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A Symbol of Unity: Freeing the Aboriginal Flag

Dominic Shaw*

This Note explores the intersection of personal identity and copyright law by examining the status of the Aboriginal flag within Australia's cultural milieu and legal landscape. The Aboriginal flag was designed by a Luritja man named Harold Thomas, who envisioned a banner under which Aboriginal protestors of the sixties and seventies could unite. By the nineties, the flag had gained enough recognition as to be recognized by the Australian government as an official flag of Australia. However, a federal court of Australia eventually held that Thomas owned the copyright to the flag's design. Thus, the Aboriginal community that the flag purportedly represents does not have ready access to the flag's design, due to the strictures of copyright law. This Note advocates for the Aboriginal community's free use of the Aboriginal flag as a necessary step in reconciliation between Aboriginal and Colonial Australia. This Note reviews three methods by which Australia might make the flag available to the Aboriginal community: an expansion of the fair dealing doctrine under Australia's copyright law, a warrant by the Governor-General under the Flags Act, or Governmental acquisition of the copyright. This Note concludes that governmental acquisition of the copyright best balances the needs of the community and the needs of the copyright holder, Harold Thomas.

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Recently, my friend . . . told me that my flag had too many symbols, that it was “cluttered.” I wanted to punch him, but instead I ran out into the howling storm, fell on my knees, and railed against the night. “Why me, Lord?” I sobbed. “Why me?”

– Jack Handey

INTRODUCTION

What is a flag, if not a symbol? There is a symbolic weight woven into the fabric of flags that imbues them with the deep meaning that they carry for so many across the world. As Jack Handey describes in his poem about his personal flag,¹ any challenge to the nature of one’s flag—be it of personal, group, or national significance—reads as an insult not just to the fabric of the flag but also to the fabric of the flag bearer’s core identity. This is because flags are often assigned narratives to inspire dedication to the ideals that they are designed to reflect.² Through commonly

1. Jack Handey, *The Symbols on My Flag (and What They Mean)*, NEW YORKER (May 12, 2008), <https://www.newyorker.com/magazine/2008/05/19/the-symbols-on-my-flag-and-what-they-mean>.

2. In this way, as a visual representation of what often amounts to little more than ideals, a flag typically begins as a first-order sign within Jean Baudrillard’s framework of signs and simulacra. In this framework, a first-order sign is intended to serve as “the reflection of a basic reality.” Jean Baudrillard, *Simulacra and Simulations*, in *SELECTED WRITINGS* 166, 166–84 (Mark Poster ed., 1988), <https://web.stanford.edu/class/>

held societal narratives that flags carry, people learn from a young age to craft their identity, at least in part, around the flags that they live under.³ This gives flags a power well beyond that of a simple piece of cloth.

When a person's identity becomes intertwined with a flag, that person may then desire to display that flag in any number of ways, ranging in type from respectful to gaudy, from flying it from a flagpole or mudflap to inking it onto the front of a T-shirt or across a bicep. In a sense, this is the purpose of a flag—to serve as a public symbol that breeds unity or loyalty to a specific cause or country. For this reason, rarely is a national flag copyrighted. For instance, the United States flag, as a work of the United States government, is not copyrighted.⁴ Nor is the Union Jack.⁵ In fact, 177 countries have signed the Paris Convention for the Protection of Industrial Property, which forbids the signing countries from copyrighting their national flags.⁶ Importantly, Australia is one of the signing countries.⁷

history34q/readings/Baudrillard/Baudrillard_Simulacra.html. However, part of what gives flags their overwhelming emotional power is their ability to morph into second-order signs, or signs that “mask[] and pervert[] a basic reality.” *Id.* One example of this is the tendency of some Americans to view the American flag not as a representation of the unification of fifty individual states, but instead as a symbol of infallible American exceptionalism. See Senator Ted Cruz (@SenTedCruz), TWITTER (JULY 13, 2021, 8:58 AM), <https://twitter.com/sentedcruz/status/1414962453398626315> (describing the American flag as a symbol of freedom across the globe); Congressman Michael Guest (@RepMichaelGuest), TWITTER (June 14, 2021, 8:54 AM), <https://twitter.com/repmichaelguest/status/1404452120456220679> (describing the American flag as a representation of the American spirit). In this way, the flag is no longer simply pointing at the makeup of the nation, it is intentionally obfuscating an objective view of the country and its status.

3. Eugene A. Weinstein, *Development of the Concept of Flag and the Sense of National Identity*, 28 CHILD DEV. 167, 173 (1957) (describing a child who learns to use flags to create a classificatory scheme that is made up of component parts such as “the child’s understanding of country, people, government, and the relationships between them; his understanding of the flag as a symbol, including the . . . multiplicity of flags and the flag as a means of identification . . .”).

4. 17 U.S.C. § 105.

5. See *Can You Brand Britain?*, BARKER BRETTELL (May 13, 2016), <https://www.barkerbrettell.co.uk/can-you-brand-britain/> (“The Union Jack flag and/or the flags of England, Wales, Scotland, Northern Ireland and Isle of Man can be used in branding . . .”).

6. Paris Convention for the Protection of Industrial Property art. 6ter, Mar. 20, 1883, 21 U.S.T. 1583 (amended Sept. 28, 1979) [hereinafter Paris Convention].

7. *Contracting Parties > Paris Convention*, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=2 (last visited Oct. 21, 2021).

Of course, private flags created for private causes can be copyrighted, such as the Trump-Pence 2020 flags that were sold as part of Donald Trump's failed reelection campaign.⁸ However, not all private flags are designed with copyrights and profit in mind. One example of a private flag made available to the public is the pride flag, which was created by Gilbert Baker, a San Francisco-based artist, in 1978.⁹ While the pride flag is not an official representation of any group of people – it's only an informal representation of the LGBTQ+ community – Baker was adamant that the flag not be reduced to a piece of lucrative merchandise. When an advocacy group tried to trademark the rainbow flag that Baker had created, he engaged in a legal battle to block the organization, wanting instead for the flag to remain available to the public.¹⁰ Thereafter, Baker never made a legal claim to his design; he was not so much interested in holding the copyright himself as he was interested in preventing a private corporation from blocking the LGBTQ+ community from using the design.¹¹

Given that context, the Aboriginal flag of Australia (hereinafter, "Aboriginal flag") sits in a very interesting space. It is the codified flag of the Aboriginal peoples of Australia.¹² So it has state recognition, but it is not a national flag that fits inarguably within the plain meaning of Article 6ter of the Paris Convention for the Protection of Industrial Property.¹³ The Aboriginal flag officially represents a broad group of people within a specific nation, yet the copyright of the flag is still privately held by the man who created the original design, Harold Thomas.¹⁴ Thus, the flag is for the people but not of the people. Many Aboriginal people are upset that

8. *Official Trump-Pence 2020 Flag – Blue*, TRUMP MAKE AM. GREAT AGAIN COMM., <https://web.archive.org/web/20200825012103/https://shop.donaldjtrump.com/products/official-trump-pence-2020-flag-blue> (last visited Oct. 21, 2021) (attributing the copyright to the Trump Make America Great Again Committee).

9. Danielle Riendeau, *Meet the Man Who Kept the Rainbow Flag Free*, ACLU (June 22, 2012, 10:04 AM), <https://www.aclu.org/blog/lgbtq-rights/meet-man-who-kept-rainbow-flag-free>.

10. *Protecting Pride: A Brief Look at the History of the Rainbow Flag*, CORSEARCH (June 5, 2020), <https://corsearch.com/protecting-pride-brief-look-history-rainbow-flag/>.

11. *Id.*

12. See *Flags Act 1953* (Cth) s 5 (Austl.) [hereinafter *Flags Act*]; *Australian Flags*, DEP'T OF THE PRIME MINISTER & CABINET, <https://www.pmc.gov.au/government/australian-national-symbols/australian-flags> (last visited Oct. 21, 2021).

13. Paris Convention, *supra* note 6, at art. 6ter.

14. DEP'T OF THE PRIME MINISTER & CABINET, *supra* note 12.

they are unable to freely use this design that represents them. This tension is exacerbated because the copyright holder has granted an exclusive license for the purpose of reproducing the flag on clothing to a white-owned clothing company that has taken aggressive moves to block Aboriginal-owned clothing producers from using the image of the flag.¹⁵

Given the unique space within which the Aboriginal flag exists, this Note seeks to address the problem of copyright enforcement of this quasi-national flag.¹⁶ In reviewing the history of Aboriginal erasure by white colonial Australia, this Note concludes that making the Aboriginal flag available to all Aboriginal people is an important step to national reconciliation between *Colonial Australia* and *First Nations Australia*.¹⁷ This Note proceeds in four parts. Part I explores both the cultural and legal history of the Aboriginal flag; Part II highlights the problems that have developed and continue to develop from a privately held copyright of the now national symbol, while giving proper recognition to the rights enjoyed by the flag's designer; Part III proposes a number of solutions that balance the private rights of the copyright holder against the need for this national symbol to be widely available; finally, Part IV concludes by recommending governmental acquisition of the Aboriginal flag's copyright.

15. Isabella Alexander, *Explainer: Our Copyright Laws and the Australian Aboriginal Flag*, THE CONVERSATION (June 12, 2019, 4:17 PM), <https://theconversation.com/explainer-our-copyright-laws-and-the-australian-aboriginal-flag-118687>.

