of fact to be determined in the circumstances of any impugned use.<sup>35</sup> Implicit in this concept is a necessary examination of the scope of any authorisation and whether the purported grantor had the necessary authority to confer the authority for use. This is the very issue which vexed the trade mark application in the Borobi trade mark case. The recommendation is that this issue be determined by a consideration of how authorisation is ordinarily granted in the community.<sup>36</sup>

Issues which will require close consideration in the drafting of the proposed legislation include the need for reproduction in a material form and thresholds of appropriation which will give rise to an infringement.

The Productivity Commission refers to and advocates the approach taken in the WIPO and Pacific Islands model laws, which specify that no infringement occurs for uses that are 'incidental'. The caveat in the WIPO model laws provides:

The provisions of Section 3 [which require authorisation to be sought] shall not apply also where the utilization is incidental.<sup>37</sup>

#### **Proposed exceptions to infringement by use of a cultural asset**

The Productivity Commission tentatively recommends exceptions for fair use: study, research or education; criticism or review; reporting news or current events; court proceedings or legal advice; personal and private use. However, it is queried whether these fair use exemptions are on all fours with closely guarded cultural assets, the dissemination of which is not generally approved of by the cultural custodians. Clearly more thought will need to be given to a blanket adoption of these copyright style fair use exemptions.

Less controversially, the Productivity Commission recommends an introduction of the defence of use for traditional and customary purposes and for individuals attempting to reconnect with culture. In the report, the draconian effect of the forced removal of Aboriginal and Torres Strait Islander children in the period from 1910 to 1970 and their consequent removal from their cultural heritage is explained as the logical driver for this defence to allow those displaced from their cultural centres to reconnect.<sup>38</sup>

29 Discussion pages 180-181 of the Productivity Commission Report

30 Productivity Commission Report, p 182.

31 Productivity Commission Report, p 183.

32 Productivity Commission Report, p 184.

33 Productivity Commission Report, p 187.

34 Productivity Commission Report, p 187.

35 Productivity Commission Report, p 190.

36 Productivity Commission Report, p 190.

37 WIPO 1985.

38 Productivity Commission Report, p 193.



## How the new *sui generis* regime would exist within the existing and any future framework

The Productivity Commission recognised that there are existing protocol frameworks<sup>39</sup> and regulatory measures<sup>40</sup> around the use of ICIP, and that the proposed ICIP legislative reform must necessarily be but part of a broader and coherent “ICIP regime”.<sup>41</sup> This was in response to its acceptance that “it is unclear whether all-encompassing ICIP laws are feasible or practicable”.<sup>42</sup>

In support of this view, the Productivity Commission provides examples of legislation internationally which have focused on specific aspects of ICIP only<sup>43</sup>. The *sui generis* legislation proposed would form one element of the strategy to be implemented.

## Concurrent work of IP Australia to enhance protection of ICIP

Concurrently with the review and report of the Productivity Commission, IP Australia was performing a scoping study in respect of indigenous knowledge legislation. This scoping study was overseen by the cross-department Indigenous Knowledge Working Group (IKWG) on potential elements of stand-alone legislation that would support Aboriginal and Torres Strait Islander peoples to protect and commercialise their indigenous knowledge.<sup>44</sup>

The IP Australia scoping study was part of a comprehensive work plan developed by IP Australia with 6 work streams in respect of indigenous knowledge to be undertaken during 2022-2023.<sup>45</sup> The development of a scoping study into stand-alone legislation for indigenous knowledge was but one stream of this comprehensive work plan.

In September 2022, IP Australia released its Consultation Report “Enhance and Enable Indigenous Knowledge Consultations 2021”. As already mentioned, the IP Australia Report was the final report published in July 2023<sup>46</sup>. The IP Australia Report states that weight was given to the Productivity Commission Report but that that report was focussed on the visual arts and crafts sector and the IP Australia report has a wider focus.

The key differences between this IP Australia Report and the Productivity Commission Report are that the IP Australia Report makes 2 further recommendations: the first dealing with genetic resources and the implementation of the Nagoya Protocol,<sup>47</sup> which is an internationally accepted

model for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources and includes protections for indigenous knowledges associated with genetic resources; the second being the recommendation of the creation of a national statutory body with the power to initiate enforcement action for infringement of ICIP.

These are the full set of recommendations made in the IP Australia Report:

1. That the Australian Government enact standalone legislation creating a new intellectual property right in respect of traditional cultural expressions and traditional knowledge.
2. That the Australian Government undertake a co-design process for the development of such standalone legislation in partnership with First Nations peoples.
3. That legislation to protect the rights of First Nations peoples in respect of the genetic resources of native flora and fauna continue to be implemented nationally through a coordinated framework of state and federal laws based on the rules for the fair and equitable sharing of the benefits of biodecovery that are contained in the Nagoya Protocol.
4. That the Australian Government ratify the Nagoya Protocol.
5. That consideration be given during the co-design process to the inclusion of the elements and features suggested in the IP Australia Report.
6. That the Australian Government enact legislation, whether as part of new standalone legislation or by amendment to the Australian Consumer Law, prohibiting the commercial supply of goods or services featuring or purporting to feature traditional cultural expression which are not produced by Aboriginal or Torres Strait Islander people or with the permission of rights holders, unless labelled as inauthentic. This is a key recommendation of the Productivity Commission Report.
7. That implementation of new standalone legislation be undertaken in conjunction with the accompanying additional measures and policies, to be developed in consultation with Indigenous stakeholders and through shared decision-making.

39 See eg, the Australian Council for the Arts’ extensive *Protocols for using First Nations Cultural and Intellectual Property in the Arts*.

40 Native title and heritage laws eg *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) can protect areas and objects that are of particular significance to Aboriginal and Torres Strait Islander people or communities under threats of injury or desecration.

41 Productivity Commission Report, p 159.

42 Productivity Commission Report, p 161.

43 Eg, in New Zealand, section 17 (1)(c) of the *Trade Marks Act 2002* (NZ) prohibits the registration of trade marks where it would be likely to offend the Māori community - an advisory committee has been established to advise on whether a trade mark is derivative of a Māori sign or likely to be offensive to the Māori community.

44 The scoping study was undertaken by consultancy Ninti One in consultation with the IKWG, and an Indigenous Expert Reference Group working with IP Australia.

45 IP Australia Indigenous Knowledge Work Plan 2022-2023.

46 Published on IP Australia’s website: *Scoping Study On Standalone IK Legislation* | IP Australia.

47 *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity* is a supplementary agreement to the Convention on Biological Diversity. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan and entered into force on 12 October 2014.

8. That, in parallel with the co-design process, the Australian Government progress the development of a strategic business case that includes a more detailed cost-benefit analysis and a primary research project surveying Australians to estimate their willingness to pay for reform options and including reliable estimates of the total benefits (both non-market and market benefits).

In respect of recommendation 7, the additional package of policies and measures recommended in the IP Australia Report spans the following ambit:

- creation of a national collecting agency to assist in negotiating licences and rights agreements and collect and distribute royalties for the permitted use of indigenous knowledge;
- the establishment of a database system, managed in accordance with cultural protocols, that can be used by rights users to identify and contact protected indigenous knowledge and its owners;
- support to rights holders to understand, access, use and enforce the new cultural rights;
- a program of public education and a marketing and communication strategy to inform potential users of the necessity to seek the permission of rights holders and to encourage the public to seek out goods and services that are ethically sourced and produced with the free, prior and informed consent of rights holders;
- enhanced border protection measures to deter trade in inauthentic product;
- capacity-building programs to support First Nations enterprise and business development including, in particular, in commercialisation to generate economic returns for, and to benefit, First Nations communities; and

- the additional recommendations of the Productivity Commission Report which looked across the broader cultural industries rather than just the visual arts and crafts industry including a national Indigenous Cultural and Intellectual Property strategy, strengthening the Indigenous Art Code and artist support services, an evaluation of existing funding arrangements, supporting First Nations workforce development and increased opportunities within the nation's public cultural institutions.

