The Colour of Copyright

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- Respond To This Article

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1 Along with all the other baggage the British brought with them to Port Jackson in 1788 were laws of ownership that were totally foreign to the original inhabitants. The particular law I'll consider here is that of copyright. The result of a few hundred years of evolution, moulded by the common law and acts of Parliament, copyright protects the intellectual property of writers and artists (Saunders). It has three requirements: originality, material form and identifiable author.

1 However, superimposed on the creative practices of the original inhabitants of Australia, copyright has proved a dismal failure. Its inability to continue its evolution means that it does not serve Indigenous Australians, whose creative practices do not fit neatly within its confines. The notions of 'rights' or 'ownership' inherent in current copyright law do not reflect, and are therefore unable to protect, Indigenous intellectual property. The limits of protection are summed up by Janke et al: '[c]ommercial interests are protected … rather than interests pertaining to cultural integrity … [r]ights are valid for a limited period … whereas under Indigenous laws, they exist in perpetuity. Individual notions of ownership are recognised, rather than the Indigenous concept of communal ownership' (Janke 1997).

1 Practical effects of these limitations are the loss of copyright of stories written down or electronically recorded by outsiders, and the absence of special consideration for, or protection of, secret or sacred material (Janke 1997). Mansell notes that Aboriginal intellectual property rights are poorly protected by current laws be they copyright, patent, plant breeders, design laws or trademarks where 'the creative customs and practices of Aborigines' are different to those of whites, who 'emphasise the individual and provide the mechanisms for the commercialisation of an individual's activity. The traditional base of Aboriginal art forms was not created with this in mind' (Mansell 196). Indigenous cultures have their own systems for the protection of intellectual property which are predicated not on the protection of commercial advantage but on the meaning and cultural integrity of the work of art (Janke 1996 15; 1998a 4). Some of these so-called works of art are, in fact, 'law bearers'; these 'Indigenous traditional cultural productions are … legal titles to clan land' (Morris 6). Ignoring this meaning of cultural productions is a little like your bank manager framing your mortgage document or rental agreement for its aesthetic qualities, and evicting you from your house.

1 While copyright law does acknowledge legally-defined entities like corporations or government departments as copyright holders, it is too limited in its definitions to recognise the complex familial relationships and reciprocal responsibilities of Aboriginal society. Under Indigenous laws 'individuals are differentiated in their awareness of elements of the local culture and in the way they make use of those elements depending on such things as their sex, their moiety or skin group, and their initiatory status' (Johnson 10).

1 Given the complex nature of Indigenous attitudes to rights in and ownership of intellectual property, those concerned with questions of fairness in the administration of copyright law must take a new perspective. While copyright law appears, in the main, to have been unable to deal with a system of law which pre-dates it by thousands of years, there have recently been some tentative steps towards a recognition of Indigenous concerns. Golvan, acknowledging that much work needs to be done 'to ensure that the legal system is meaningful to Aboriginal people', sees some aspects of the judgement in the Carpets Case1 which 'show a strong determination to seek to unite Western copyright principles with the need to deal with issues of indigenous cultural harm' (Golvan 10). And, in Foster v Mountford 1976 (discussed below), Justice Muirhead noted that 'revelation of the secrets [contained in the offending book] … may undermine the social and religious stability of [the] hard-pressed community' (quoted in McDonald 24). These examples show some willingness on the part of the courts to take into account matters which fall outside of common law.

1 While there has as yet been very little litigation regarding copyright ownership of written works, there is no reason to assume that this situation will continue. The first case of infringement of Aboriginal copyright to surface in the media occurred in 1966, when David Malangi's painting 'The Hunter' was adapted without permission as part of the design for the new one-dollar note (Johnson 13). Ten years later, the Pitjantjatjara Council was involved in litigation with Dr Mountford, 'an anthropologist who had been given information by the Pitjantjatjara people … in 1940 … about tribal sites and objects, communal legends, secrets, paintings, engravings, drawings and totemic geography' (McDonald 23). Interestingly, this particular case relied not on copyright law but on a breach of confidence as 'the material … was not protected by copyright, being material in which copyright either did not subsist, or in which copyright had expired' (23). This is a good example of the lack of protection afforded by copyright law to intellectual property of religious and spiritual significance.2