16. The Aboriginal flag is not the Australian National Flag. See *Flags Act*, *supra* note 12, at 3 (codifying the Australian National Flag). However, the Aboriginal flag has been proclaimed a flag of Australia pursuant to Australian law. See Alexander, *supra* note 15. In addition to holding this privileged status, the Aboriginal flag is also flown over many of Australia's most famous national monuments, such as the Sydney Harbour Bridge. See, e.g., Gary Nunn, *The Woman Fighting to See the Aboriginal Flag Fly Permanently on the Sydney Harbour Bridge*, SBS NEWS (May 26, 2020, 8:00 AM), <https://www.sbs.com.au/news/the-woman-fighting-to-see-the-aboriginal-flag-fly-permanently-on-the-sydney-harbour-bridge>. Given the legal status of the Aboriginal flag and the prominence with which it is flown, some consider the flag to be a second national flag.

17. For further explanation of these designations, see *What is Reconciliation?*, RECONCILIATION AUSTL., <https://www.reconciliation.org.au/what-is-reconciliation/> (last visited Oct. 21, 2021); HENRY REYNOLDS, *FORGOTTEN WAR* 121–34 (2013) (highlighting the difference between the colonizers versus the aboriginal people in the Frontier Wars).

I. THE DEVELOPMENT OF THE ABORIGINAL FLAG IN THE
AUSTRALIAN ZEITGEIST

A. *Origins of the Aboriginal Flag and Its Role in Modern Society*

The design of the Aboriginal flag is simple, neat. The flag is divided horizontally into halves. The top half is a deep black; the bottom is red. In the center sits a bright, yellow circle. Though often disputed,¹⁸ a Luritja man named Harold Thomas designed the flag, which fact was established through protracted, intensive litigation before an Australian federal court.¹⁹ Thomas designed the flag for National Aborigines Day, 1971.²⁰ He has explained that the black represents the Aboriginal people; the red represents the red soil that the Aboriginal peoples have always lived on and the red ochre used in a number of Aboriginal ceremonies; and the yellow circle represents the sun, the giver of life and protector.²¹ The flag's design is intended to connect modern Aboriginal people to their ancestors. So, while the design of the flag is simple, its meaning is rich, profound, and full of deeply personal, bordering sacred, symbolism.

18. See Alexander, *supra* note 15 (noting that several other people had at one time or another asserted that they were the artist behind the flag's design).

19. *Thomas v Brown* (1997) 37 IPR 207, 214 (Austl.).

20. *Aboriginal and Torres Strait Islander Flags*, NAT'L ABORIGINES & ISLANDERS DAY OBSERVANCE COMM., <https://www.naidoc.org.au/about/indigenous-australian-flags> (last visited Oct. 21, 2021).

21. *Id.*



Figure 1: Digital Rendering of the Aboriginal Flag²²

Thomas designed the flag during a period of intense political discourse in Australia. While Aboriginal people were finally granted the right to vote in 1962,²³ the 1960s were a time in which the Australian government made a number of policy decisions that showed a consistent disregard for the rights, values, and in particular the ancestral land of Aboriginal Australians.²⁴ This included: a federal policy of assimilation,²⁵ the excision of the

22. Digital rendering of the Aboriginal flag.

23. *Electoral Milestones for Indigenous Australians*, AUSTRALIAN ELECTORAL COMM'N, <https://www.aec.gov.au/indigenous/milestones.htm> (Nov. 12, 2020).

24. See, e.g., Coral Dow & John Gardiner-Garden, *Overview of Indigenous Affairs: Part 1: 1901 to 1991*, PARLIAMENT OF AUSTL. (May 10, 2011), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/1011/indigenousaffairs1. As a note, there were governmental actions taken that seemed to hear the voices of the Aboriginal peoples and sought to address those concerns, such as Queensland giving the vote to Aboriginal and Torres Strait Islanders in 1965 following the federal government's step towards giving the vote to Indigenous Australians in 1962 or South Australia's Aboriginal Lands Trust Act 1966. See *id.* However, it is beyond the scope of this Note to examine all the ways in which the government legislated, adjudicated, or made policy regarding the rights of the Aboriginal peoples. Instead, this section seeks to explain the general political landscape of Australia at the time of the creation of the Aboriginal flag. For a more in-depth look at the political landscape of Australia at this time, see generally MILDRED KIRK, *A CHANGE OF OWNERSHIP: ABORIGINAL LAND RIGHTS* (1986).

25. Dow & Gardiner-Garden, *supra* note 24.

Yolngu people's homeland for a bauxite mine,²⁶ and the failure to timely award Aboriginal pastoral workers equal pay.²⁷ Many of these policies directly affected the land of Aboriginal peoples, which led to an increased movement for Aboriginal land rights, with increased protests by Aboriginal Australians towards the end of the sixties and into the seventies.²⁸ It was in this context that the Aboriginal flag was designed.

Thomas, as a Luritja man himself, attended these various land rights protests. During the protests, Thomas noticed that the Aboriginal protesters were often lost within a sea of gaudy banners that were waved by those with other interests.²⁹ As such, he felt that the Aboriginal protesters needed some sort of banner to wave that would make them more visible and cohesive.³⁰ Given this perceived necessity, Thomas went to work in designing the Aboriginal flag, which he intended to be a "symbol of [Aboriginal people's] race and identity."³¹ The flag was then first flown on National Aborigines Day, July 12, 1971, in Adelaide's Victoria Square.³² This was a meaningful step towards wide-scale adoption of the flag, but it was not at this point that the Aboriginal flag became widely accepted by the people of Australia.

Instead, the flag began to take its place in the Australian zeitgeist almost a year later, when the flag began flying over the Aboriginal Tent Embassy in 1972 shortly after the embassy's inception.³³ The Aboriginal Tent Embassy adopted the Aboriginal

26. *Aboriginal Land Rights Act*, NAT'L MUSEUM OF AUSTRALIA, <https://www.nma.gov.au/defining-moments/resources/aboriginal-land-rights-act> (last visited Oct. 21, 2021).

27. See Dow & Gardiner-Garden, *supra* note 24.

28. Ellie Griffiths, *The History of the Australian Aboriginal Flag*, CULTURE TRIP (Sept. 29, 2016), <https://theculturetrip.com/pacific/australia/articles/the-history-of-the-australian-aboriginal-flag/>.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Aboriginal and Torres Strait Islander Flags*, *supra* note 20. The Aboriginal Tent Embassy was established in January 1972, when four Aboriginal men set up a beach umbrella on the lawns outside of Australia's Parliament House. They described their encampment as the Aboriginal embassy. In the subsequent years, this Tent Embassy, as it has come to be known, was moved around and operated from a variety of different locales, but it was eventually given a permanent establishment on those same lawns where the four men

flag as their official flag near the end of that year.³⁴ In subsequent years it continued to gain more prominence, as the flag was thrust loudly onto the national stage throughout the 1990s and early 2000s. In 1994, Cathy Freeman broke protocol during the Commonwealth Games, carrying both the Australian flag and Aboriginal flag in her victory laps following the 200m and 400m sprints.³⁵ In 1995, the Aboriginal flag was adopted as a flag of Australia by a proclamation of the Governor-General.³⁶ Then, again in 2000, Cathy Freeman waved the flag in victory; this time her victory was on an even larger stage, that of the Gold-Medal stand at the Olympics for the women's 400m race.³⁷ Events like these firmly entrenched the flag into the culture of Australia.

To be clear, these moments in which the flag became nationally and internationally visible served as more than just moments of visibility for a black, red, and yellow piece of cloth. These moments of visibility for the flag also represented moments of visibility for the people that the flag purported to represent – Aboriginal people across the continent. So much so that people still celebrate the anniversary of these moments of poignant visibility. Take Cathy Freeman's Olympic win and barefoot victory lap in which she carried the Aboriginal flag as an example. When that moment of striking visibility celebrated its 20th anniversary, it was widely reflected upon by pundits the whole world over.³⁸

This visibility was meaningful because of Australia's long and bloody history that sought first to destroy Aboriginal people and later to destroy their culture.³⁹ When British colonizers arrived on

originally raised their beach umbrella. The Aboriginal flag was not flown above the original umbrella. *Aboriginal Tent Embassy*, NAT'L MUSEUM OF AUSIL., <https://www.nma.gov.au/defining-moments/resources/aboriginal-tent-embassy> (last visited Oct. 21, 2020).

34. Griffiths, *supra* note 28.

35. *Id.*

36. *Flags Act 1953 Proclamation*, No. S258 (July 14, 1995) (Austl.) [hereinafter *Flags Act Proclamation*].

37. Faith Lagay, *Olympic Gold-Medal Winner Carries the Aboriginal Flag*, 2 *AMA J. ETHICS* 72 (2000).

38. See, e.g., Rachel Thompson, *Cathy Freeman's Gold Medal Milestone Echoes 20 Years Later*, NBC SPORTS (Sept. 25, 2020, 7:57 AM), <https://olympics.nbcsports.com/2020/09/25/cathy-freeman-sydney-olympics/> (“[H]er win remains one of the most significant moments of the Games, and the image of Freeman circling the track in a barefoot victory lap with the Aboriginal and Australian flags is indelible.”).

