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Art law and policy in Australia and the appropriation of Aboriginal and Torres Strait Islander art styles

Marie Hadley and Clara Klemski*

In 2018, British artist Damien Hirst was accused of cultural appropriation of Aboriginal art from Alice Springs, Australia, for his series of 24 abstract expressionist paintings known as 'The Veil Paintings'. This article uses the contestation surrounding The Veil Paintings to animate a discussion of the legal status of 'style appropriation' — that is, the appropriation of Aboriginal and Torres Strait Islander art styles, designs and motifs — under customary law, copyright law, cultural heritage laws and consumer law, as well as recent art policy and law reform initiatives. While there is momentum in favour of greater regulation of intercultural engagements with Aboriginal and Torres Strait Islander art, particularly following recognition of the cultural and economic harms of fake art and the push for intangible heritage protection, legal protections against style appropriation remain limited in scope under the Australian legal system.

I Introduction

On 1 March 2018, well-known British commercial artist Damien Hirst opened an exhibition of 24 abstract paintings known as *The Veil Paintings* at the Gagosian Gallery in Los Angeles, United States. The paintings are a vibrant mix of layered brushstrokes in pink, yellow, orange and daubs of impasto, highlighted with dabs of blue and green.[1] Sold for prices between $500,000–$1.7 million,[2] Hirst has stated that the paintings are inspired by the pointillism of French post-impressionists Georges Seurat and Pierre Bonnard.[3] Nevertheless, 250 kms north-east of Alice Springs, Australia at the edge of the Utopia cattle station in Anmatyerre country,[4] they were received as the cultural appropriation of the expressive, multilayered painting style of Utopia community artists Polly Ngale (c 1940–) and Emily Kame Kngwarreye (1910–96). Ngale is described

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[1] A video of Hirst creating *The Veil Paintings* can be viewed at Gagosian, 'Damien Hirst: Veil Paintings' (YouTube, 9 July 2020) <https://www.youtube.com/watch?v=xElPQdmmon0>.

[2] The paintings grossed approximately USD $18 million.

[3] See Michaela Boland and Alison Branley, 'Damien Hirst's Latest Artworks "Done Exactly Like my People's Story", Indigenous Artist Claims', *ABC News* (online, 29 March 2018) <https://www.abc.net.au/news/2018-03-29/indigenous-artists-claim-damien-hirst-paintings-similar-artworks/9592578>.

[4] The 1,800 square kms that the Utopia region occupies are broken into a number of ancestral groups including the Anmatyerre, Alyawarra and Northern Arrernte. Anmatyerre country extends across the desert centred on Utopia, to the west of Utopia, and through Ti Tree Station to the north.

as 'one of the most accomplished painters'[5] from the community and Kngwarreye is, arguably, Australia's most successful Indigenous artist.[6] Hirst, however, was purported to be 'unaware' of Utopia art.[7] Those critical of his actions insist that Hirst has a 'moral obligation' to properly acknowledge the Aboriginal art influences that they see as implicit in his work.[8]

This article uses the Hirst example as a stepping-off point to explore the legal status of style appropriation — that is, conduct involving a person imitating or inspiring themselves in another culture's art styles when creating their own artworks or art and craft objects. 'Style appropriation' is a sub-type of 'cultural appropriation', which occurs when a non-authorised cultural outsider (typically from the dominant culture) takes intangible cultural property belonging to another culture (typically an Indigenous, marginalised or vulnerable culture). The appropriation of a 'style' refers to an individual adopting (in the sense of copying, exploiting or seeking inspiration from) the functional aspects of a work — such as its colours, techniques, and methods — developed by members of another culture.[9] All of these actions can result in the creation of an artwork that either directly or indirectly appropriates Indigenous Cultural and Intellectual Property ('ICIP')[10] or results in the creation of a work that has an Aboriginal and Torres Strait Islander 'look and feel'. The latter is referred to in the art industry as 'fake art'. In this article, we use the term 'style appropriation' to capture a broad range of conduct including seeking inspiration from Aboriginal artworks, the mimicking of art styles, designs, patterns or the signature styles of specific artists or communities, creating fake art, and recreating or rearranging elements of existing artworks.