While the IP Australia Report endorses the approach to separate standalone legislation advocated in the Productivity Commission Report, importantly it proposes that the approach to protection of genetic resources must be a different legislative approach to the protection of indigenous knowledge and indigenous cultural expression generally. It takes endorsement from the position of the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**). The IGC's longstanding approach is that the protection of genetic resources and associated traditional knowledge requires a different legal framework from that suited to the protection of traditional cultural expression and other aspects of traditional knowledge.

#### The road to implementation of the new legislation

At this stage, there has been no further public steps towards implementation of the foreshadowed standalone ICIP legislation. However, the commitment of the current government to reconciliation and recognition of indigenous rights, and particularly its support for indigenous arts expressed through *Revive* suggests that progress can be expected. The detailed considerations of the scope of the ICIP legislation made in the Productivity Commission Report and the IP Australia Report provide a framework for the next steps to be taken to for the introduction of *sui generis* legislation protecting ICIP into Australian law.



## 2023 CAMLA Annual Oration

To be delivered by

**NICK MCKENZIE**

Investigative journalist, The Age and Sydney Morning Herald

- 14 times Walkley winner
- 4 times Australian Journalist of the Year

**Date:** Thursday, 16 November 2023

**Registration:** 6:00pm. Keynote address 6:30pm, followed by a cocktail reception

**Venue:** Ashurst Ballroom, 4/5 Martin Pl, Sydney NSW 2000

**Attire:** Semi-Formal

**Further details and registration link to follow**





## Interview with George McCubbin

**George McCubbin** is an artist and patent litigator in the intellectual property team at Herbert Smith Freehills in London. After studying both science and law, he commenced his career in intellectual property law in Melbourne. Having always held a deeply creative side, a few years into his legal career, George's request to switch to work part time in order to pursue his art more seriously was granted. He has since moved to London, working as a lawyer part-time, creating art and exhibiting his work at hot spots in East London. Our co-editor **Ashleigh Fehrenbach** sits down with George at a café close to where his most recent exhibition was held to discuss painting, patents, advice from mum and what it means to have an overwhelming desire to create.

**ASHLEIGH FEHRENBACH:** George, I'm delighted to be interviewing you for this special edition of the CLB! Can you tell us about your career path to date. How did you end up specialising in intellectual property law?

**GEORGE McCUBBIN:** I studied science and law at Monash University in Melbourne. I always liked science but the decision to focus on it at uni was more down to not knowing precisely what I wanted to do. One thing I was sure of though was that I wanted to do something creative after university. I had thought about doing animation, but it was not a good time for the industry. I had done an internship at Disney, but then they shut down all their 2D animation studios in the mid-2000s. So I thought ok, I've always been good chemistry and physics – what about studying science? I got the marks for law so decided to

pursue both disciplines. I actually really liked law. Both science and law have an analytical side that I'm drawn to.

After that, I went through the clerkship process which everyone seemed to be doing. At that point, I didn't even know that there was a field of law called "intellectual property". People began suggesting it to me because I was studying science. It was only during my clerkship at Ashurst that I could see how intellectual property law worked in practice – that there were parallels between the technical subject matter and the legal framework. On the science side, I'd thought about doing a PhD but I just didn't enjoy lab work. The day-to-day activities of science are slow moving and you have to be willing to accept failure. Instead I always enjoyed the high-level strategy side of science, being able to theorise how things work and

think through problems. If I could have parachuted into being a professor, that would have been ideal. But in IP law you actually get to play a role closer to that.

**ASHLEIGH:** Asking as someone who paired her law degree with an arts degree, do you think studying science gave you a particular advantage in the IP world?

**GEORGE:** That's an interesting one. There is a lot of focus in the UK on getting STEM students to come through IP teams. At open days, I would often hear people saying "Oh, I've heard that you need to have a technical science background to do IP". But I don't think that's true. Some of the best people I have worked with in Australia were not technically trained. They come to a subject matter with no pre- (or sometimes mis-)conceptions and don't assume too much knowledge – a classic fallacy. That being said, I think the reason why I've survived so long in law is because of my technical ability. It's my niche and my role in the team. Other people might find their niche in the precise coordination work that's involved in litigation. Directing people and knowing the technical procedures inside and out is an incredibly important skill set, especially when you are working on a multi-jurisdictional matter. Right now, we have a case that involves 25 countries – that's live IP litigation in 25 countries! The coordination piece is huge, and it involves a different skillset.



**ASHLEIGH:** What do you enjoy most about your work and is that in any way related to what you like about art?

**GEORGE:** Definitely the technical side. I like getting deeply involved in a new, niche area. There's a parallel there with art. I like exploring ideas to a degree that's probably obsessive. That can be both positive and negative. In law, we get put in front of a lot of tough problems. There's no easy answer. Instead, you're forced to obsess about what the correct answer is. It's the same with painting. There's no easy way to resolve or "solve" a painting. Once you start, you might think "Oh, this isn't visually or thematically or conceptually working". Then you need to work out, how am I going to solve this problem that I've created on the canvas without destroying it?

Every painting has a solution to it. But to get there, I think you fall into one of two camps. One where people can see the end at the very beginning and they're just executing a relatively well-formed idea. But I'd say that's a minority. I think most people start with the genesis of an idea, then you work through it. You also need to be comfortable with that. It's the same with law, sometimes you need to write things over and over and over again. But gradually, you get to a point where you say – ok, this better reflects the position.

For me, the biggest blocker to creating something in law and in art is inaction. There's nothing scarier than a blank canvas or a blank document. As soon as you start throwing stuff down and you add colour, it's so much better – but you need to do something. You just trust the process and end up maybe with

something decent at the end. That's the only way to go about it, otherwise, what's the alternative? You'd never make anything or write anything.

**ASHLEIGH:** A little while into your legal career, you decided to pursue your art more intensely. What were the considerations around that?

**GEORGE:** I had been at Ashurst for about a year and a half. I realised I was pretty unhappy at that point because I felt like I was like working all the time. It wasn't necessarily that I was working too hard or ridiculous hours. I just wasn't satisfied with the way that my life was. I was missing doing something, but didn't quite know what. In the past, I had always made art, but it was so unguided. There was no direct output as such, and I think it was part of the problem. It was an unsatisfying, irreconcilable feeling because I wanted to do something creative, but I didn't know how to express that or what the point of it all was. I took six months off and I painted a lot in that time. After that break, I started at MinterEllison in the IP team. After a year or so, as I had less and less hours in the day to create, old feelings started to creep in. That's when I asked if I could change to working a nine-day fortnight and work on my art part time. Thankfully, that was agreed to. Eventually, seeing this part-time arrangement working, I moved to a four-day week.

There were some challenges and trade-offs with that. I remember being worried about not being taken seriously, and about giving up 1/5th of my salary. Especially when some days, you might be tired or scattered and not feeling like

creating anything. My mum, to her credit, gave me some good advice saying "Well, would you rather like 80% of a good salary or 0% because you quit and burned out?" She was right – everything in law is about longevity. It also took time for me to realise that being creative doesn't mean always painting. It can mean going to art galleries, reading books, watching films, and trusting that all these activities will one day arc back to a creative output.

**ASHLEIGH:** In 2018, you moved to London, joining Herbert Smith Freehills' patent litigation team. Has the move overseas influenced what you like to create?

**GEORGE:** I started an Instagram account called "Goodnight Gallery" when I moved to London where I curated and shared other artists' work (my painting moniker is "Goodnight Thief", hence the name of this other account!). That encouraged me to go out to galleries and museums a lot. Every Saturday I'd aim to go somewhere different and get exposure to different artists. I needed something to push me - I had no formal training. I didn't study art history. In Australia, I tended to use a lot of stencil, spray paint and colour. Maybe that was the Melbourne influence, but I never really reflected on what I was making. Coming to London, you see the whole gamut. It can be inspiring and intimidating – there's so much out there. There's a flip side to that as well – it makes me consider why I want to create art in such a saturated market. There's also the physical accrual of materials and finished works. In quieter moments, that can weigh on you. But I don't think those are good enough reasons *not* to create.