39. *A White Australia*, AUSTRALIANS TOGETHER, <https://australianstogether.org.au/discover/australian-history/a-white-australia/> (last visited Oct. 21, 2021).

the Australian continent, they waged war against the First Nation peoples who were living there. The end result was that tens of thousands of Aboriginal people were killed, while significantly less colonizers died.⁴⁰ However, when the white colonizers' war failed, they shifted tactics from genocide to assimilation.⁴¹ Instead of murdering Aboriginal people, the Australian government moved to absorb them into polite, white society.⁴² This assimilationist goal was steeped in the language of eugenics and involved removing Aboriginal children from their homes to leave with white families and essentially breed the blackness out of them.⁴³ Slowly, the language of eugenics fell out of fashion,⁴⁴ but the goal of assimilation extended well into the sixties and seventies.⁴⁵ As such, these moments of visibility for the flag were, by extension, moments of visibility for a group of people that had spent the entirety of the previous century resisting erasure. Thus, each use of the flag on the national stage can easily be seen as a step towards reconciliation for past wrongs and as either formal or informal recognition of Australia's First Nation people. It is this historically informed view of the Aboriginal flag on the national stage that illustrates why the flag has become so tightly interwoven into the identity of many Aboriginal people.

The flag's role in so many Aboriginal identities can be seen by the way it is spoken of. One man, who identifies as Kullilli and Murruwari, refers to the flag as "our flag" when explaining his belief

40. See REYNOLDS, *supra* note 17, at 121–34. The colonizers did not keep accurate records of the number of Aboriginal peoples killed and often this number is still widely debated. Compare *id.* (estimating approximately 20,000 Aboriginal deaths), with Paul Daley, *Why the Number of Indigenous Deaths in the Frontier Wars Matters*, GUARDIAN (July 14, 2016), <https://www.theguardian.com/commentisfree/2014/jul/15/why-the-number-of-indigenous-deaths-in-the-frontier-wars-matters> (citing the work of two historians who believe that in Queensland alone, "at least 65,180 Aboriginal Australians were killed from the 1820s until the early 1900s"). Regardless of the exact number, it is evident that the colonizers sought to exterminate Australia's First Nation inhabitants by way of genocide.

41. *A White Australia*, *supra* note 39.

42. *Initial Conference of Commonwealth and State Aboriginal Authorities*, Aboriginal Welfare (Apr. 23, 1937).

43. *Stolen Generations*, EUGENICS ARCHIVE, <http://eugenicsarchive.ca/discover/tree/53d8321a4c879d0000000012> (last visited Oct. 21, 2021).

44. *Id.*

45. See *supra* note 24 and accompanying text.

that “as Aboriginal people we have the right to our flag.”⁴⁶ In another instance, a woman who identifies as Narungga-Italian, explains that the flag is a celebration of Aboriginal identity and culture, a celebration that “represent[s] the struggle and the resistance [of Aboriginal peoples]. It’s a symbol for all Aboriginal people to use, together, that unites us.”⁴⁷ These are only two anecdotal examples of the depth of meaning that the flag holds for some Aboriginal people. Of course, these examples cannot cover the breadth and depth of feeling (or lack thereof) that Aboriginal people have towards this symbol. However, the deep feelings that these two individuals seem to share for this symbol do begin to highlight the issues that arise when Aboriginal people are not allowed to use this symbol of their struggle, resistance, and unification.

B. The Legal Background and Copyright of the Aboriginal Flag

While the Aboriginal flag was designed in 1971, the ownership of this design went unestablished for decades. For years, it was just a design that was used by various groups and people.⁴⁸ But eventually, as the flag grew in recognition, Australia formally recognized the Aboriginal flag as an official flag of Australia.⁴⁹ This led to a number of parties attempting to claim the design as their own intellectual property. As mentioned, Harold Thomas ultimately prevailed and established his ownership of the design,⁵⁰ which has allowed Thomas to license his design. It is Thomas’s ownership of the design that is causing controversy to fester and grow. As such, a more comprehensive history of the legal status of the flag is warranted.

To begin, the flag had various quasi-official uses from essentially the time of its creation. It flew in Adelaide’s Victoria

46. Miki Perkins, “Free the Flag”: Aboriginal Businesses Told Not to Use Aboriginal Flag Over Copyright, *SIDNEY MORNING HERALD* (June 11, 2019, 3:46 PM), <https://www.smh.com.au/national/free-the-flag-aboriginal-businesses-told-not-to-use-aboriginal-flag-over-copyright-20190611-p51wkn.html>.

47. Lorena Allam, *Company that Holds Aboriginal Flag Rights Part-Owned by Man Prosecuted for Selling Fake Art*, *GUARDIAN* (June 11, 2019, 4:18 AM), <https://www.theguardian.com/australia-news/2019/jun/11/company-that-holds-aboriginal-flag-rights-part-owned-by-man-prosecuted-for-selling-fake-art>.

48. See, e.g., *supra* notes 28–33 and accompanying text.

49. *Flags Act Proclamation*, *supra* note 36.

50. *Thomas v Brown* (1997) 37 IPR 207 (Austl.).

Square, a public space, on National Aborigines Day, a public holiday.⁵¹ It was adopted by the Aboriginal Tent Embassy, which began as illegitimate but has evolved into a permanent fixture of Australian politics.⁵² Beginning in 1977, the Newcastle City Council began regularly flying the flag, marking Newcastle as the first city to grant the flag any sort of official recognition.⁵³

These various semi-official uses, alongside the more personal uses described in Part II.A led to a growing understanding within the federal government of Australia that the Aboriginal flag “is recognized as the flag of the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally.”⁵⁴ As such, the then acting Governor-General of the Commonwealth, William George Hayden, acting on the advice of the Federal Executive Council, appointed the flag as the officially recognized “flag of the Aboriginal peoples of Australia” under the Flags Act 1953.⁵⁵ In addition to being codified as a flag of Australia, the flag began to be flown at Aboriginal Centers and flown during National Aborigines and Islanders Day Observance Committee (NAIDOC) Week and National Reconciliation Week.⁵⁶ In short, the flag became permanently enshrined within the government of Australia, beyond its former role as a highly recognizable symbol.

At the time that Hayden pronounced the Aboriginal flag an official flag of Australia, the flag was being freely used and produced.⁵⁷ No one had established an ownership interest in the design, and the government behaved as such. The Purchasing Department of the Commonwealth began working with manufacturers to arrange for the production of Aboriginal flags that were to be used by the government.⁵⁸ Harold Thomas responded by filing an application for remuneration with the Copyright Tribunal, claiming for the first time that he was the author of the creative work that was codified as the Aboriginal

51. *Aboriginal and Torres Strait Islander Flags*, *supra* note 20.

52. *Aboriginal Tent Embassy*, *supra* note 33.

53. PATRICK DODSON, *WALKING TOGETHER: THE FIRST STEPS* ch. 19 (1994), <http://www.austlii.edu.au/au/other/IndigLRes/car/1994/1/168.html>.

54. *Flags Act Proclamation*, *supra* note 36.

55. *Id.*

56. *Australian Flags*, *supra* note 12.

57. *Thomas v Brown* (1997) 37 IPR 207 (Austl.).

58. *Id.*

flag.⁵⁹ Under Australian Law,⁶⁰ the Copyright Tribunal only has jurisdiction to hear remunerative claims when the Commonwealth or a state of Australia has used the copyrighted material and “the parties have endeavoured to agree on the amount to be paid and have failed to do so.”⁶¹ In this case, the Commonwealth expressed that it would be willing to negotiate terms of remuneration to whomever held the copyright but was unable to do so until it had a more definitive understanding of who held the copyright. The Commonwealth reasoned that because it could not establish with certainty who owned the copyright, it refused to begin negotiations with any party. Thus, in the case raised by Thomas, the parties (Thomas and the Commonwealth) could not reach the stage of “endeavouring” to agree on an amount to be paid for remuneration. As such, the parties could not disagree, which was the requisite event for jurisdiction to vest in the Copyright Tribunal.⁶²

Because Thomas could not show that the Copyright Tribunal had jurisdiction over his case, he found himself in the position of having to raise a claim in the Federal Court of Australia, seeking a declaration of his authorship of the Aboriginal flag and ownership of the associated copyright in order to begin the remuneration negotiations with the Commonwealth.⁶³ When Thomas moved his case into the Federal Court, previous claimants of the copyright were notified, namely David Brown, James Tennant, and Gary Foley.⁶⁴ With all parties engaged, a trial commenced in which each party was given the opportunity to present evidence of their authorship of the design.⁶⁵

The Court found that Thomas’s case was the most consistent and most well-supported by persons other than the claimant.⁶⁶ By the time that Thomas had brought his suit, Foley had abandoned his claim of authorship to the Aboriginal flag. Instead, he testified

59. *Id.* The ostensible reason for this late-stage petition, as with most litigation, is money. Owning the copyright to a state-sponsored design is a very valuable position for Thomas to find himself in.

60. *Copyright Act 1968* (Cth) s 183(5) (Austl.).