In contrast to philosophers such as James Young who argue that the style appropriation of dot painting is an example of illegitimate cultural overreach, we are not concerned with arguments against the moral worth of claims to own a 'style'.[11] Our approach is to take contemporary style appropriation claims like the one made of Hirst's *The Veil Paintings* at face value and centre the perspectives of those who assert cultural appropriation and are affected by it. We are mindful of the problems in doing so. All claims of cultural appropriation are likely to be complicated in practice by the artificial nature of drawing boundaries around culture and its membership and

[5] 'Polly Ngale Paintings', *Utopia Lane Gallery* (Web Page) <https://www.utopialaneart.com.au/collections/polly-ngale>.

[6] Kngwarreye's paintings have been exhibited internationally and commanded high prices. Eg, her painting, *Earth's Creation 1*, set a record when it was resold for AUD2.1 million in 2017.

[7] As reported in Calla Wahlquist, '"Uncanny Similarity": New Damien Hirst Works in Spot of Bother in Australia', *The Guardian* (online, 29 March 2018) <https://www.theguardian.com/artanddesign/2018/mar/29/uncanny-similarity-new-damien-hirst-works-in-spot-of-bother-in-australia>.

[8] See eg Bundjalung artist Bronwyn Bancroft, quoted in Boland and Branley (n 3).

[9] See the definitions of style appropriation in James Young, 'Cultural Appropriation and Arts Management' (September 2019) *Arts Management Quarterly* 12, 13 ('Cultural Appropriation and Arts Management'); James Young, *Cultural Appropriation and the Arts* (Wiley-Blackwell, 2010) 6.

[10] While the scope of Indigenous Cultural and Intellectual Property ('ICIP') is 'constantly evolving', it is generally defined to include intangible and tangible aspects of cultural heritage from cultural property to cultural sites, languages and practices, including those that pertain to art: Terri Janke and Co, *Indigenous Knowledge: Issues for Protection and Management* (Discussion Paper, 2018) 13 <https://www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf>.

[11] Young, 'Cultural Appropriation and Arts Management' (n 9) 15. Young bases this on the view that 'a style like this is not ownable' as '[d]ot paintings have been independently produced in several cultural contexts': at 15.

properties.[12] Culture is an organic, living thing that resists reduction to a definitive list of traits, features or qualities and is often mixed and shared.[13] Yet, fixed conceptions of culture may be leveraged in the service of performative identity claims and political goals.[14] Even where cultural property has a relatively stable quality, culture and its borderlands are marked by competing entitlements from outsiders and internal contestation. This makes claims of cultural appropriation fundamentally unstable property claims, even when senior or prominent community members might regard the perceived violation as straightforward.[15] Nevertheless, while we are cognisant of the slipperiness of claims (and the implications this can have for legal standards of proof, let alone for intracommunity disputes) we have chosen to simplify this complex field of interaction for strategic reasons. Allegations of cultural appropriation can present as (and be received as) a distinct demand upon the Western legal system. Such allegations have been consistently associated with law reform discourse since at least the 1990s — initially in the area of copyright law, and with recent emphasis in intangible cultural heritage law and consumer law. Some controversies have also been framed as a violation of Aboriginal and Torres Strait Islander customary law. Our decision to apply a legal lens to allegations of style appropriation is consistent with the possessive language deployed in claims,[16] and timely given the recent concern with the numbers of works styled on Indigenous aesthetics and themes[17] and legal and policy attention on fake art.

This article responds to two key questions: (1) To what extent are art styles, patterns and designs, like those prevalent in the Utopia community, associated with customary rights and obligations and/or linked to customary law by those who object to cultural appropriation?; and (2) To what extent are such art styles, patterns and designs protected under Australia's copyright law, cultural heritage law and consumer law? We aim to identify the gaps that might exist between the former and the latter in order to better understand the potential benefits and limitations of sector-led and other art law and policy options that are put forward to address style appropriation.