**ASHLEIGH:** As a creative person, do you think you have a greater appreciation of the lengths that artists need to go to in order to protect and enforce their rights?

**GEORGE:** I think there are a few angles to this. On one hand, in understanding the law you run the risk of impeding your own creativity – you know that there are limitations. There is a great generation of artists like Jeff Koons and Richard Prince who push right up against those limitations. These guys all got into pretty public legal spats with creators who argued that they had stolen their works with little or no transformation. My belief is that you should be able to sample and transform other people's work. I feel like the younger generation are more responsive to the idea that "any publicity is good publicity" – being copied can be flattering. But then, where do you draw the line between that and having people purely profiteer off your work – it's been interesting being involved on both sides of the equation, as an artist and a lawyer.

**ASHLEIGH:** You've more recently been delving into the digital side of art. Tell me about that.

**GEORGE:** I started during a two-week Covid quarantine. I was stuck in a hotel room in Adelaide with nothing to do, so I started learning the infamous Blender 'donut tutorial' on YouTube (Blender is the name of the free 3D program). That was 2021 and now I'm very proficient at it. As an artist, I don't like the idea of being tied to only one medium. On one hand, part of why I love painting is the tactility of it. Especially when you are behind a computer all day in the office. It's nice to smell and touch things – use your hands and your body in a different way. But you're quite constrained by how much you can physically paint in a day.

On the other hand, 3D is incredibly satisfying work because it's such a quick way to explore ideas. Rather than having to sketch or paint something and spend weeks or months on a work, you can do it in hours on a computer. I can design it; work on the digital cut and print it. That would take a week. You start to question – do I want to make one thing a year or one thing a week?

**ASHLEIGH:** The focus on digital sounds like a great fit especially for you, especially considering all the noise around developments in generative art and AI.

**GEORGE:** Yes, it's been nice to see some parallels between my art and my work. The Metaverse and NFT spaces have become a focus in my team at HSF and it's great to be able to bring in creative clients and know what their challenges are.

**ASHLEIGH:** Who are two of your favourite artists?

**GEORGE:** Urs Fischer is one. He embodies my point earlier about not being tied to any one medium in the sense he does painting, 3D works and NFTs, sculptures – totally multidisciplinary. He's well known for these amazing wax sculptures that melt down over the course of the exhibition. He also does a lot of digital installations as well.

Another artist I like because you can't pinpoint him in any one area is a painter called Rudolf Stingel. He does hyper realistic oil paintings but has also done things like cover the walls of a gallery with foam insulation and invited people to do whatever they wanted to the walls. Then he used electro plating to create huge gold and silver sculptures out of the inscriptions in the walls. He's also featured some incredible pieces where he takes other artists' paintings and presents them in alternative narratives – faded or ripped in different ways.

I'm drawn to the idea that your creativity doesn't have to be restricted to a particular genre or medium. Through the Instagram page that I curate, I got exposed to a lot of the internet's opinions on things. Another one of my favourite artists, the great Cy Twombly, embodies this. His work generated such strong (negative) feelings whenever I would share it. However, looking at a Twombly for the first time made me understand that you don't have to like something because you find it aesthetically pleasing, or because you appreciate the technicality behind it. You can like things from a purely irrational, emotional point of view. Art doesn't have to mean nice to look at or amazingly executed – the most effective works probably evade explanation, and that's quite a liberating feeling.

**ASHLEIGH:** You've done a few brilliant exhibitions since moving to London. What's it like to showcase your work like that?

**GEORGE:** Once you start telling people, I'm going to do an exhibition – then you have to go through with it. Working towards something is useful. Talking to people about your work is nice because creating art can be a really isolating activity that you're mostly doing in a vacuum. Getting positive reinforcement about what you're doing is important – it can make your work feel fulfilling and satisfying. I've even learned to appreciate the negative comments too, because people can have such different takes on your work. Some stuff they love, others they just don't respond to. People's tastes are different and some people might not like what you do, and that's okay.

**ASHLEIGH:** What advice would you give to any young lawyers who are also thinking about pursuing a creative channel?

**GEORGE:** When I took my leave of absence from Ashurst, I didn't necessarily know that, almost 10 years later, it would lead me here. But it felt like what I needed at the time, and during that break I rediscovered my love for painting and other creative pursuits. The length of time also helped me start to close the gap between my lacklustre technical ability at the time and what I envisaged wanting to create – that gap can be so big and so overwhelming, that it stopped me from picking up a paintbrush for years.

But starting out also doesn't need to be this drastic, the great thing about London is that there are heaps of short courses available and so it's possible to try a range of different creative areas and mediums and see if any resonate with you. Of course, if you do feel that a break from the law is what you need, then try to focus on this and not catastrophise the outcome. I left with no bank balance (which I wouldn't recommend, although it did force me to start selling paintings for money!), and worrying that it would impact my legal career going forward. It did not. In fact, working part-time and having this side pursuit has always resonated with the clients and team that I work with.

**ASHLEIGH:** Lastly, where can our readers find your work?

**GEORGE:** My paintings are on: Instagram (@goodnightthief) and my website [www.goodnightthief.com](http://www.goodnightthief.com), and I never thought I would have a TikTok account but I do for my 3D works (also @goodnightthief). I'm also still actively sharing content from the exhibitions I visit, and my thoughts on art and painting, on my other Instagram account (@goodnightgallery) and website [www.goodnight.gallery](http://www.goodnight.gallery).

# Current Trends in Litigating Value and Transparency in the Visual Art Industry

**Dougal Phillips**, Lawyer (Banki Haddock Fiora), examines recent disputes within the art world and comments on the challenges facing art litigation.

It is without doubt a very interesting time in the intersection of the visual art industry with the complex protocols of disputes and litigation. Nebulous questions of authorship and value in works of art are being litigated at high levels, particularly in the United States. The cut and thrust between the majority and the dissent in the 18 May 2023 US Supreme Court decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*<sup>1</sup> is the most high-profile recent example, with the majority opinion (authored by Sotomayor J) reaffirming that the judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.<sup>2</sup> Meanwhile, Kagan J in dissent (with whom the Chief Justice joined) embarked on a spirited journey down that particular rabbit hole. The “*fistfuls of comeback footnotes*” (in Her Honour’s words) directed at the dissent in the majority opinion paint the picture of the high stakes of the debate over authorship and aesthetic value that took place in this lofty forum.

The transformative use analysis in US copyright law of course sets the table for this sort of conceptual grappling. Courts are effectively required to consider where the value lies in an artwork: as an original authored work; in relation to other original works; and in the market in which all of these artworks exist in economic constellation. One interesting phrase pops out in the dissent: Kagan J interprets the majority’s view of the first fair-use factor codified in 17 U.S.C. §107 – the purpose and character of the use – as being “uninterested” (that is, the factor itself is uninterested) in “*the distinctiveness and newness of Warhol’s portrait [...] What matters under that factor, the majority says, is instead a marketing decision [...]*”.<sup>3</sup>

The Warhol decisions has been widely received as a shift back from the approach taken by the Second Circuit in the Richard Prince case,<sup>4</sup> which commentators (and another appellate court) saw as weighting “transformative” use too greatly in the fair use assessment, effectively undermining the §107 fairness factors. These factors are roughly comparable to subsections 40(2)(a) to (e) of the *Copyright Act 1968* (Cth), although these are of course confined to specific fair dealing exceptions rather than fair use. Harnessing the transformative argument, Richard Prince (and perhaps more importantly, his megadealer gallerist Larry Gagosian) preserved the market value in his appropriation artworks, with 25 of the very expensive artworks in question held to be transformative and the other five remanded to the lower court for assessment prior to the case eventually settling.