61. *Thomas*, 37 IPR 207.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

on behalf of Thomas that Thomas was indeed the author of the design.⁶⁷ The Court further found that Tennant's evidence was "entirely improbable," owing in part to the obviousness that the Aboriginal flag was designed and spread from Adelaide, whereas Tennant claimed to have designed the flag in either Canberra or Sydney. The Court ultimately found that Tennant's claim appeared to be inconsistent.⁶⁸ Finally, the Court rejected the case of Brown. Brown himself was found to be an unreliable witness, as two doctors testified that Brown's excessive alcohol consumption had caused serious problems with Brown's memory beginning from the time before Brown claimed to have designed the flag.⁶⁹ Brown's testimony was bolstered by that of his estranged wife and a childhood friend. However, as with Tennant, Brown's evidence was found to be improbable, owing in part to the fact that Brown was a teenager at the time he claims to have designed the flag. The Court noted, among other reasons, that "it was unlikely that a 17 year old Aboriginal youth such as Mr Brown, would have had the interest and the motivation and concern to set about designing a flag for the Aboriginal people."⁷⁰ Having made these determinations, the Court concluded that Thomas was, indeed, the author of the design and therefore the owner of the copyright.⁷¹ This copyright interest will last for Thomas's life plus seventy years.⁷²

Having established his ownership of the copyright,⁷³ Thomas gained control of the right of reproduction of his design.⁷⁴ Thomas has since made significant use of that right, establishing exclusive licensing agreements with three companies: one for reproduction of flags, one for use of the design on objects, and one for use of the

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Copyright Act 1968* (Cth) s 33(2) (Austl.).

73. *Australian Flags*, *supra* note 12.

74. *Copyright Act 1968* s 31(1)(b)(i).

flag on clothing.⁷⁵ Some commentators estimate that the copyright and licensing agreements are worth approximately \$25 million.⁷⁶

From the time when Thomas established his copyright interest in the Aboriginal flag and until recently, Aboriginal groups didn't seem to take issue with the copyright status of the flag.⁷⁷ However, recently, Thomas granted a company called WAM Clothing the exclusive license to reproduce images of the flag on clothing in 2018.⁷⁸ WAM was the first company to actively protect their exclusive license, sending out cease-and-desist letters to companies that were producing clothing that bore images of the flag.⁷⁹ The companies that received such letters include a handful of Aboriginal-owned clothing companies and, strikingly, the Australian Football League.⁸⁰ WAM has justified these cease-and-desist-letters by framing their aggressive defense of this license in terms of protecting Thomas's interest in his intellectual property. Through a spokesperson, WAM has explained that "[u]ntil WAM Clothing took on the licence for clothing with Harold Thomas, Harold was not receiving recognition from the majority of parties both here and overseas, who were producing a huge amount of items of clothing bearing the Aboriginal flag[.]"⁸¹ WAM's actions since they acquired this license have caused activists, commentators, and social media users to begin questioning whether it is appropriate for a company such as WAM—or even Thomas himself—to hold a copyright in what has become a symbol

75. Isabella Higgins, *New License Owners of Aboriginal Flag Threaten Football Codes and Clothing Companies*, ABC NEWS (June 10, 2019, 8:43 PM), <https://www.abc.net.au/news/2019-06-11/new-licence-owners-of-aboriginal-flag-threaten-football-codes/11198002>.

76. Oliver Peterson, *Rights to Aboriginal Flag Could Be Worth \$25 Million*, 6PR NEWS (Aug. 20, 2020), <https://www.6pr.com.au/rights-to-aboriginal-flag-could-be-worth-25-million/>.

77. See Alexander, *supra* note 15 (noting that WAM clothing did not receive their license to reproduce the design on clothing until 2018 and that WAM is the company that is actively sending out cease-and-desist letters to Aboriginal companies that use the design). As a note, there was some issue taken with the Commonwealth's proclamation that made the flag an official flag of Australia. Thomas was one of the ardent dissenters to that course of federal action. He believed that the federal government claiming the flag was a "usurpation of something which properly belonged to the Aboriginal people . . ." *Thomas v Brown* (1997) 37 IPR 207 (Austl.).

78. Allam, *supra* note 47.

79. See *id.*

80. *Id.*

81. *Id.*

for such a large group of people,⁸² particularly a group of people who have been as disenfranchised as the Aboriginal people have been throughout Australia's sordid history.

II. STATE APPROACHES TO THE INTELLECTUAL PROPERTY OF INDIGENOUS PEOPLES

A. *The Problems of a Copyrighted Flag*

Among the organizations that found themselves in the sights of WAM was a small Aboriginal-owned company called Clothing the Gaps. Clothing the Gaps has been described as a "profit for purpose" business.⁸³ While not a traditional nonprofit organization, their profit is funneled into free health and well-being programs for Aboriginal people.⁸⁴ The company's commitment to Aboriginal health is enshrined in the company's name. "Clothing The Gaps is a play on the words 'Closing the Gap', which is an Australian Government health initiative to help close the life expectancy gap between Aboriginal people and non-Indigenous Australians."⁸⁵ Yet, despite Clothing the Gaps's laudable goals, they used a copyrighted design on clothing that they were selling, the Aboriginal flag. As such, WAM sent the company a cease-and-desist letter. This letter resulted in what has been described by some legal commentators as "justifiable resentment."⁸⁶ Sianna Catullo, the head of marketing for Clothing the Gaps has expressed her resentment in response to the copyright issue, stating, "We make our merchandise for the mob⁸⁷ . . . we make it for them so they can celebrate their identity and wear their culture with pride . . . We don't make our clothes to profit."⁸⁸

82. *See id.*

83. Perkins, *supra* note 46.

84. *Id.*

85. *About Us*, CLOTHING THE GAPS (last visited Oct. 24, 2021), <https://www.clothingthegaps.com.au/pages/meet-the-clothing-the-gap-team>.

86. Alexander, *supra* note 15.

87. "Mob" is a colloquial term referring to a group of people to which the speaker belongs. Jens Korff, *Glossary of Aboriginal Australian Terms*, CREATIVE SPIRITS (Apr. 3, 2021), <https://www.creativespirits.info/aboriginalculture/glossary-of-aboriginal-australian-terms>.

88. Allam, *supra* note 47.

This resentment is only deepened by WAM's status as a "non-Indigenous owned" business.⁸⁹ Catullo, along with many others, has questioned why a non-Aboriginal owned company would be interested in holding the license to the Aboriginal flag.⁹⁰ Catullo questioned the motives of WAM, stating, "I'm not sure what their connection to community is, but it's definitely not as strong as our connection, or that of the other Aboriginal businesses that are being hurt by [the copyright]."⁹¹ The intuitive answer to why WAM would want to hold the exclusive license to print the flag on clothing is profit. The flag is an internationally recognized symbol that holds deep meaning for hundreds of thousands of people across the globe.⁹² Clothing with the Aboriginal flag on it has a guaranteed market; it isn't a trend or fad that will fade. Yet, the fact that Catullo's response to WAM's exclusive license is predicated on questions of WAM's connection to the flag highlights the problem of a copyright existing and casting a pall over such an intensely personal symbol and a source of identity for a community as broad as the Aboriginal community. Recognizing this tension, WAM has tried to frame their protection of their license in terms of "promot[ing] the Aboriginal flag in a positive light."⁹³

This racially focused tension of Aboriginal-owned companies being blocked from using the flag by a non-Aboriginal owned company raises a slew of ethical and legal questions. It raises questions about whether the copyright of "such a powerful and well-loved symbol" should be enforced.⁹⁴ It raises questions of cultural appropriation.⁹⁵ It raises questions of identity and the

89. *Id.*

90. *Id.*; see also Perkins, *supra* note 46 (quoting the Aboriginal owner of Dreamtime Kullilla-Art on the topic of his belief that the Aboriginal flag should belong to the Aboriginal people).

91. Allam, *supra* note 47.

92. See *supra* Part I.

93. Allam, *supra* note 47.

94. Alexander, *supra* note 15.

95. A co-owner of WAM Clothing, Ben Wooster, also owns another company called Birubi Art. Allam, *supra* note 47. Birubi Art sold products such as digeridoos, boomerangs, and message stones, advertising the products as "genuine" and "aboriginal art." However, these products were made in Indonesia and thus could not be considered genuine aboriginal art. As such, an Australian Court held that Birubi had violated Australian Consumer Law for the misrepresentations Birubi made. *Court Finds that Birubi Art Misled Consumers Over Fake Indigenous Australian Art*, AUSTRALIAN COMPETITION & CONSUMERS COMM'N (Oct. 24, 2018), <https://www.accc.gov.au/media-release/court-finds-that-birubi->

expression thereof. However, easy as it may be to believe that Aboriginal people should have the right to use their flag, this mindset requires a person to make a number of tricky definitional judgments. What does it mean that Aboriginal people should have the right to use the flag? How does one define “Aboriginal”? Is the term racial? Cultural? Ethnic? At what point does a person become so removed from that definition of Aboriginal that they no longer have the right to claim that flag as their own? Do Aboriginal-owned businesses have the same right? What if the business is co-owned? What if the majority owner or owners are not Aboriginal? Ultimately, any lines that would be drawn to hand the right to use the flag only to Aboriginal people would require arbitrary lines to be drawn and would be untenable.⁹⁶ So, if Aboriginal people are to have the right to use the flag, then that must be through the wholesale invalidation of the copyright to the flag’s design.