The article proceeds in two main sections. Section II, 'Appropriation as a cultural incursion', outlines the cultural appropriation claim against Hirst and considers the regulation of art through

[12] Marie Hadley, 'The Politics of Cultural Appropriation Claims and Law Reform' (PhD Dissertation, August 2019) 6–7 ('The Politics of Cultural Appropriation Claims and Law Reform').

[13] See eg James Clifford, 'Introduction: Partial Truths' in James Clifford and George E Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, 1986) 1, 19; Renato Rosaldo, 'Ideology, Place, and People Without Culture' (1988) 3(1) *Cultural Anthropology* 77, 87; Jonathan Friedman, *Cultural Identity and Global Process* (Sage, 1994) 73–5.

[14] See generally Hadley, 'The Politics of Cultural Appropriation Claims and Law Reform' (n 12).

[15] See eg 'given the dynamism of culture in the face of essentialised cultural constructs relied on in claims, the "truth" at the heart of a claim is unstable, defying empirical testing': ibid 58. Weatherall also identifies this dynamic as relevant to group proprietary rights in traditional designs: see Kimberlee Weatherall, 'Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs' (2001) 64(2) *Modern Law Review* 215, 231.

[16] On cultural appropriation claims as an unmet legal need, see generally Marie Hadley, 'Whitmill v Warner Bros and the Visibility of Cultural Appropriation Claims in Copyright Law' (2020) 42(4) *European Intellectual Property Review* 223, 223–9.

[17] See Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2016) 8(27) *Indigenous Law Bulletin* 17, 17 ('Ensuring Ethical Collaborations in Indigenous Arts and Records Management').

traditional knowledge ('TK')[18] in Aboriginal and Torres Strait Islander communities. We identify that, in some instances, style appropriation is perceived to violate customary law. Section III, 'Appropriation as a concern of Australian law', examines how style appropriation is regulated under three legal regimes — copyright law, cultural heritage laws and consumer law — in the absence of a sui generis law that specifically protects ICIP. After exploring the limitations of current protections, we scope recent sector-led initiatives for reform. We argue that although existing regimes render unlawful some dealings with Aboriginal art, much style appropriation continues unchecked. The article concludes that despite decades of demands for reform from within the art sector, the Australian legal framework remains complicit in style appropriation, affecting the capacity of Aboriginal and Torres Strait Islander artists and communities to protect their culture, and benefit financially from the strong consumer demand for it.

We turn now to consider the relationship between *The Veil Paintings*, style appropriation, and the regulation of art that is alleged to draw upon or embody TK regulated by Aboriginal and Torres Strait Islander legal and knowledge systems.

II Appropriation as a cultural incursion

In the week leading up to *The Veil Paintings* exhibition, Damien Hirst provided an irreverent explanation of his motivations in developing the series. He stated via Instagram that he had a 'fuck it' moment when he realised he needed 'to go back to [his] original feelings about colour and forget the grid and to hell with order'.[19] In more official channels, the work of French post-impressionist and pointillists Georges Seurat and Pierre Bonnard, as well as Hirst's own previous series *Visual Candy*, were acknowledged as the key inspirations for the series.[20] Regardless, following their exhibition at the Gagosian, *The Veil Paintings* were criticised as having an unauthorised and inappropriate connection to Utopia art.