In the *Warhol* case, the value of the artwork of the other Prince (the late musician) is seemingly affirmed as being

grounded as much in its commercial purpose as in the process of its emergence as a standalone aesthetic object. Again, the American transformative doctrine presses this question in a way that would not be possible under Australian copyright law. Nonetheless, a consideration of deployment of the original artwork in the visual art economy underlies many recent high-profile legal proceedings (unsurprisingly, particularly in the US where recourse to high-profile litigation is a key tactic). The courts continue to be presented with quandaries around authorship, originality and value, most blatantly in the inescapable current topic of AI and art.

On 18 August 2023 the U.S. District Court for the District of Columbia reaffirmed the decision of the U.S. Copyright Office to refuse a copyright registration to plaintiff Stephan Thaler, he of the famous Australian Patent Application No. 2019363177 which nominated the AI system DABUS as inventor and was eventually the subject of a denial of special leave by the High Court in *Thaler v Commissioner of Patents* [2022] HCA Trans 199.

Thaler’s claim was in respect of an artwork titled “A Recent Entrance to Paradise”, with said entrance being a fairly banal digital image of train tracks running through a plant-covered stone arch. An uncharitable viewer might find this work falling far short of the monumental power of Anselm Kiefer’s *Abendland [Twilight of the West]* (1989), which hangs in the National Gallery in Canberra depicting more or less the same train tracks motif, but is 4 metres tall, made of paint, lead sheet, ash, and earth, and weighs 347 kilograms. Nonetheless, as section 10 of the Copyright Act expressly states, it does not matter whether the artistic work to be protected is of artistic quality or not. The key point is that an AI model run by Thaler’s company Imagination Engines had generated the image. At issue here is both the absence of a human author and the opaque “appropriation” of a huge dataset of art in the training of the AI model.

Thaler – who intends to appeal – is of the view that denying AI-generated works the protection of registration under the US system goes against the principle of protection of original works of authorship fixed in any tangible medium of expression. For the moment, the US Copyright Office and the courts disagree with Thaler on the point of authorship, but the point of transparency as to which other (human) artists have had their works scraped to be re-deployed as generative images remains unresolved.

It might in fact be argued that just as the economic value of Goldsmith’s photographic portrait of Prince was supplanted (at least in part) by Warhol’s re-deployment of the image

1 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. \_\_\_, 2023

2 *Warhol v. Goldsmith* at [482]

3 *Warhol v. Goldsmith* at [490]

4 *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)



in similar channels, the economic value of all the original artwork available online is in danger of being silently leached by private companies training generative AI art models. There is no doubt more litigation and policy debate to come on this point.

Litigation can indeed serve an effective role in clearing away the notorious opacity of the essentially unregulated art industry. In a recent expansive *New Yorker* profile of the aforementioned Larry Gagosian, Patrick Radden Keefe writes that “[l]itigation occasionally offers a glimpse of the shadowy backroom aspects of the trade”,<sup>5</sup> going on to detail the 2010s lawsuit filed by the billionaire financier Ronald Perelman who had bought over two hundred artworks (most likely each valued in the millions or even tens of millions) from his “trusted art advisor” Gagosian since the 1990s. Keefe reports that Perelman claimed in the pleadings that Gagosian was “undervaluing works when purchasing them, overvaluing them when selling them, and pocketing the substantial differential”, and put forward “a novel legal theory—that an art dealer should have a duty of loyalty to the people he is representing”.

The disputed dealings included a painting by Cy Twombly, considered one of the great painters of the late twentieth century and whose *Three studies from the Temeraire* (1998-1999) was a headline acquisition of the Art Gallery of New South Wales for \$5 million in 2004. The lack of transparency in these dealings seemed to be the core of Perelman’s complaint, which riled him to the point that he took the long-standing relationship into the courtroom.

What is perhaps notable (in Keefe’s view) is that Perelman, after settling, returned to dealing with Gagosian. The brand, the *imprimatur* of Gagosian – with his gallery empire on which the sun never sets – is as or more important (again, in the view of the author of the profile) than the originality and rarity of the artwork created by a Twombly or a Jeff Koons. Similarly, we have recently seen that where claims for legal relief have arisen in respect of the much-maligned artform of NFTs, these claims have been directed at the marketing decisions underpinning the value of the artworks.

The NFT market has certainly dropped from the giddy highs of 2021 (although it is likely too early to say whether the NFT form of visual art ownership is completely defunct) with recent media coverage of the precipitous drop in value of a Bored Ape Yacht Club NFT owned by Justin Bieber. Bieber’s Bored Ape #3001 has (at time of writing) declined in value by approximately 95% over a period of eighteen months.<sup>6</sup> Valued at USD\$1.3 million in 2022, the work is now worth around USD\$60,000 – still, it must be noted, a significant valuation for a visual artwork.

On 17 August 2023 CNN reported that a group of investors is suing Sotheby’s Holdings Inc. and others over a 2021 auction and promotion of Bored Ape NFTs, with “the four named plaintiffs in the class action lawsuit alleg[ing] that the auction house “misleadingly promoted” the NFTs and colluded with creator Yuga Labs to artificially inflate their prices.”<sup>7</sup> Sotheby’s is one of thirty defendants named in the lawsuit – alongside celebrities like Paris Hilton, Stephen

Curry, The Weeknd and indeed Bieber himself – who have been accused of promoting the NFT collection without disclosing relevant financial relationships. The claim is also focused on the “air of legitimacy” Sotheby’s involvement gave to the sale of the Apes.

Seeking relief on the basis of misleading and deceptive commercial conduct by high-profile artworld entities and celebrity figures is perhaps the best remedy available for a devaluation NFT collection. It could be worse, though – the recourse for a stolen NFT is seemingly non-existent and presumably outside the reach of the courts when anonymous hackers are involved. Despite the proprietary position of the owner of an NFT being arguably the same as the owner of a Cy Twombly painting, there does not appear to be much one can do at present to protect this property under the law. Nor does the general public seem to be particularly sympathetic to the owners of the unique NFT pieces – the theft of NFTs spawned the “all my apes gone” meme when Twitter user @toddkramer1 posted in December of 2021: “I been hacked. all my apes gone. this just sold please help me”. @9\_volt\_, a subsequent victim of a digital heist was even more succinct, tweeting on 11 February 2022: “they went straight for my ape”.

Back in the physical world of painting on a surface, celebrity and the value of the artwork come together again in an ongoing claim in the United States District Court of Puerto Rico in the matter of *Roman v. Ocasio, et al.*, Civ. No. 21-1621 (ADC), which in March 2023 survived a motion to dismiss.<sup>8</sup>

The plaintiffs, with their own money, designed and painted a mural on the wall of a basketball court in Puerto Rico’s Santurce neighbourhood. In 2018, Benito Antonio Martínez Ocasio, a Puerto Rican rapper, singer, songwriter known professionally as Bad Bunny, shot a music video for his song “Ser Bichote” which consisted of a static camera shot with the mural occupying the majority of the background.

While the plaintiffs recognised in their submissions that the value of the artwork was in “us[ing] street art to revitalize Santurce’s abandoned buildings and deteriorated public areas... [giving] residents a renewed sense of ownership over public spaces”, it did not go unnoticed that the music video the subject of the claim amassed 9.2 million views on YouTube in less than 3 months and reached 15,422,615 million views in less than 10 months, or that Bad Bunny had since gone on to megafame. In both 2020 and 2021 he was the first non-English language artist to be Spotify’s most streamed artist, and then reportedly had the biggest streaming year for any artist on Spotify in 2022.

Again, Australian law would likely take a more measured approach via the application of section 67 of the Copyright Act which carves out an exception to infringement where an artistic work is included in a cinematograph film or television broadcast, but only where the inclusion is incidental to the principal matters represented in the film or broadcast. Interesting queries might be raised as to both the non-incidental status of the mural backdrop and the value it adds to the music video (and perhaps by extension to the artist’s street credibility).

5 “How Larry Gagosian Reshaped the Art World”, *The New Yorker*, July 24, 2023

6 <https://www.cnn.com/2023/07/07/justin-biebers-bored-ape-nft-has-lost-95-percent-of-its-value-since-2022.html>

7 <https://www.cnn.com/style/article/bored-apes-sothebys-lawsuit>

8 <https://casetext.com/case/roman-v-ocasio>

In the high-stakes world of global pop media, a visual artist can quickly find themselves reframing the value of their artwork beyond the value it holds in its place of exhibition as an aesthetic object. In much the same way, artists are now having to identify value in their art in its place in a gigantic dataset upon which AI eyes are trained.

