

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

Jake Phillips[†]

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

I. INTRODUCTION

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

[†] Juris doctor expected in 2010, University of Washington School of Law. The author would like to thank Professor Robert Anderson and the editors of the *Pacific Rim Law & Policy Journal* for their tremendous guidance and assistance. Any errors or omissions are the author's alone.

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

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

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

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

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