1 At first glance, the implications of the 1992 Mabo land rights case for publishing in Australia today might seem remote. However, some of the implications of this historic case hold the potential for a new approach to intellectual property rights which may actually serve the interests of Indigenous artists and writers. The importance to intellectual property rights of the Mabo decision lies in the fact that 'the Court held that … local law remains in place except to the extent that it may be in conflict with British law, and until it is over-ruled by the colonisers' 3 (McDonald 26). This meant that not only the myth of terra nullius was repudiated, but with it any notion that Australia was 'either a wild and lawless place or a legal blank slate. Indigenous customary law … was thereby given both recognition and validity' (26). Gray goes further than this, and states in relation to native title and

Aboriginal art: 'the two in fact are quite inseparable if not exactly the same' (Gray 12). This statement strongly emphasises Morris' concerns expressed above, regarding the diminution of authority of 'cultural productions' when they are perceived as merely artistic objects. Pearson, in discussing Mabo, talks of native title as the 'recognition space' 4 between common law and Aboriginal law (Pearson 154). He points out that Aboriginal law exists, is practised is in fact a 'social reality', and adds that 'it is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law' 5 (155).

1 Recently the Australian Society of Authors (Heiss) prepared two discussion papers and a checklist for non-Indigenous writers who want to write about Indigenous culture. One of the papers, 'Australian Copyright vs Indigenous Intellectual and Cultural Property Rights', reiterates the point that the Copyright Act 1968 'as it stands is unsuited to protecting Indigenous culture'. It briefly discusses the desirability of the sharing of copyright between the Indigenous storyteller or informant and their non-Indigenous collaborator an issue I will examine in greater depth in my thesis on cross-cultural editing. A problematic practice, shared copyright deals with 'ownership' in a way that satisfies white or western conceptions but may compromise the Indigenous sense of (Indigenous) communal title to the work.

1 The importance of effective copyright law for Indigenous Australians goes beyond the earning of royalties or the commercial 'ownership' of creative work: it refers to the protection of their cultural heritage (Heiss). One solution suggested by Janke is an amendment to 'the Copyright Act to provide moral rights (rights of attribution, no false attribution and cultural integrity)' (in Heiss).

1 Another possible, though longer term solution, may lie in the way common law itself develops. It has evolved over time, albeit slowly, to suit the needs of the particular environment economic, technological, cultural or other in which it has to operate. As Ginsberg remarks in the context of the introduction of moral rights law to two common law countries, the US and Australia, regarding the gradual adoption of moral rights: 'a Common Law approach to moral rights … slowly builds up to the general principle from gritty examples worked out fact-by-fact. This accretion method is familiar to both our countries' legal approaches' (Ginsberg 34). This same accretion method could be used to change copyright law so that it more adequately protects Indigenous intellectual property.

1 Whatever solution is reached, at present the copyright laws are colour-blind when presented with the complex and alien nature of Indigenous cultural practice. In the interests of reconciliation, natural justice and the integrity of Indigenous culture, reform cannot come too soon.

NOTES

1. Milpurrurru v Indofurn Pty Ltd, 1995; an Australian company copied and adapted various Indigenous works of art and had them woven into carpets in Vietnam, and imported into Australia. Permission to use the designs was never sought. An award of almost $200,000 was made to the 8 artists involved, and the offending carpets were withdrawn from sale. By 1996, Indofurn had been wound up and the director declared bankrupt: the artists have not received a cent. (Janke 1998b 9).
2. Fortunately for the Pitjantjatjara elders, the court held that Mountford's book did constitute a breach of confidence.
3. 'The Court held that the rights of Indigenous inhabitants of a colony are the same as the rights of a conquered nation: local law remains in place except to the extent that it may be in conflict with British law, and until it is over-ruled by the colonisers' (McDonald 26).
4. 'Native title is therefore the space between the two systems, where there is recognition. Native title is, for want of a better formulation the recognition space between the common law and the Aboriginal law which now afforded recognition in particular circumstances' (Pearson 154).
5. However, some cases subsequent to Mabo place limitations upon the recognition of Indigenous traditional law. Justice Mason in Coe v Commonwealth of Australia (1993, at 115) stated that 'Mabo … is at odds with the notion … that [Indigenous Australians] are entitled to any rights and interest other than those created or recognised by the law of the Commonwealth, the [relevant] State… and the common law' (McDonald 2627).

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