Some artists are looking to harness the technology and dive headfirst into questions of AI authorship – consider Hito Steyerl a “post-internet” artist, the first woman to top *ArtReview* magazine’s “Power 100” list, and arguably one of the most important contemporary artists of our time. Steyerl’s 2023 work “*Green Screen*,” featured in the group show “Dear Earth: Art and Hope in a Time of Crisis” at the Hayward Gallery in London (21 June to 3 September 2023), combines an LED screen constructed from empty bottles and crates with a vertical garden of plants behind the screen. The plants generate bioelectrical audio signals which are then fed into an AI engine which generates images of blooming flowers across the screen.

In terms of a copyright law position in respect of authorship, here we might recall selfie-taking *Naruto* the Sulawesi crested macaque from *Naruto v. Slater*, 888 F.3d 418, and note that plants may be even behind animals in the queue for whom there might one day be granted protection of their valuable intellectual property as authors.

However, we might also note that an artist as established as Steyerl can afford to be less threatened by AI than most. Artists and those in the art industry will no doubt continue to seek to protect the value of their work against de-authoring and decentralising control of originality, rarity, and commercial exchange. Transparency in the use of AI and in the commercial dealings underpinning highly valuable works of art (whether that value is as original pieces or as a dataset of a signature style) is likely to be as much the battleground in the courts going forward as traditional legal questions around infringing uses – subsistence, substantiality and so on.

Transparency, it might be said, is not the art industry’s strong point. We might recall the Christopher Nolan film *TENET* (2020), which made a central feature of a fictional freeport, a highly-secured tax-free zone featuring climate-controlled storage for extremely valuable artworks, which in the real world are located in places like Singapore and Geneva. The Geneva Freeport reportedly stores more than fifty billion dollars’ worth of works by da Vinci, van Gogh, Picasso and others, and it is said that it would rival the Louvre, if only it were publicly accessible.

## Event Report: The 2023 CAMLA CUP

The CAMLA Cup was held on 31 August 2023, at the Sky Phoenix. Teams from across Sydney gathered to showcase their knowledge and intellect in a fierce trivia competition.

The turnout was impressive, with around 270 participants, with teams from the ABC, Addisons, Allens, Ashurst, Baker McKenzie, Banki Haddock Flora, Bird and Bird, Clayton Utz, Corrs Chambers Westgarth, Creative Lawyers, Dentons, Free TV, Gilbert + Tobin, Holding Redlich, Herbert Smith Freehills, Level 22 Chambers, Marque Lawyers, MinterEllison, McCullough Robertson Lawyers, Netflix, SBS and Thomson Geer. Despite the intense competition, Allens demonstrated exceptional knowledge and unwavering expertise, earning them the title of champions at the 2023 CAMLA Cup. The CLB’s Co-Editor Eli Fisher surprised even himself, coming out the victor in a Guess Who round (spoiler: answer was Margot Robbie).

In addition to the prestige of being recognised as champions in the field of media, technology, and communications related knowledge, all those who competed were up for a selection of exciting prizes. These included passes to Taronga Zoo, double tickets to the Belvoir Theatre, wine, chocolate, cookbooks, keep cups, sporting equipment, and G+T branded gin.

The 2023 CAMLA Cup was a resounding success, with everyone enjoying



themselves immensely. Not only does this event challenge participants to stay updated on industry developments and test their knowledge, but it also provides a great atmosphere for networking and catching up with friends and colleagues.

If you missed out on securing a table at this year’s sold-out event, make sure to lock down your spot early next year. Both CAMLA members and non-members are welcome and encouraged to attend.

CAMLA extends its thanks and gratitude to the event’s illustrious hosts Deb Richards, Sylvia Alcarraz, and Nicholas

Kraegen. A huge thank you also to the ever-dedicated CAMLA Young Lawyers volunteers, Kathy Janevska, Laksha Prasad, Erin Mifsud Belyndy Rowe and Lilli Thompson, and of course the CAMLA Board for orchestrating yet another exceptional event.

A huge thank you to all the organisations for the prize donations. The night would not be the same without your support and generosity. Thank you!

Join us next year as we eagerly await to discover whether Allens can defend their championship or if a new contender will seize the CAMLA Cup crown.



## Interview with Richard Barnett

**Richard Barnett** is the Head of Legal at the National Gallery London, which houses the UK's national collection of paintings in the Western European tradition from the 13th to the 19th centuries.

The National Gallery is committed to caring for, enhancing, and studying its collection to ensure access to the artworks for education and enjoyment by the widest possible public, free of charge, for 361 days a year. Richard specialises in commercial, intellectual property, and technology law, with expertise in contract negotiation, brands, and data protection within the cultural sector.

At the National Gallery, Richard leads the legal team, overseeing legal matters related to the gallery's operations and activities. Prior to his current role, Richard served as the General Counsel at the Science Museum Group in London. His legal career began at Eversheds, where he completed his training contract before moving on to boutique firm Hansel Henson.

Richard sat down with **Belyndy Rowe** (Senior Associate at Bird & Bird and Chair of the CAMLA Young Lawyers Committee) to discuss his career.

**BELYNDY ROWE:** Can you please provide an overview of your background and experience as a legal professional in the art industry?

**RICHARD BARNETT:** I certainly didn't start my career as an art lawyer. Initially, I worked in IP and commercial law. I trained at a prominent international firm, Eversheds. Afterward, I became qualified and joined a specialised IP practice called Hansel Henson. Our focus was on soft IP, trade marks and copyright, with a particular emphasis on computer games, TV, and film. We also handled some small-scale corporate M&A transactions. I truly enjoyed my time there. They were very nice people, and they also entrusted me with my own caseload, which was precisely the experience I was looking for.

An opportunity arose to join the Science Museum Group. I had always considered pursuing a career in public service, and this seemed like an excellent avenue. My 4 years at the Science Museum Group were incredibly intense. Prior to my arrival, they had never had a Head of Legal. I had also never worked in the cultural sector before. There was an awful lot to do. The group comprises 5 museums and an extensive airbase storage facility. The Royal Air Force had

provided the Science Museum Group with this site to house a significant portion of their collection. The site includes numerous hangars filled with items such as Concordes and printing presses, housed in different buildings. It was a challenging but tremendously rewarding experience, and I made a dent in establishing a legal operation there.

During my first interview at the Science Museum, I had the pleasure of meeting Kate Howe who was the General Counsel at the National Gallery. I had pursued art history as part of my degree. When a few years later she mentioned her upcoming retirement and plans for new endeavours, I saw an opportunity. I applied for the position and was fortunate to secure it.

As for working in the art industry at the National Gallery, I learned a lot on the job as I went along. I find that the core legal principles remain quite universal, at least within the English legal context. While there may be art industry-specific terminology and customs to grasp, it's not an entirely alien landscape from IP and commercial practice. I was fortunate to have a colleague here at the National Gallery who had also spent a couple of years in this role. So having

an in-house lawyer wasn't entirely new to the organisation. That person's insights were invaluable, and I've also encountered a network of helpful individuals within the museum and gallery sector.

**BELYNDY:** As Head of Legal, what are your key responsibilities and how do you ensure legal compliance within the Gallery's operations?

**RICHARD:** At the National Gallery, and in many larger cultural institutions, there's a common thread in that they function much like 20 or so different businesses, all operating from one site: a visitor attraction, a catering operation, an event hire business, touring exhibitions, a licensing and publishing business, a research centre and a comprehensive learning offering for children, adults and academics. This complexity and variety are what makes these places so interesting and challenging.

The National Gallery is a major visitor attraction that, before the pandemic, welcomed a staggering 6 million visitors annually. Managing and staffing such a monumental operation is no small feat. We deal with a multitude of challenges from addressing visitor concerns to ensuring their safety as they explore our premises.

