

## **The provenance and hallmarks of the “authentic” commodities: intellectual property, counterfeit product and Aboriginal art**

This paper compares the legal treatment of counterfeiting in the Aboriginal art market to that of “ordinary” counterfeit product. In both cases copyright and trade mark law seeks to regulate the orderly consumption of the commodity and to maximise asset value by restraining the unauthorized circulation of products. In both cases to demarcate legal rights and determine the level of protection to be accorded to the asset, the law must first determine the provenance and hallmarks of the “authentic” commodity. However despite strong expressions of concern for stamping out piracy in both cases, the legal treatment of the Aboriginal commodity remains markedly different to that of the ordinary case.

In response to concerns for global piracy, recent Australian reforms have considerably facilitated the power of the purported multinational owner to enforce their claims of exclusive rights. In copyright there are new presumptions of ownership<sup>1</sup>, a system of “on-the-spot” fines for strict liability offences to be imposed by police<sup>2</sup>. In trade mark law courts have allowed multinational-trained persons to give independent “non-expert” opinion evidence about the authenticity of alleged counterfeit product.<sup>3</sup> It appears that contemporary legal practices facilitate commodification in the global marketplace by abandoning the rule of law, at least so far as it relates to assessing multinational intellectual property claims.

In a recent inquiry into the Aboriginal arts sector an Australian Senate Committee recommended “that, as a matter of priority, the ACCC be funded to increase its scrutiny of the Indigenous art industry, … with a goal of increasing successful prosecutions of illegal practices in the industry.”<sup>4</sup> The illegal practices identified include fraud, forgery and counterfeiting. It is further recommended “that the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights, (and) that the legislation be drafted to ensure prosecutions of breaches will have a realistic chance of success, and that the Australian Customs Service be given an appropriate role in assisting the protection of these rights in relation to imported and exported goods.”<sup>5</sup> However rather than considering Aboriginal owners are entitled to the same or similar protection as that granted to the multinational owner, *sui generis* legislation for Indigenous Cultural and Intellectual Property (ICIP) is recommended.

Whilst facilitating further commodification of Aboriginal culture is not necessarily a desirable goal, I want to explore the logic of pursuing a reform agenda that requires a more precise definition of indigenous property rights at

---

<sup>1</sup> s124 Copyright Act 1968 (Cth).

<sup>2</sup> s248SA Copyright Act 1968 (Cth).

<sup>3</sup> *Nokia Corporation v Truong* [2005] FCA 1141.

<sup>4</sup> Key Recommendation 15. Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art - Securing the Future Australia’s Indigenous visual arts and craft sector*, (Commonwealth of Australia, 2007).

<sup>5</sup> Other Recommendation 25. Ibid.

a time when the multinational owner is permitted to evade any such comparative legal requirement. This, coupled with the challenge of legislatively defining “authentic” Aboriginal art with the degree of clarity that it would permit enforcement by border security, seems to set the bar peculiarly high for Aboriginal intellectual property claims. I would also like to reflect on the political implications of using the downsider status of Aboriginal Australia to bolster the public appeal of an anti-piracy, pro-policing, legal agenda, and the peculiarity of a new criminality being advanced under the auspices of supporting indigenous “cultural reinvigoration and communication within, between and beyond Indigenous communities” and “economic growth amidst poverty and economic disadvantage”.<sup>6</sup>

---

<sup>6</sup> Chapter 1. Introduction para 1.1.