Utopia Elder and painter Barbara Weir recognised the 'strong influence' of Utopia art on the works.[21] She alleged that one of the paintings was 'done exactly like my people's story ... by Emily and Polly Ngale. If he did copy that, he had no right. It looked too much like Utopia art.'[22] Bundjalung artist Bronwyn Bancroft generally identified in Hirst's series the 'hallmarks' of Utopia work and Western Desert painting: 'I was a little bit shocked when I saw them cause I thought they could have been passed [off] as some Utopian work'.[23] Art dealer Christopher Hodges, the owner of Utopia Art Sydney and Kngwarreye's representative at the time of her death, described the paintings as having an 'uncanny' resemblance to Utopia art in the use of 'little dots', 'dots

[18] We have chosen to use the term 'Traditional Knowedge' rather than other alternatives such as 'Indigenous Knowledge' because this article is concerned with the protection of traditional culture.

[19] Damien Hirst Instagram caption quoted in Nate Freeman, 'Damien Hirst's Latest Conceptual Feat? Painting the Canvases', *Artsy* (Web Page, 2 March 2018) <https://www.artsy.net/article/artsy-editorial-damien-hirsts-latest-conceptual-feat-painting-canvases>.

[20] As reported in Wahlquist (n 7).

[21] Boland and Branley (n 3).

[22] Barbara Weir quoted in ibid.

[23] Bronwyn Bancroft quoted in ibid.

within dots' and 'shifting layers', all typical Kngwarreye's style.[24] A few months after the Hirst controversy, a New York exhibition called *Beyond the Veil* reflected on the alleged appropriation.[25] In responding to work by select Aboriginal artists, including Kngwarreye and Ngale*,* an art critic wrote:

> This is a different cry by far from the recent dot paintings of Damien Hirst, whose probable appropriation – we are not certain this is true – looks very much like the theft of a venerable art coming from a culture some 100,000 years old. Hirst's borrowings do tend to look facile in light of the greater gravitas of the Indigenous women's works, which can be understood by Western viewers – albeit on a level likely more superficial than the paintings themselves.[26]

Hirst has specifically denied any connection between Utopia art and *The Veil Paintings*. Nevertheless, Hirst's actions bear the hallmarks of style appropriation from the perspective of the above commentators. In replicating or mimicking the distinctive painting styles of Utopia artists like Polly Ngale and Emily Kngwarreye, Hirst, as a non-Indigenous artist, is perceived to have adopted an art form or style developed by members of another culture.

Art in Aboriginal and Torres Strait Islander communities that draw on TK can be considered ICIP;[27] that is, a mechanism of cultural knowing, cultural transmission and intergenerational belonging, defined by its representation of connection to Country. As Terri Janke, a Wuthathi/Meriam woman and ICIP expert explains, '[c]ultural and artistic practices form out of Indigenous peoples' deep and continuing connections to land, seas, and all things on it'.[28] The visual and techniques embodied in an artwork are 'a representation of cultural songlines'.[29] Desert paintings such as

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[24] Christopher Hodges quoted in Sarah Cascone, 'Is Damien Hirst's Latest Series a Ripoff of an Aboriginal Australian artist? See the Works Side-by-Side', *Artnet* (Web Page, 30 March 2018) <https://news.artnet.com/art-world/damien-hirst-veil-paintings-aboriginal-artists-1257185>.

[25] *Beyond the Veil* was curated by Aboriginal Art Association President Adam Knight. It was hosted at Olsen Gruin Gallery in New York between May and June 2018.

[26] Jonathan Goodman, 'Beyond the Veil at Olsen Gruin', *Arte Fuse* (Web Page, 9 June 2018) <https://www.olsengallery.com/news-details.php?pressroom_id=409>.

[27] While using the term ICIP to refer to the rights that Indigenous people have to protect their art and culture is widespread, the linking of cultural property and intellectual property in the concept of ICIP is not uncontroversial. Some commentators are concerned that the concept of ICIP leads to conflation between cultural property (as an expression of culture and/or heritage, related to traditional knowledge ('TK')) and the Western system for granting private property rights over intangible property. We do not share this concern. The meaning of 'intellectual property' as a creation of the mind is contextual, and its use in the term ICIP (and associated ICIP commentary by Aboriginal and Torres Strait Islander commentators like Terri Janke) is dynamic and evolving and not limited by Western property constructs. While the nature of ICIP may pose challenges for law reform initiatives — these challenges are not brought about by the term per se, but the dynamism of culture, the slipperiness of cultural claims discussed earlier, and the fact that the law reform initiatives are sought within the Western legal system.