Maintaining the physical condition of our building is crucial, especially when housing priceless artworks. The old masters, for instance, require meticulous care, and we employ advanced climate control systems to preserve their integrity. We also uphold the highest standards in terms of building maintenance.

We've successfully navigated the art market, acquiring pieces both at auctions and through private sales. Additionally, we've utilised various tax



schemes available in our country to facilitate these acquisitions, a process that can pose challenges for public institutions.

We have public procurement requirements as we are an arm's length body of the Department for Culture, Media, and Sport, so we must adhere to strict public procurement rules when buying goods and services.

Art acquisition however represents only a portion (roughly 30% to 40%) of my role; the remainder of my responsibilities are more multifaceted. We acquire and lend artworks, as well as organise international tours, such as our successful ones to Japan and Australia, even amidst COVID restrictions. Currently, we have an ongoing tour in Asia, visiting Shanghai and Korea. Remarkably, the exhibition in Shanghai has become the most visited exhibition in the National Gallery's history, with 430,000 attendees.

We also offer a diverse range of commercial services. From hosting events and running a shop to managing concessions and catering. Our learning program is fantastic. One standout initiative is 'Summer in the Square', a free art festival. At the helm is our Head of Learning, Karen Eslea, a true marvel who has enhanced the program significantly over the past three years.

**BELYNDY:** What initially attracted you to the Head of Legal role, and what have been the most rewarding aspects of your position so far?

**RICHARD:** Each day brings its own unique challenges. While we do have a strategic plan in place at the gallery, the specifics of our day-to-day activities remain unpredictable. We never quite know what the hot topic of the day will be or who we'll need to engage with to draft contracts or correspondence. It's one of the great joys of the job.

During my recent annual review, I couldn't help but reflect on the exceptional experiences this role has offered. Not every lawyer has the opportunity to negotiate contracts with the Louvre concerning da Vinci drawings. Even if the subject matter can be highly intricate, it's also incredibly enjoyable and fulfilling.

In total, our team consists of five members, including myself. In my role I report directly to the director. I oversee two solicitors (both named Charlotte) who despite the slight inconvenience of their shared name, both excel in their roles: a data protection and information governance manager, and a procurement manager.

All members of my team work exceptionally hard. They genuinely care about the instructions they receive and strive to deliver their very best. I must emphasise that working here remains a tremendous privilege. This role is undeniably a remarkable and rewarding opportunity. There are moments when I can hardly believe how fortunate I am.

**BELYNDY:** What do you find most inspiring and unique about working with a collection of such renowned artworks?

**RICHARD:** It's truly remarkable when you ascend the stairs and encounter some of the most exquisite creations that humanity has ever produced. One thing I've come to appreciate even more since being here, surrounded by the collection every day, is that each piece holds a spectacular history and an incredible story.

Take, for instance, *The Finding Of Moses* by Orazio Gentileschi, a picture we acquired in my first couple of months at the Gallery. It's not just a beautiful representation of that biblical story, but the same artwork that once adorned the walls of Charles I as he had it commissioned for his wife upon the birth of Charles II.

Every work transports you to a different time and place, offering a rich and unique experience. It's a slower and more profound way of engaging with and appreciating the world around us, which, I dare say, is somewhat akin to mindfulness. Many of these works aren't instantly accessible. They require contemplation and a deeper look, a departure from the instant gratification of constant doom-scrolling.

**BELYNDY:** Do you have a favourite work?

**RICHARD:** That is quite a challenging question. However, there's one that comes to mind, a painting by Carel Fabritius, titled *A View of Delft*. It's by the same artist who features in 'The Goldfinch' by Donna Tartt, which is a fantastic book centred around a Fabritius picture. His story is fascinating; he died tragically in an explosion that destroyed most of his art. Consequently, there are only a few of his paintings, and this particular one is quite unique. It's tiny, among the smallest in the collection, resembling a detailed drawing. In the picture, you'll find a man slouching in one corner, with a Church in Delft behind him. Interestingly, an art historian named Laura Cummings recently wrote a book about it. I've always had a deep appreciation for that painting and often find myself drawn to it.

On the other hand, there are the 'big hitters'. I have a special attachment to Thomas Lawrence's *Red Boy* because I worked on its acquisition, making it particularly dear to me.

It is a tradition at the gallery that when people leave the gallery, they typically receive leaving cards with their faces superimposed on a picture. I suspect I'm nailed on for my head being stuck on the *Red Boy* when the time comes.

But the truth is, there's so much to love in the collection. It spans different eras and represents various facets of our history. For instance, I love Raphael's *Portrait of Pope Julius II*, despite the Pope's notorious reputation. The painting somehow humanises him, creating a sense of sympathy. In practically every room, there's something captivating.

It's difficult to choose favourites; it's almost like picking among your children. Everyone has their own cherished pieces, and this sentiment extends to the public's feelings about the collection as well.

**BELYNDY:** The art industry often involves complex legal issues, such as copyright, intellectual property, and contracts. How do you stay updated with the latest developments and changes in art-related laws and regulations?

**RICHARD:** That's something I miss from "big law". Major firms excel in having established professional support lawyers and knowledge services. They provide lawyers with the resources for continuing professional development. Unfortunately, we don't have the same luxury.

We do have some specific societies and interest groups. For instance, there is a "Lawyers in Charities" (LinC) group who meet quarterly to discuss and share issues and problems. I'm also member of the 'Society of Computer Law' (SCL), given my IT/IP background – and that society provides great events and training.

I'm also involved in a new group being set up this year called the Art Lawyers Association (ALA) which brings together experienced art lawyers from private practice, auction houses and the public sector.

We also rely on the legal content published by law firms. They don't go unnoticed; we read and consume these materials to stay informed. The fundamentals of English contract law and IP change relatively slowly, unlike

fields like employment law, which evolve more rapidly. Data protection has seen significant changes over the last 5 or 6 years and continues to evolve. It's a dynamic field, with new bits of legislation added.

My role at the gallery includes taking on the privacy officer functions. I must admit that I don't believe GDPR is the perfect solution. It's a rather complex piece of legislation that can inundate individuals with information they lack the time or capacity to process. A principle-based system with clear obligations might be more effective. Instead of just showing a cookies pop-up, it could state that websites can collect your data but must delete it after 30 days, for example. I'm more inclined toward that approach. GDPR's current structure is not very helpful, especially when non-compliance is often tacitly tolerated, making it even messier. This is a personal concern of mine. It's an area that absolutely should be regulated, but with technology advancing so rapidly, it poses unique challenges.

I believe generative AI will be revolutionary technology for lawyers. The catch right now is that it's only useful if you already know the answer. It doesn't help if you're uncertain because you can't distinguish between valid information and nonsense. It operates based on what seems to fit, not necessarily on what's true. However, I do think it will fundamentally transform how we work. My current concern is that it's incredibly easy to inadvertently disclose proprietary or confidential information when using it. We don't have a reliable "walled garden" system for its use yet, but Adobe, Microsoft and others are all building systems to meet this need.

**BELYNDY:** How do you collaborate with other departments within the gallery, such as curatorial, exhibitions, and sales teams, to address legal considerations and potential risks in their activities?

**RICHARD:** We have a decent set of precedents that people use. We work on precedents for loans in and loans out with the registrars, the people who control those sorts of things. But we do so much contracting. It's not possible or desirable for us to look at everything.

And people at the gallery know who we are. We sit in the middle of the building. It's sort of everyone being available, knowing the committees and just having our ears to the ground to figure out what's going on. Internal communication is not always the public



sector's strong suit, but I do think our team is quite outward facing, and we just try to stay in a dialogue with people.

However, we can still get blindsided by stuff. There are still projects where you go, 'Hang on, what are you doing here?'. People come to legal once it's already in motion or once they've already got a problem. They always come to us when they get into a dispute or a problem. They might quite accidentally use the wrong template or thought they could take out IP provisions to make the contract shorter. Sometimes people play with contracts. A little bit of knowledge can be the most dangerous!