Yet to strip the flag of its copyrighted status raises yet more questions. Would this invalidation of Thomas’s copyright equate to another governmental appropriation of Aboriginal property rights?⁹⁷ How does Australia toe the line between giving Aboriginal people, as a group, the ability to express their shared identity, without stripping one specific Aboriginal man of his intellectual property? This is the question posed by the Aboriginal flag. This is the question that will be hard fought in the coming years.

This Note takes the utilitarian stance that the flag, as a piece of Aboriginal cultural identity and a unificatory symbol, should be as generally available as a standard national flag, such as the Australian flag, the American flag, or the Union Jack. This goal can most likely be accomplished by one of three means, which will be explored later in this Note: broadening an understanding of the fair

art-misled-consumers-over-fake-indigenous-australian-art. Wooster, a non-aboriginal man, appears to have made a habit of profiting off the appropriation of Aboriginal culture.

96. See, e.g., RECONCILIATION AUSTRALIA, *Let’s Talk: Race Relations*, in STATE OF RECONCILIATION: DISCUSSION GUIDE 5, 5 (2016) (“The concept of ‘race’ was historically used to attempt to classify humankind according to apparently similar and distinct physical characteristics between groups of people. However, it is important to appreciate that, in actuality, ‘race’ is simply a socio-cultural construct with no proven biological underpinning. That is, it is an idea based on socially and culturally informed imaginings or assumptions, rather than being inherent in our genetics.”).

97. See Alexander, *supra* note 15.

dealing doctrine, governmental acquisition of the copyright,⁹⁸ or by warrant of the Governor-General. However, each of these options raise serious concerns about how Thomas's personal interest in the copyright will be affected. Thus, before exploring these three options, the history of Aboriginal intellectual property and the problem with stripping Thomas of his ownership must be addressed.

*B. Indigenous Intellectual Property and the Problem of Taking
Thomas's Copyright*

If the Aboriginal flag were to become widely available, it must necessarily mean that Thomas no longer would have the right to control the use of his design, effectively stripping Thomas of his copyright as he would have no power to prevent the use of his design by any party.⁹⁹ Thus, any solution that involves wide-scale availability of the flag essentially amounts to a taking of intellectual property from an Aboriginal man. This concern becomes all the more poignant when viewed through the lens of Australian history, in which Aboriginal people were frequently displaced and often stripped of their property, both real and intellectual. As far as real property is concerned, a comparison between a map of Aboriginal Australia and a current map of Australia will demonstrate that the entire continent has been usurped and colonized,¹⁰⁰ a process which continued well into the twentieth century.¹⁰¹

However, this is not an issue of Thomas being stripped of real property; instead, he would lose his intellectual property. Intellectual property of Indigenous people in Australia and across the world also has a long history of being co-opted and sold by

98. Kate O'Rourke, *A Tale of Two Flags: Who Owns the Right to Use?*, WORLD TRADEMARK REV. (Oct. 1, 2019), <https://www.worldtrademarkreview.com/brand-management/tale-two-flags-who-owns-right-use>.

99. See *Copyright Act 1968* (Cth) s 115(2) (Austl.).

100. Compare *Map of Aboriginal Australia*, AIATSIS, <https://aiatsis.gov.au/explore/map-indigenous-australia> (last visited Oct. 21, 2021) (visually representing the diversity of cultures existing on the continent prior to colonization), with *Australia*, WORLD ATLAS, <https://www.worldatlas.com/webimage/countrys/oceania/au.htm> (last visited Oct. 21, 2021) (visually representing only the seven states and territories established by English colonizers).

101. See *supra* notes 24–26 and accompanying text.

white colonizers.¹⁰² The taking of Aboriginal intellectual property does not function in the same way that the taking of real property functions. This is in part because intellectual property does not have the same tangibility as real property. Where real property has specific borders, intellectual property—and particularly Indigenous art—does not. It can be replicated dozens of times over without the artist ever finding out.¹⁰³ Of course, this is true of art designed by any artists, regardless of their status as Indigenous or non-Indigenous. However, the difference between these two types of artists is that there are large markets for fake Indigenous art.¹⁰⁴ The same is not necessarily true of non-Indigenous-created artworks. And this appropriation of Indigenous art comes at a high price for Indigenous communities. It is not just an appropriation of potential earnings, but also of the very culture of the community.¹⁰⁵

The appropriation of Indigenous designs in Australia most frequently takes the form of inauthentic souvenirs that are imported from overseas and are not produced by or with the permission of any Aboriginal person or community.¹⁰⁶ One issue is providing the consumer with an inauthentic product¹⁰⁷ that serves no cultural or historical purpose.¹⁰⁸ Additionally, beyond the issue of providing the consumer with an inauthentic product that serves no cultural or historical purpose, the Australian Competition & Consumers Commission has found that the production and sale of inauthentic Aboriginal art impacts “the welfare of Indigenous Australians,” and has thus made the prosecution of such conduct

102. See STANDING COMM. ON INDIGENOUS AFFS., H.R. REP. ON THE IMPACT OF INAUTHENTIC ART AND CRAFT IN THE STYLE OF FIRST NATIONS PEOPLES s 1.6, at 2 (2018) (hereinafter REPORT ON THE IMPACT).

103. See Francesca Fionda, *Fake Art Hurts Indigenous Artists as Appropriators Profit*, THE DISCOURSE (Nov. 30, 2018), <https://thedisourse.ca/urban-nation/fake-art-indigenous>. Fionda’s article has a Canadian skew, though one can see how the logic of her piece extends far beyond one single country. In her article, she recounts an anecdote of an indigenous Canadian artist named Maynard Johnny Jr. In this anecdote, Johnny spots one of his designs tattooed on a tourist. The steps that led from his creation of the design to it being tattooed on this tourist’s skin demonstrate that a design can be stolen without the artist ever being aware that their intellectual property had been stolen. *Id.*

104. See REPORT ON THE IMPACT, *supra* note 102, s 1.6, at 2.

105. *Id.* s 1.4, at 2.

106. *Id.* ss 2.2–2.3, at 5.

107. See *Court Finds That Birubi Art Misled Consumers Over Fake Indigenous Australian Art*, *supra* note 95.

108. *Introduction*, in REPORT ON THE IMPACT, *supra* note 102.

one of the Commission's enduring priorities.¹⁰⁹ Thus, the history of Aboriginal designs being stolen has historically caused harm to Australia's Aboriginal community.¹¹⁰

Given the history of colonial forces appropriating Aboriginal designs, one can assume with some level of certainty that Thomas would be resistant to any form of governmental intervention that would make the flag widely available.¹¹¹ Indeed, Thomas has been against governmental use and recognition of the Aboriginal flag, believing that the government's adoption of the flag was a "usurpation of something which properly belonged to the Aboriginal people and not to the Australian people generally."¹¹² He has also made statements in which he claims the right to license the design to whomever he pleases.¹¹³ He recognizes this right to be his "common law right and Aboriginal heritage right, as with many other Aboriginals, [to] choose who [he] like[s] to have a licence [sic] agreement to manufacture goods which have the Aboriginal flag on it."¹¹⁴ He apparently believes WAM is that entity.¹¹⁵ Despite the controversy of WAM being a company that is not Aboriginally owned but instead is co-owned by a man who has predatorily sold fake Aboriginal art,¹¹⁶ Thomas has stated that "[i]t's taken many years to find the appropriate Australian company that respects and honours the Aboriginal flag meaning and copyright and that is WAM Clothing."¹¹⁷ Based on Thomas's statements, it seems clear that he would be resistant to the federal government of Australia usurping his right to "choose who [he] likes[s] to have a licence [sic] agreement" with.¹¹⁸ Because of this stance, the government would likely have to act contrary to his wishes – which is contrary to the

109. *Compliance & Enforcement Policy & Priorities*, AUSTRALIAN COMPETITION & CONSUMERS COMM'N, <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities#enduring-priorities> (last visited Oct. 21, 2021).

110. The word "stolen" is one used by at least some indigenous artists. See Fionda, *supra* note 103 (describing Maynard Johnny Jr.'s design as "stolen").

111. See *supra* text accompanying note 77.

112. *Thomas v Brown* (1997) 37 IPR 207 (Austl.).

113. Allam, *supra* note 47.

114. *Id.*

115. *Id.*

116. AUSTRALIAN COMPETITION & CONSUMERS COMM'N, *supra* note 95.

117. Allam, *supra* note 47.

118. *Id.*

wishes of the Aboriginal copyright owner – if it is to make the flag widely available.

Framed in terms of the historic disenfranchisement of Aboriginal people, any means by which the Commonwealth makes the design widely available is the taking of Aboriginal intellectual property. Thus, each option presented below has the potential to become very problematic, given the historical context of Aboriginal erasure. However, governmental intervention is likely less problematic than holding the flag hostage from a group of people that rely on the flag as a symbol of their culture and identity.

III. POTENTIAL GOVERNMENT INTERVENTION

While Thomas will likely resist any governmental action, it seems that government action is the only likely means by which the flag can be freed for the Aboriginal community generally, which Thomas formerly proclaimed to be his goal for the flag. Thomas created the flag to be a symbol for Aboriginal “race and identity.”¹¹⁹ He claims to have created it for the “unification of our people,” ostensibly referring to the Aboriginal people.¹²⁰ Prior to establishing his authorship of the design, he saw the flag as “properly belong[ing] to the Aboriginal people.”¹²¹ However, he now argues that the people who are petitioning for the Aboriginal flag to be generally available¹²² should have come forward during the court case in which he established his ownership of the copyright in 1996.¹²³ This suggestion ignores the function of copyright law¹²⁴ as well as access to justice issues for many

119. Griffiths, *supra* note 28.

120. Central Australia Aboriginal Media Association, *Harold Thomas Discusses the Aboriginal Flag in this Exclusive 2019 Interview with CAAMA Radio*, YOUTUBE, at 2:12 (June 24, 2019), https://www.youtube.com/watch?v=vUpmbeT0Q5w&ab_channel=HANNACHannel [hereinafter CAAMA].