[28] Terri Janke, *True Tracks: Indigenous Cultural and Intellectual Property Principles for Putting Self-Determination into Practice* (PhD Dissertation, February 2019) 23 ('*True Tracks*').

[29] House of Representatives Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (Report, 2018) 1 <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report>.

those from Utopia typically involve four layers of meaning: first, a depiction of inherited stories, forms and techniques of sacred significance; second, a cartography of a place owned by the painter including journeys across it; third, a representation of Aboriginal philosophy, ontology or cosmology ('Dreaming'), thus constituting a statement of connection to the land; and lastly, an individual interpretation of cultural duties and practices.[30] Emily Kngwarreye's *Yam Dreaming* paintings, for example, 'show her imagination and knowledge of underground patterns of tuber formations and root systems … informing us about the country, exploring mental images (even fantasies) of a spectacular harvest, and sharing with us something of [the artist]'.[31] Other paintings by Kngwarreye explore the tracks of the emu feeding on yam flowers and seeds, marking journeys and pathways across the country and, at a deeper level, special sites and sacred places along the songlines of ancestors.[32]

Each Aboriginal and Torres Strait Islander cultural group has their own Dreaming or cultural stories, ceremonies, languages, social practices, kinship structures and material culture. Art is rooted in these distinctive cultural contexts. [33] Polly Ngale, for example, whose painting subject matter is drawn from 'acute observation … as a source of knowledge relating to country'[34] is a senior custodian of the *Anwekety* or Bush Plum Dreaming.[35] The depiction of this Dreaming (and associated styles, patterns and designs) in Ngale's artwork confirms, in visual form, her deep knowledge of customary law. Customary laws are the 'social and cultural norms and customs by which Indigenous communities operate and inform the ways in which Indigenous knowledge is created and managed within communities'.[36] Customary law refers to 'the body of rules, values and traditions that are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community'.[37] If Ngale's painting is a product of customary law's regulation of her relationship to the work and the land, appropriation of its distinctive features conceivably violates that customary law as the requisite relationships would be missing.[38]

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[30] Emily Kame Kngwarreye et al, *Emily Kngwarreye Paintings* (Craftsman House, 1998) 26.

[31] Ibid 16.

[32] Ibid 21.

[33] See eg Francesca Cubillo, 'The Remarkable Kundu Masks of the Nyangumarta' in Ian Chance (ed), *Kaltja Now: Indigenous Arts Australia* (Wakefield Press, 2001) 44.

[34] Liz Cameron, 'Australian Indigenous Sensory Knowledge Systems in Creative Practices' (2021) 7(2) *Creative Arts Education Theory* 114, 123. Such bodily experiences bring Country into the present as a lived bodily experience. On the topic of the Western Desert art of female artists as an articulation of bodily experiences, see generally Jennifer Loureide Biddle, *Breasts, Bodies, Canvas: Central Desert Art as Experience* (University of New South Wales Press, 2007); Tristan Harwood, 'An Essay on the Works of Western Desert Women Artists and Aboriginal Culture' (2015) 1(1) *NEW: Emerging Scholars in Australian Indigenous Studies* 14, 14–23 <https://epress.lib.uts.edu.au/student-journals/index.php/NESAIS/article/view/1401>.

[35] To view a selection of Ngale's *Bush Plum* paintings, see 'Polly Ngale', *Aboriginal Art Directory* (Web Page) <https://aboriginalartdirectory.com/artists/polly-ngale/>.

[36] Terri Janke and Co (n 10) 20.

[37] Ibid 13.