That said, there are lots of people who fulfil contract manager functions. Our registrars team (responsible for moving works in and out of the gallery) knows more about import and export than I do. And I would lean on them to advise me on what to do there. And we might go to external counsel to have a look if we think we're in a particularly tricky spot.

I have heard in-house teams referred to as the "department of business prevention". You don't want to be that. We try to be facilitators rather than just

saying, 'No'. We suggest alternative ways or solutions. It's more work to think of different solutions and manage risk.

**BELYNDY:** The gallery's collection holds immense cultural and historical value. How do you ensure the preservation and protection of these artworks while still encouraging public access?

**RICHARD:** It's a real tightrope because you want to have as good access as possible, and as close access as possible. But there are several strands to this. One is security. You could make the artwork virtually totally secure by sticking it behind glass panels and keeping the public 6 to ten feet away from it. You can do that, but it does affect the enjoyment of the art. I think there's no doubt about that. So we are reluctant. There are various interventions that you can undertake, such as physically separating people from artwork. You can have security that is extremely oppressive, with rules like no liquids, no bags, no nothing. You could go that far, but you want it to feel like people are entering a cultural venue where they can have fun and enjoy the art. So there is a balance to be struck, and we're still working on that balance.

I think we do a great job; our operations team ensures it's a good experience with lots of invigilation. We have increased the number of works that are glazed, and we have sophisticated security systems, many of which aren't visible.

Physical security is one aspect, and the other is the condition of the building. We have sophisticated plant systems to maintain the paintings in tip-top order. We also have a conservation team, some of the best scientists and conservators in the world, working on and fixing the pictures, monitoring them, and keeping an eye on their condition.

One great thing about this place is that we have some of the best art handlers, curators, and registrars in the world. In the conservation studio, they have a philosophy of not doing anything that can't be undone because technology is likely to advance, and better conservation methods may emerge in the future. There has been a slow increase in the gallery glazing artworks. We had an instance where people have thrown things and stuck things to pictures, and we don't want to expose the artworks in any way. However, we did have measures in place to protect the artworks before these incidents occurred.

We track what people do with the pictures using motion sensors and similar technology. This allows us to keep a close eye on what goes on. Most people are aware that they should not lean against the walls, etc. We want to trust people to enjoy the collection while ensuring its safety.

**BELYNDY:** The art world has seen an increase in digital initiatives and online presence. How do you approach legal issues surrounding the gallery's online exhibitions, virtual tours, and digital publications?

**RICHARD:** The gallery has a robust digital program that includes various elements such as Augmented Reality (AR) installations, an app called 'Keeper of Paintings' developed in collaboration with companies Arcade Limited and Story Futures (part of Royal Holloway University) as well as interactive games.

We also offer virtual galleries, digitised collections available online, and a significant amount of video content through various social media channels and our website.

As a lawyer, my approach to these digital initiatives is similar to how private practice lawyers approach their work. I use the tools and knowledge gained from other areas of law to navigate the complexities, often dealing with somewhat outdated legislation. The

increasing complexity of delivery systems and software, including cloud computing and AI, can pose challenges related to IP and contractual issues. Nevertheless, we do our best to navigate and adapt to these challenges effectively.

Acknowledging the importance of digital initiatives, the gallery has integrated them into its overall strategy. There is a digital-first approach, and prior to my joining, significant progress had already been made (particularly by our excellent information services team). When the pandemic hit, we were well-prepared, having laptops and virtual internal systems in place, which allowed us to work remotely seamlessly.

**BELYNDY:** How did the gallery manage its operations during the pandemic?

**RICHARD:** The gallery was closed for a total of 117 days during the lockdown. We were among the first to reopen once restrictions eased, but it was a challenging time. Due to the strict lockdown measures, people were not allowed to visit cultural institutions or go outside for extended periods.

I worked from home during this period while taking care of my small children, who were around three and four years old at the time. We were fortunate to have a small patio garden, but many people in large cities didn't have that luxury.

I wasn't furloughed and continued to work throughout the lockdown. However, it was a tough period for the country and the cultural sector, with significant layoffs and closures affecting many businesses reliant on public engagement, events, and retail operations.

The gallery itself was closed for a long time. It is designed to maintain a kind of homeostasis to respond to external conditions and changes. However, in recent years, energy costs have significantly increased. This has been exacerbated by various economic challenges, including high inflation, which is currently around 10% in the UK. The rising costs of fuel, oil, and gas have contributed to this situation, and it's a concern that needs to be addressed.

**BELYNDY:** Collaborating with international institutions or hosting foreign exhibitions might present unique legal challenges. How do you manage cross-border legal matters and ensure compliance with different jurisdictions?

**RICHARD:** Trust and strong relationships are crucial when collaborating with international partners, especially in the context

of lending artworks or engaging in commercial deals. The calibre of the partners you choose is essential, and when working with world-class institutions like the Rijksmuseum, the National Gallery in Washington, the Shanghai Museum, or others, you can have confidence in their capabilities and standards.

Building these relationships requires trust, and while contracts play a significant role in protecting your interests and brand reputation, trust remains a fundamental foundation. Ensuring that the people and organisations you collaborate with are trustworthy is essential.

In terms of due diligence that we engage in, we conduct credit checks, international checks, and for significant deals we engage ethics committees for evaluations. This demonstrates a thorough and responsible approach to partnerships and helps safeguard the institution's reputation and interests.

**BELYNDY:** What is your vision for the legal department's future in the gallery, and how does your team plan to contribute to the continued success of the institution?

**RICHARD:** My vision for the organisation focuses on modernisation, collaboration, and a digital-first strategy. I really think that when technology is allied to sensible commercial legal thought leadership. This can really help organisations.

I also think we have a responsibility to our colleagues to try and put them in the best position we can, to facilitate all that we are trying to achieve. This means that we have to create a good environment for people to work in. I think it's important that we enjoy our work and that as a team, we spend time together, and enjoy the collection.

**BELYNDY:** Richard, thank you for speaking with us for this special art law edition of the CLB.



# Patterns of History: The Papunya Tula Art Movement

**Chloe Hillary**, Secondee Solicitor (Arts Law Centre of Australia), tells the story of Geoffrey Bardon and the Papunya Tula art movement.

It's an exciting time to be an artist in Australia. Promising – the Federal Government has recently announced a new cultural policy set to ramp up funding and support across artistic industries. Hopeful – part of the national cultural policy promises stand-alone legislation to protect Indigenous Cultural Intellectual Property (ICIP). Uncertain – all of the above and the very nature of being an artistic creator.

This tumultuous ride is something artists know well, and something a man named Geoffrey Bardon experienced first-hand. Alongside Aboriginal artists including Old Bert Tjakamarra, Bill Stockman Tjalpatjarri, Long Jack Phillipus Tjakamarra, Old Mick Tjakamarra and Kaapa Tjampitjinpa, Bardon is widely acknowledged as the facilitator of the Papunya Tula arts movement, which started the Western Desert Art movement in the early 1970s. The Papunya Tula Artists cooperative was the first Aboriginal arts centre, the model of which is still used widely in Indigenous communities across Australia today.

Papunya is a small Aboriginal community, about 240 kilometres northwest of Alice Springs. It was one of the last Government settlements in the Australian Government's policy of assimilation. When Geoffrey Bardon arrived there in 1971, it was a melting pot of multiple language groups from around the area. Bardon was a young teacher and he arrived to teach in the government run school. He was an artist himself – a painter, photographer and filmmaker, he arrived with a Combi van full of gear. While he started off teaching the children, his role morphed quickly over his short time there from general teacher, to art teacher at the school, to his role with the men, which in the end was much more than just teacher.