121. *Thomas v Brown* (1997) 37 IPR 207 (Austl.).

122. *Free the Aboriginal Flag Before Its 50th Anniversary Birthday*, CHANGE.ORG (Feb. 19, 2021, 4:00 PM AEDT), <https://www.change.org/p/australia-change-the-licencing-agreement-around-the-aboriginal-flag-pridenotprofit>. Started by one of the companies that was served a cease-and-desist letter by WAM, this online petition asks that “[v]iable channels for new licensing agreements, especially those for Aboriginal organisations and businesses, must be created.” As of the date this petition was last visited, 164,462 people had signed the petition.

123. CAAMA, *supra* note 120.

124. Copyright only subsists in an artistic work for the author of that work. *See Copyright Act 1968* (Cth) s 32(1) (Austl.). A work may have multiple authors, but still the copyright only subsists for the author or authors. *See id.* s 78.

Aboriginal people,¹²⁵ but more markedly, it implies that Thomas is no longer interested in uniting his people; rather, he is interested in protecting his copyright. As such, it seems unlikely that Thomas will consent to the wide-scale use of the flag by any groups of people, Indigenous or not. This is why the government may well have to step in if the flag is to be freed for the Aboriginal community. This Note will first examine the less preferred options: (1) parliamentary expansion of the fair dealing doctrine, and (2) Governor-General warranting the use of flag, before moving to the preferred method of a governmental acquisition of the flag.

A. Expanding the Fair Dealing Doctrine

The framework for Australia's copyright law includes a number of carve outs for fair dealing.¹²⁶ These carve outs include fair dealing for the purposes of: research or study,¹²⁷ criticism or review,¹²⁸ parody or satire,¹²⁹ reporting,¹³⁰ use in judicial proceedings,¹³¹ certain types of temporary reproductions,¹³² certain types of private use,¹³³ and a few other very narrow exceptions relating to chemicals and medicine.¹³⁴ Clearly, the reproduction of the flag on clothing—the primary battleground for the current copyright controversy¹³⁵—does not fit within any of the carve outs listed in Australia's Copyright Act. Selling a T-shirt with the flag is

125. THE L. SOC'Y OF W. AUSTL., BRIEFING PAPER: ACCESS TO JUSTICE ISSUES FACED BY ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN WESTERN AUSTRALIA 8 (2017) (“[T]he services available to Indigenous people have improved over the years. However, currently the services are not adequate in providing full access to justice.”).

126. See, e.g., *Copyright Act 1968* s 40(1) (defining “fair dealing” as an act that “does not constitute an infringement of the copyright in the [artistic] work”).

127. *Id.* s 40.

128. *Id.* s 41.

129. *Id.* s 41A.

130. *Id.* s 42.

131. *Id.* s 43.

132. *Id.* ss 43A–B.

133. *Id.* s 43C.

134. See, e.g., *id.* ss 44B, 44BA.

135. *Supra* Section II.A.

not research. It's likely not a cogent criticism.¹³⁶ It couldn't be called a parody or satire. And on and on. This same logic could be applied to any non-private reproduction of the flag.¹³⁷ If an Aboriginal person wanted to sew their own flag, there is no carve out.

However, given that the government has made other exceptions to copyright law – exceptions which no doubt abrogate, even to a small extent, an artist's right to control the exact ways in which their creation is reproduced – it is clear that the government maintains the right and ability to limit creators' statutory rights to their intellectual property.¹³⁸ This would imply that Parliament could amend the Copyright Act to make specific concessions for the use of the Aboriginal flag. This could take various forms, the most obvious of which would be to add a legislative carve out which declared any reproduction of an official flag of Australia¹³⁹ to be fair dealing. Parliament could argue that a national symbol should not be inaccessible behind a shield of copyright. This idea finds some level of legitimacy in the Paris Convention for the Protection of Industrial Property, which discourages the signing countries from copyrighting their State flags.¹⁴⁰ While Australia's Flags Act 1953 does not fully establish or declare the level of formality of a flag to

136. One could certainly make the argument that reproducing the flag on a shirt was a commentary on the reproducers belief that the flag should not be copyrighted. Of course, this argument should fail as its approval would essentially eviscerate copyright law, insofar as it opens the door for any copyrighted material to be reproduced as a commentary on the reproduced image's copyrighted status. But the policy argument aside, even the argument that one's reproduction was a sort of quasi-commentary, there would still be the statutory requirement of showing that the reproducer had made "sufficient acknowledgement of the work[.]" which still likely limits the ways in which one might use the image. *Copyright Act 1968* (Cth) s 41 (Austl.).

137. The statutory carve out for private use refers to certain types of print publications made for "private and domestic use[.]" or performances of "literary, dramatic or musical work[s]" at a person's private residence. *Id.* ss 43C, 46. Neither of these exceptions are applicable to the controversy at hand.

138. See AUSTRALIAN COPYRIGHT COUNCIL, FAIR DEALING: WHAT CAN I USE WITHOUT PERMISSION? 1 (2020), https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Fair_Dealing_What_Can_I_Use_Without_Permission.aspx (describing the doctrine of fair dealing as an "exception[] to copyright infringement").

139. Defined as any flag described in the Flags Act 1953 or subsequently appointed a flag of Australia pursuant to Flags Act 1953 s 5.

140. Paris Convention, *supra* note 6, at art. 6ter, ¶ 1(a) (establishing that members of the treaty "agree to refuse or to invalidate the registration" of State flags).

be accorded to a “flag of Australia,”¹⁴¹ like the Aboriginal flag,¹⁴² the plain language of that statute does seem to codify the Aboriginal flag as an official state symbol. Whether that make the Aboriginal flag a “State flag” is less obvious. Australia has signed on to the Paris Convention, which has been in force as to Australia since October 10, 1925.¹⁴³ As such, there is an argument that under the treaty, the Federal Court of Australia should not have declared Thomas to be the “the owner of the copyright subsisting in the [Aboriginal flag],”¹⁴⁴ as doing so directly contradicts the directive of the treaty “to refuse or to invalidate the registration, and to prohibit by appropriate measures” the trademarking—and by extension—the copyrighting of State flags.¹⁴⁵

While legislative expansion of the fair dealing doctrine would accord with international treaties, it is an imperfect solution. The major argument against the expansion of the fair dealing doctrine to include any use of State flags is that such a targeted expansion of the Thomas’s copyright of the Aboriginal flag would go against the Rule of Law principle that laws ought to be general and not targeted.¹⁴⁶ This principle is sometimes described as requiring that laws not be “directed toward a single named individual.”¹⁴⁷ Of

141. See *Flags Act supra* note 12, s 5.

142. *Flags Act Proclamation, supra* note 36.

143. WIPO-Administered Treaties: Contracting Parties > Paris Convention, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2 (last visited Oct. 21, 2021).

144. *Thomas v Brown* (1997) 37 IPR 207 (Austl.)

145. Paris Convention, *supra* note 6.

146. In what is now a classic on the subject, Professor Lon Fuller describes eight formal aspects of the Rule of Law, which lend a legitimacy of the law being promulgated: generality, promulgation, prospectivity, clarity, consistency, practicability, constancy, and congruence. See generally LON L. FULLER, *THE MORALITY OF LAW* 46–90 (1969).

147. *Id.* at 47. A common example of this principle enshrined in modern legal systems is the prohibition of Bills of Attainder. While Bills of Attainder are not specifically forbidden by the Australian Constitution, Australian courts do seem to follow this principle. Compare U.S. CONST. art. I, § 9, cl. 3, with *Australian Constitution*. For example, this principle seems to underly the Australian High Court case of *Polyukhovich v Commonwealth*. In that case, the High Court held that it was be unconstitutional for the legislature to pass statutes targeted at individuals as such legislation would amount to the exercise of judicial rather than legislative power. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 (Austl.). And while *Polyukhovich* was a criminal case, the philosophical underpinnings can be analogized to the case at hand. Any legislation that granted third parties the right to use Thomas’s copyright would be tantamount to a judgment that is inconsistent with the Federal Court’s ruling in *Thomas v Brown*.

course, Parliament could craft an amendment to the Flags Act 1953 that was devoid of any reference to Harold Thomas or the Aboriginal flag that he created. In such an instance, Parliament could amend the fair dealing doctrine by allowing reproduction to, for example, an official flag of Australia. Such legislation could then cite the Flags Act, in defining what counts as an official flag of Australia. This approach would give the law the facial appearance of generality, in that such a statute would seemingly apply equally to all flags of the State. However, in practice, any such law would and could only be directed at Thomas and those to whom he grants a license to reproduce the flag. This is because the Aboriginal flag is the only flag of Australia that is protected by a privately held copyright; the Australian flag, the Australian Red Ensign, and Defence Ensigns all exist without copyright protection by any party.¹⁴⁸ Thus, any expansion of the fair dealing doctrine crafted specifically to include State flags would only affect the Aboriginal flag and thus would only affect Thomas and his licensees.