[38] The status of Hirt's paintings — allegedly appropriative as they are of the layered dot painting style typical of Ngale and Kngwarreye's work — as a violation of customary law is perhaps less clear cut than it appears at first glance from the critiques advanced by commentators. In the context of Papunya artists, researcher Vivienne Johnson has argued that the evolution of dot painting styles occurred to *hide* sacred images and stories to avoid violations of customary law rather than express TK, 'leaving out the offending images from the

Customary laws vary from community to community, and they may be practised at different levels of operation or recognised to varying levels within and across a community. [39] However, in general, these laws determine social and religious behaviour, define land ownership as well as the relationship between people and the land, and determine identity through land ownership.[40] Customary laws play a fundamental role in the protection of TK, imposing certain obligations and responsibilities for ICIP,[41] and placing strict controls on painting techniques and the use of certain images and symbols.[42] Complex authority systems and consent processes exist for clearing rights to use TK,[43] and may be mandated within a customary law system. TK is typically held collectively by the Indigenous community, although a section of the community or a particular person may speak for or make decisions in relation to a particular aspect of TK as a custodian or caretaker.[44] In practice, this means that art production is frequently a matter of individual responsibility, with different community members holding lifelong rights and responsibilities over designs, patterns, styles and their affiliated narratives. Individuals are cleared for consent based on factors such as the person seeking to use the material (their knowledge and relationships/kinship) and the proposed use or form of cultural expression.[45]

Given the close relationship between art, land, TK and customary law, it is not surprising that 'the use of designs [and styles] belonging to others without the appropriate permission [can constitute] a major breach of Aboriginal law'.[46] Even where a breach of law is not evident, an unauthorised appropriation could be perceived as a moral or ethical violation of the relationship between the cultural custodian and the TK, or an illegitimate claim to cultural belonging or

ceremonial context, reducing the design elements to essentials and filling in the background with dots': Vivien Johnson, *The Art of Clifford Possum Tjapaltjarri* (Gordon and Breach Arts International, 1994) 36. We thank the anonymous reviewer for this insight.

[39] Ibid 21. It is also acknowledged that some Aboriginal and Torres Strait Islander artists may create artworks that they understand as connected to culture without the works being created within a customary law framework nor in connection with designated customary rights or obligations.

[40] Eleonore Wildburger, 'The Cultural Design of Wesern Desert Art' in Beate Neumeier and Kay Schaffer (eds), *Decolonizing the Landscape: Indigenous Cultures in Australia* (Brill, 2014) 72–3.

[41] Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law' (Background Paper 12, WA Law Reform Commission, 2006) 452 <https://www.wa.gov.au/system/files/2021-04/LRC-Project-094-Background-Papers.pdf>.

[42] *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 214 (Von Doussa J, summarising the evidence led at the trial) ('*Milpurrurru*').

[43] The affidavit tendered by Djardie Ashley and the Statement of Claim that sets out the claim of the traditional owners in the *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513 ('*Bulun Bulun v R & T Textiles*') case is illustrative of the type of consent and authority structures that exist in Aboriginal communities (in that case, the Yolgnu). See the discussion in Riccardo Mazzola, '"I Make an Oath and Swear as Follows": Yolngu Discourse over Sacred Art and Copyright' (2020) 10(4) *Oñati Socio-Legal Series* 876, 894.

[44] See eg Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22(2) *University of New South Wales Law Journal* 631, 633 ('Respecting Indigenous Cultural and Intellectual Property Rights').

[45] Terri Janke and Co (n 10) 21–3.

[46] Wally Caruana, *Aboriginal Art* (Thames and Hudson, 2nd ed, 1996) 15. The theft of art has been described as 'the same as invaders coming to our land without asking. It is the same as people stealing our land': Affidavit of P Bandjurljurl, tendered in *Bulun Bulun v Nejlam Pty Ltd* (Federal Court, 1989) ('*Bulun Bulun v Nejlam*') reproduced in Mazzola (n 43) 888.

authority.[47] Appropriation can also have serious ramifications for custodians and artists, who can be held responsible for the actions of appropriators and punished by their community — even when they had no knowledge or control over what occurred.[48] This is because when unauthorised appropriation occurs, the true custodian is considered to have abdicated their responsibility to maintain the Dreaming.[49] Style appropriation is thus not simply a matter of imitation — it can occur in violation of cultural rights and responsibilities without due regard for existing authority systems and consent processes, and/or demonstrate that a custodian or artist themselves has breached an obligation or customary law.