There is evidence that there was already art being created in the area when he arrived.<sup>1</sup> In a review of a 2017 exhibition 'Tjungunutja: from having come together', Finnane talks about the genesis of the Western Desert Art movement, as explained in the exhibition catalogue by the Aboriginal curators, as when the communities of Papunya came together and performed ceremony to demonstrate which group had the strongest culture and law. This was said to lead to them painting, the year before Bardon's arrival.<sup>2</sup>

However the way Bardon tells it is that there was nothing for the men in the community to do when he arrived. He saw them tracing symbols in the dirt and he would ask them what they were. He would encourage them to draw in their

style, not whiteman's style. One interpretation was that the men in the community were jealous of the work that Bardon was doing with the children: they thought it was their right to paint the stories, not the children's.<sup>3</sup>

In around June 1971, the painting of murals, including the Honey Ant Mural started at the school. While some reports say that Bardon had encouraged the children to create murals, it was the men in the end who took over the project, which was ultimately painted over by the authorities. After the murals, the men under Bardon's guidance began to paint on a smaller scale. At first, the artists used materials from around the community – leftover paint, pieces of wood. Bardon took some of these early paintings to Alice Springs to sell. Bardon would talk to the artists about the layout and composition of a work in progress and when a work was complete, and deemed satisfactory, he would prepare a sketch that set out the meaning of the story depicted. A room was found for them to use, sometimes referred to as the Great Painting Hall, and the men would come together daily to paint. Bardon acted as an unofficial intermediary at first, encouraging the men to develop the art and then taking them into Alice Springs to sell. He would return with a cheque which he would distribute amongst the artists, fuelling them and others, to create more – and so it went. In August 1971, Kaapa Tjampitjinpa's painting, *Men's Ceremony for the Kangaroo, Gulgardji* jointly won the Caltex Golden Jubilee Art Award alongside a European-style painting. Kaapa was the first Aboriginal Australian to win a contemporary art award.

Bardon admitted to 'interfering' with the works of the artists, he referred to it as 'purifying the mythology' or said it was for the purpose of 'spatial organisation'.<sup>4</sup> He said "I was concerned with the making of paintings with a Western Desert iconography and meaning to the exclusion of whitefella painting conventions, though with an efficient and artistically justified use of space."<sup>5</sup>

The history of the time and the development of the art movement is clouded and contradictory in its detail. Bardon himself was a documenter and he has published several books about his time in the community. He tends to paint the picture one way – against the background of a Government trying to stomp out Aboriginal culture through a policy of assimilation; he fought for the artists and brought their art to the world. While there are certainly elements of truth to that very simplified version of Bardon's perspective, on the other side

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- 1 Luke Scholes, 'Unmasked the myth: the emergence of Papunya painting' in John Kean (ed) *tjungunutja – from having come together* (2017, MAAGNT) 127
  - 2 Kieran Finnane, 'Papunya painting: Revisiting the genesis of the movement' (2017) *Art Monthly Australia*, Issue 298 May 2017
  - 3 'Mr Patters', Film Australia Collection (Penny Robins, 2004)
  - 4 Scholes, (n 1) 149
  - 5 Geoffrey Bardon, *Papunya: a place made after the story: the beginnings of the Western Desert painting movement* (Melbourne University Publishing, 2004) 12

there is evidence that there was already an arts movement in the area before Bardon arrived and it was supported, at least in principle, if not in practice, by the Government.<sup>6</sup>

As early as 1955, there was a policy to stop the removal of Aboriginal sacred and ritual objects from the Northern Territory. The *Native and Historical Objects and Areas Preservation Ordinance 1955* required written consent for such objects to be taken from the Territory.<sup>7</sup>

On 23 April 1971, the then Prime Minister William McMahon, said in a speech to the conference of commonwealth and state ministers responsible for Aboriginal Affairs:

We believe that Aboriginal Australians should be assisted as individuals and, if they wish, as groups to hold effective and respected places within one Australian society with equal access to the rights and opportunities it provides and accepting responsibilities towards it. At the same time, they should be encouraged and assisted to preserve and develop their culture their languages, traditions and arts so that these can become living elements in the diverse culture of the Australian society. My Government's policy will be directed to these ends.<sup>8</sup>

Bardon's disagreements with the authorities at the time were perhaps at a more granular level. He never got along with the officials, a difficulty he put down to his unwillingness to engage in their drinking culture. Although he evidently made enough friends to make the system work for him and the male artists at least for a time.

As part of the Assimilation Policy, in place well before McMahon, the Aboriginal men in the community received a training allowance to perform tasks around the community such as cutting wood.<sup>9</sup> When Bardon's painting group was in full force, it was detracting from the work of the community. When painting took over and the chores were not being done, this caused tensions with the local officials.

Bardon claims that in January 1972 when he returned from a holiday to Sydney, the head teacher, Fred Friis (one of Bardon's few white allies) had left, and that's when things started to change. Bardon claims that in February 1972 he was accused of trafficking Aboriginal paintings by the deputy superintendent.<sup>10</sup>

The group was incorporated on 10 July 1972 as Papunya Tula Artists Pty Ltd, with three Aboriginal directors and Bardon in a role as artistic director. Only 17 days later he left Papunya.<sup>11</sup> The exact reason for his departure is unclear. It appears that at least part of the reason involved a dispute over the distribution of money to artists: Bardon claimed

that the authorities had failed to distribute money to the artists, and the artists seem to have blamed Bardon. There had been an investigation ordered from the Economics and Business Management Department of the Welfare Administration, looking into the operations of the group.<sup>12</sup> There are also subsequent recorded reports of concerns that the paintings that were being produced were not authentic traditional stories.<sup>13</sup>

It's not clear if Bardon intended to return to Papunya when he left in July 1972. In most of his recounts, Bardon simply says that he was ill, and this was the reason he left Papunya. Other reports record it as a nervous breakdown. Once he returned to Sydney, he was admitted to Chelmsford Hospital and underwent "Harry Bailey's notorious deep sleep therapy, a form of 'treatment' for depression that left dozens dead and many others, including Bardon, physically incapacitated for life."<sup>14</sup> Despite his ordeal, Bardon returned to Papunya in 1973 with the assistance of a research grant to confirm findings from a report from 1972.<sup>15</sup>

The first meeting of Papunya Tula Artists Pty Ltd was held on 30 October 1972, and one of the agenda items was to accept Bardon's resignation.<sup>16</sup> The start of the Art Centre was also the end of Bardon. Papunya Tula is still an art centre today. While there was undoubtedly art and storytelling before Bardon arrived in Papunya he helped to make it accessible – he helped with materials and he helped with finding an audience outside of the communities and a way to help that audience understand the stories in the art, at great expense to his personal health and wellbeing. In doing so, he paved the way for the modern concept of art centres, that continues in today's First Nations art scene.

Papunya Tula Artists continues to operate today, and the company is entirely owned and directed by Aboriginal people from the Western Desert and represents around 120 artists predominantly of the Luritja/Pintupi language groups. The art centre is a member of Desert, which is the Association of Central Australian Aboriginal Arts and Crafts Centres and represents 35 independently governed Aboriginal Art and Craft Centres representing 8000 artists. Papunya Tula Artists have led the Western Desert art movement from the desert to the world stage, with artists Tommy Watson and Ningura Napurrula represented in Paris at the *Musée du Quai Branly*.

*Chloe Hillary is a Seconded Solicitor at the Arts Law Centre of Australia, seconded to Arts Law with the generous support of the Australian Government Solicitor from February – December 2023.*

6 Vivien Johnson, *Once upon a time in Papunya* (UNSW Press, 2010) 138

7 Ibid, 134

8 William McMahon, 'Aboriginal affairs policy – statement by the Prime Minister, the Rt Hon William McMahon – to the conference of Commonwealth and State Ministers responsible for Aboriginal Affairs' (Speech, 23 April 1971) available <<https://pmtranscripts.pmc.gov.au/release/transcript-2408>>

9 Scholes (n 1)

10 Bardon (n 5)

11 Scholes (n 1)

12 Scholes, (n 1) 154

13 Scholes, (n 1) 154

14 Dan Edwards, 'Message Sticks: Breaking the silence', *realtime* (Web page) <<https://www.realtime.org.au/message-sticks-breaking-the-silence/>>

15 Bardon, (n 5) 10

16 Scholes (n 1) 157



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