Given Australia's history of Aboriginal erasure,¹⁴⁹ a targeted attempt to erase the copyright interest of an Aboriginal man seems particularly egregious, particularly where that interest is estimated to be as valuable as is the case in this particular scenario.¹⁵⁰ Given that historical context and the present-day context of increased visibility and concern for disenfranchised racial groups on a global scale,¹⁵¹ this method of freeing the Aboriginal flag for all Aboriginal

148. *Australian Flags*, *supra* note 12. The Torres Strait Island Regional Council holds a copyright for the Torres Strait Islander Flag. *Id.* However, the Council, sometimes referred to as the Torres Strait Island Regional Authority, is an autonomous governing body that is elected. See *About Council*, TORRES STRAIT ISLAND REG'L COUNCIL, <http://www.tsirc.qld.gov.au/your-council/who-we-are/about-council> (last visited Oct. 24, 2021); *Torres Strait Island Regional Council By-election*, ELECTORAL COMM'N QUEENSL., <https://www.ecq.qld.gov.au/elections/election-events/2020-election-events2/torres-strait-island-by-election> (last visited Oct. 24, 2021).

149. See *supra* note 24 and accompanying text.

150. See *supra* note 76 and accompanying text.

151. See, e.g., Helen Regan, Angus Watson & Carly Walsh, *In Australia, Protestors Demand Justice Over Minority Deaths in Custody*, CNN (June 11, 2020, 3:08 AM), <https://www.cnn.com/2020/06/06/australia/australia-black-lives-matter-protests-intl-hnk/index.html> (highlighting support of the Black Lives Matter movement in Australia); Michael Baggs, *Black Lives Matter in the UK: "We're Still Not Being Heard"*, BBC (Aug. 25, 2020), <https://www.bbc.com/news/newsbeat-53812576> (highlighting support of the Black Lives Matter movement in the UK); Peggy Fletcher Stack, *Black Lives Matter, LDS Leader Dallin Oaks Tells BYU Audience, and Is a Cause All Should Support*, SALT LAKE TRIB. (Oct. 27,

people seems unwise. Freeing the flag for the masses should not come at the cost of a colonial government simply diverting the benefit of Thomas's creation away from him with absolutely no compensation or say in the matter. So, while Parliamentary expansion of the fair dealing doctrine is a plausible option, this is not the approach recommended by this Note.

*B. Australia's Governor-General Warranting Reproduction of the
Aboriginal Flag Under Australia's Flags Act 1953*

A second, statutorily based solution to the Aboriginal flag problem already exists within the current framework. However, instead of requiring movement of Parliament, this solution requires a somewhat novel interpretation of the word "use." The Flags Act 1953 grants the Governor-General the authority to authorize the "use [of] a flag . . . referred to in, or appointed under, [the Flags] Act," in addition to the authority to appoint a new flag of Australia.¹⁵² A very broad reading of the word "use" could feasibly allow the Governor-General to authorize any Aboriginal group or person to use the design on clothing, merchandise, or, frankly, for any purpose. After all, the verb "use" can be used in multitudinous contexts.¹⁵³ One can use a screwdriver to build a bookshelf, or one can use a screwdriver to open a can of beans.¹⁵⁴ One can use drugs—that is to say they can consume the drugs to get high—or they can use drugs as a bogeyman—à la Ronald Reagan's war on drugs. If the verb has that many different uses, even when attached to the same noun, it is plausible to interpret the statute to cover the reproduction of a design in various contexts. The interpretation would ask how one "use[s]" a flag.¹⁵⁵ Of course, flying a flag is one use. But so too is printing the flag on a T-shirt or setting it as a

2020, 3:55 PM), <https://www.sltrib.com/religion/2020/10/27/black-lives-matter-lds/> (highlighting support for racial justice at an American university by the leader of a global religion).

152. *Flags Act, supra* note 12, at s 6.

153. The Oxford English Dictionary has twenty-two definitions of the word, not counting sub-definitions, phrasal verbs, or phrases. The most applicable definition for the scope of this Note is "[t]o put (an instrument, implement, etc.) to practical use; *esp.* to make use of (a device designed for the purpose) in accomplishing a task." *Use*, OXFORD ENGLISH DICTIONARY (3d ed. 2011).

154. The second example is one that the author of this Note can personally testify is possible after having moved to an unfamiliar city for a summer externship, only to realize he forgot to pack his can opener.

155. *Flags Act, supra* note 12, at s 6.

banner across the home screen of a website. In the latter of the two instances, one might argue that the flag is being used just as much as if it were being flown. After all, how is the flying of a flag any more its “use” than a display of the flag in other circumstances?

With the aforementioned questions in mind, this Note still rejects this solution to the Aboriginal flag problem. This is due to the fact that despite the sheer breadth of meaning carried by the word “use,” this interpretation of the statute stretches that breadth past the point of credibility based on the following analogy. The word “use” should not cover the production of the thing that is said to be used, or in this case, it should not cover the re-production of a design. One is not “using” a chair when they are building it. Instead that person is “using” the chair when they are sitting in it, throwing it through a plate-glass window, or burning it for heat. It takes little creativity to conjure other scenarios in which the production of an item cannot be normally understood to refer to the use of the item.¹⁵⁶ And considering the primary controversy with the flag has to do with re-production of the flag, reliance on an idiosyncratic theory of statutory interpretation may not be the best solution to the Aboriginal flag problem.

However, the Governor-General David Hurley (or any subsequent Governor-General) may not need to argue that he is authorizing the production of the flag, but instead that he is authorizing the “use” of the Aboriginal flag design. After all, the Flags Act 1953 grants him the authority to authorize any party “to use a flag . . . referred to in, or appointed under, this Act, either *without defacement* or *defaced* in the manner specified in the warrant.”¹⁵⁷ Given that the statute expressly contemplates the design and its possible defacement – which could be read to mean alterations to the design – the Governor-General could argue that the statute authorizes the use of the design rather than only a tangible, cloth flag. While the text of the statute does lend some credence to this argument, it is wholly untested in the courts – where it would likely end up, considering Harold Thomas’s aversion to the government co-opting his design.

156. While this Note does not warrant an in-depth corpus linguistics analysis of the word “use” and its relation to an item’s production, such a study could provide further insight on whether this argument has *any* merit for purposes of freeing the Aboriginal flag.

157. *Flags Act*, *supra* note 12, at s 6 (emphasis added).

Given the utter lack of precedent, it is impossible to predict whether the courts would accept the somewhat idiosyncratic interpretation of the Flags Act 1953 set forth above. Still, this method of freeing the flag is more appealing than a legislative broadening of the fair dealing doctrine for a number of reasons. This law does not suffer from the problems of being drafted against the individual.¹⁵⁸ Instead this solution involves an existing statute. The Governor-General has had this ability for more than half a century, lending this solution the internal morality of “[c]onstancy of the [l]aw through [t]ime.”¹⁵⁹ However, like the fair dealing solution, this solution suffers from the problem of stripping an Aboriginal man of his rights. Though, with this solution, the dissolution of Thomas’s rights could be more limited, as the Governor-General could specify which specific groups or people he was authorizing to use the flag. He could thus limit this authorization only to Aboriginal people, groups, organizations, or companies. This would technically leave some life in the copyright that could be claimed by Thomas and his licensees, but this course of action would still functionally strip Thomas of his copyright.

Because this solution is built on tenuous statutory interpretation and strips Thomas of his copyright interest, it is not recommended by this Note.

C. Governmental Acquisition of the Copyright

Having rejected the first two potential routes to freeing the Aboriginal flag, this Note takes the position that the Australian federal government should purchase the copyright to the Aboriginal flag. This solution has been suggested by a former head of the Australian Copyright Council, Fiona Phillips, who suggested that “the Australian federal government could step in to settle the current dispute over who can reproduce the Aboriginal flag, by buying out all the rights to license the image.”¹⁶⁰ She believes that the “onus [is] on the federal government to find a solution” to the Aboriginal flag

158. *Supra* Section III.A.

159. FULLER, *supra* note 146, at 79.

160. Lorena Allam, *Government Could Buy Aboriginal Flag Copyright to Settle Dispute, Lawyer Says*, THE GUARDIAN (June 12, 2019, 1:20 PM), <https://www.theguardian.com/australia-news/2019/jun/12/government-could-buy-aboriginal-flag-copyright-to-settle-dispute-lawyer-says>.

problem.¹⁶¹ Because, in her words, “[w]hen you’re dealing with a national symbol like that there are broader issues at play.”¹⁶² In this instance, those broader issues include Aboriginal identity¹⁶³ and national reconciliation between Aboriginal and White Australia.¹⁶⁴

Governmental acquisition of the rights to the Aboriginal flag would likely be a step in the direction of reconciliation, because it both compensates Thomas, the individual, and frees the flag for the group. The Council for Aboriginal Reconciliation, renamed Reconciliation Australia,¹⁶⁵ has outlined five dimensions of reconciliation necessary for Australia’s political and social climate. These dimensions are improved race relations, equality and equity, institutional integrity, unity, and historical acceptance.¹⁶⁶ As things currently stand with the copyright of the Aboriginal flag being privately held and enforced, we are seeing the scenario described by Professor Isabella Alexander, who wrote, “enforcing copyright of such a powerful and well-loved symbol against those seeking to use it to express their cultural identity, solidarity or sympathy, or for charitable causes, gives rise to justifiable resentment.”¹⁶⁷ This resentment is only enflamed due to the fact that WAM, as a white-owned business, is doing the bulk of the copyright enforcement.¹⁶⁸ This resentment speaks to at least two of the necessary dimensions of national reconciliation: race relations and unity.

First, Reconciliation Australia describes race relations, which are “[a]t the heart of reconciliation,” as requiring the country to develop strong relationships of trust and respect, free of racism.¹⁶⁹ Aboriginal people who have been blocked from using the flag that has become a symbol for their identity have expressed a frustration

161. *Id.*

162. *Id.*

163. *See, e.g.,* Weinstein, *supra* note 3; Allam, *supra* note 47.

164. *See* Melissa Castan & Kerry Arabena, *Indigenous Reconciliation in Australia: Still a Bridge Too Far?*, THE CONVERSATION (May 18, 2016, 3:44 PM), <https://theconversation.com/indigenous-reconciliation-in-australia-still-a-bridge-too-far-54336> (discussing the need for reconciliation between Aboriginal and White Australia with anecdotes about governmental steps towards reconciliation).

165. *Id.*

166. *See* RECONCILIATION AUSTL., *supra* note 96.

167. *See* Alexander, *supra* note 15.

168. Allam, *supra* note 47.

169. RECONCILIATION AUSTL., *supra* note 96, at 5.

that points to a lack of understanding and feelings of distrust for WAM and the non-Aboriginal gatekeepers of the Aboriginal flag.¹⁷⁰ Thus, the enforcement of the Aboriginal flag intrudes on national reconciliation by way of damaging race relations.

Second, Reconciliation Australia describes the dimension of unity as requiring White Australia to “[a]ctively listen[] to Aboriginal and Torres Strait Islander peoples.”¹⁷¹ The Council describes unity as a form of multiculturalism in which the dominant colonial culture no longer overshadows the Aboriginal and Torres Strait Islander cultures.¹⁷² If Aboriginal people feel that they cannot express their identity because a White company—which is inextricably tied to the dominant “colonial” culture identified by Reconciliation Australia—then enforcement of the copyright will also damage the unity dimension of national reconciliation.

Given the harm that enforcement of the copyright of a “national symbol” causes to the goal of national reconciliation, this Note agrees with Fiona Phillips that the Australian federal government should “seek to compulsorily acquire copyright from Mr Thomas on public policy grounds.”¹⁷³ And the best way for the government to do that is by purchasing those rights. Such a solution would not require any expansion of a legal doctrine¹⁷⁴ or risky statutory interpretation.¹⁷⁵ Still, this solution would not be without its potential downsides. First, if Thomas is as against the idea of the government co-opting his design as he claimed to be in the mid-nineties, he may be resistant to selling his rights to the government.¹⁷⁶ This first issue may well bleed into the second, which is that acquisition of these rights would be expensive, with estimates that the copyright in the flag is worth around \$25 million.¹⁷⁷ However, these issues are not as drastic as

170. Allam, *supra* note 47 (“[Sianna] Catullo said she could not understand why a non-Indigenous owned business would want to license the Aboriginal flag.”).

171. RECONCILIATION AUSTRALIA, *supra* note 96, at 30.

172. *Id.*

173. Allam, *supra* note 160.

174. *Supra* Section III.A.

175. *Supra* Section III.B.

176. *Thomas v Brown* (1997) 37 IPR 207 (Austl.) (“Mr Thomas, along with other members of the Aboriginal community, bitterly resented the flag being proclaimed in this way. In their view, the proclamation represented a usurpation of something which properly belonged to the Aboriginal people and not to the Australian people generally.”).

177. Peterson, *supra* note 76.

the issues with either an expansion of the fair dealings doctrine or with the Governor-General authorizing widespread Aboriginal use of the flag.

While Thomas's aversion to governmental interference with his design and the cost of the flag are real concerns, they should not foreclose the possibility of the government acquiring the copyright to the flag. Despite Thomas's resentment for the government proclaiming his flag as a State flag,¹⁷⁸ he has also more frequently and more recently asserted that the flag belongs to the Aboriginal community.¹⁷⁹ As things now stand, giving license to a company – any company, not even just the non-Aboriginal owned WAM – will necessarily prevent the Aboriginal community at large from having full access to the flag that apparently belongs to their community, as any company would have every incentive to increase its profits by enforcing the copyright. So, while “[a]sking the government to intervene in this way could be seen as yet another appropriation of Aboriginal property rights – in this case, the rights of an artist to maintain ownership of his work[,]”¹⁸⁰ at least the government wouldn't be intervening in such a way as to deprive Thomas of the financial benefit associated with the design. Instead, Thomas would be receiving an extremely large payday, one that may be worth \$25 million or more, which is a hefty sum, but which ultimately is not too steep a price for reconciliation.

While \$25 million is no insignificant amount, it represents only the barest fraction of a percentage of Australia's GDP. Additionally, the Australian federal government typically operates efficiently enough to allot surplus amounts in its yearly budget.¹⁸¹ This has been the trend for most of the last decade.¹⁸² In fact, the 2020–21 budget forecasted a surplus of \$6.1 billion.¹⁸³ While this forecast may prove incorrect, given the COVID-19 pandemic that has ravaged people across the world,¹⁸⁴ it demonstrates that \$25 million

178. *Thomas*, 37 IPR 207.

179. *Id.*; Allam, *supra* note 160 (quoting Thomas as stating that the “Aboriginal flag is doing its job as it was intended to do, to bring unity and pride to all Aboriginals”).

180. Alexander, *supra* note 15.

181. COMMONWEALTH OF AUSTRALIA, BUDGET 2018–19: BUDGET OVERVIEW 4 (2018).

182. *Id.*

183. COMMONWEALTH OF AUSTRALIA, BUDGET 2020–21: ECONOMIC RECOVERY PLAN FOR AUSTRALIA 6 (2020).

184. *Id.*

is well within the means of the federal government to spend. Assuming that the government paid only \$25 million, and Thomas didn't negotiate for more due to his distaste for the Australian government's use of his design, that amount would only total 0.4% of what the government expected to be its surplus for the year.

Even if the Commonwealth were to purchase the rights to the flag for \$50 million, double the estimated value of the copyright, this would still be less than 1% of their anticipated surplus. In doing so, the Commonwealth would also take steps towards reconciliation and providing a disenfranchised group with access to this deeply beloved symbol of their identity, a symbol that the group could use for personal reasons, or that members of the group can use to financially support themselves.¹⁸⁵

While some may disagree that providing free access to a copyrighted symbol is worth tens of millions of dollars, it is important to remember that this is a symbol that has come to represent the identity of a historically disenfranchised group.¹⁸⁶ For that reason, this Note concludes that the steep price is one that the government should be happy to give back to a community that it has consistently taken land,¹⁸⁷ culture,¹⁸⁸ and traditional designs from.¹⁸⁹

CONCLUSION

Australia's history of colonialism has, for centuries, taken aim at the Aboriginal community. This has taken the form of genocide, displacement, and forced assimilation, all tactics that Australia's Aboriginal community resisted. However, it wasn't until the seventies that the Aboriginal community had a banner to unite beneath; that banner is the Aboriginal flag, a flag that is steeped in important historical context. It has become a symbol that has

185. That Aboriginal people could sell designs that include the flag also speaks to the reconciliation dimension of equality and equity as a white Australian would not be prevented from designing T-shirts with the Australian flag. RECONCILIATION AUSTL., *supra* note 96, at 15 ("Enabling equal opportunities for Aboriginal and Torres Strait Islander peoples to fully participate in the freedoms of not only Australia's national community but also of the international community, is further governed by the United Nations' Universal Declaration of Human Rights.").

186. *Supra* Section I.A.

187. Dow & Gardiner-Garden, *supra* note 25.

188. *Id.* (referencing the federal policy of assimilation).

189. *Compliance & Enforcement Policy & Priorities*, *supra* note 109.

helped define the identities of countless members of the Aboriginal community. As such, the community should have full access to this historical symbol.

As things stand, the community is being blocked from full use of the symbol, as the Aboriginal flag is copyrighted by Harold Thomas. Given this context, the Australian government should step in and free the flag for full use by the community that the flag purports to represent. While the government has a few options, including an expansion of Australia's fair dealing doctrine or authorization by the Governor-General for use of the flag, the solution which this Note recommends is a governmental acquisition of the copyright. This option seems to strike the best balance between respecting the rights of the individual while also providing the group with full access to a piece of their cultural identity.

Such action by the Australian government would not only serve the Aboriginal communities over which that government rules but could potentially provide important international precedent for how various colonized countries can seek reconciliation with those countries' various native peoples. The problem of white appropriation of Indigenous intellectual property is far from an exclusively Australian problem.¹⁹⁰ Of course, most of these nations—America, Canada, South Africa, etc.—do not have a national symbol that is hidden behind a copyright. However, in watching how Australia moves forward with this pressing and delicate national debate, perhaps other nations can learn how to negotiate with their native communities in an attempt to promote reconciliation and native rights.

190. Fionda, *supra* note 103.