Whether or not a specific instance of style appropriation occurs in direct conflict with a distinct customary law framework, style appropriation is closely associated with cultural harm.[50] It is culturally insensitive, and occurs 'without recognition of any Indigenous connection and without benefits accruing back to Indigenous people'.[51] In addition to causing financial harm in circumstances where art production is linked to financial security and the reproduction of culture in many remote communities,[52] appropriation has also been alleged to undermine authentic ICIP practices and threaten cultural transmission through its effect upon the integrity and survival of cultural traditions.[53] Ganalbingu artist Johnny Bulun Bulun, a claimant in two separate cases of copyright infringement, stated:[54]

> Unauthorised reproduction of [*Magpie Geese and Waterlilies*] *At the Waterhole* threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threaten our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations.[55]

While such criticisms of appropriation are most frequently put forward in legal cases in the context of literal copying of entire artworks — as occurred in Bulun Bulun's case — they are also levelled at the 'bastardisation' of culturally significant expressions such as patterns, motifs and styles. As Terri Janke explains:

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[47] Dean Ellinson, 'Unauthorised Reproduction of Traditional Art' (1994) 17(2) *University of New South Wales Law Journal* 327, 331.

[48] *Milpurrurru* (n 42) 214–15 (Von Doussa J, summarising the evidence led at the trial).

[49] Ellinson (n 47) 331.

[50] Jill McKeough and Andrew Stewart, 'Intellectual Property and the Dreaming' in Martin Hinton, Elliott Johnston and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge, 1997) 53, 55.

[51] Terri Janke and Co (n 10) 15.

[52] See Department of Aboriginal Affairs, *The Aboriginal Arts and Craft Industry* (Report, 1989) 293–4.

[53] See eg Terri Janke and Co (n 10) 15. On the harms of style appropriation, see generally James Young and Conrad Brunk, 'Introduction' in James Young and Conrad Brunk (eds), *The Ethics of Appropriation* (Wiley-Blackwell, 2012) 1, 9.

[54] *Bulun Bulun v Nejlam* (n 46); *Bulun Bulun v R & T Textiles* (n 43). We return to discuss *Bulun Bulun v R & T Textiles* at below Section III.

[55] Affidavit of J Bulun Bulun, 8–9, tendered in *Bulun Bulun v R & T Textiles* (n 43), reproduced in Mazzola (n 43) 893.

> The act of misappropriation and desecration of ICIP has a perpetuating collective impact on Indigenous people being able to practice [sic] and transmit culture intergenerationally. The 'bastardisation' of culturally significant expression and knowledge demeans the integrity of cultural practice and diminishes connection to the cultural source of creativity and the collective legitimacy for such IP creation. [56]

Imitative artworks and craft products are destructive because they involve a distortion of Aboriginal art and cultural knowledge to the wider public.[57] Groups such as the National Indigenous Arts Advocacy Association (NIAAA) have expressed concern about non-Indigenous artists using specific Indigenous styles such as the rarrk (cross-hatching) and X-ray styles, and the usage of sacred images such as the Wandjina and Rainbow Serpent, all of which are central themes in their respective cultures.[58] Strongly associated with the recent 'Fake Art Harms Culture' campaign that targets style appropriation in the souvenir arts and crafts market, it has been a concern that appropriative art forecloses financial opportunities for cultural members and distorts the market for Indigenous art.[59] Others such as Janke have criticised the production of fake Aboriginal tourist products, such as plastic boomerangs painted in styled dots and Aboriginal iconography, for disrupting cultural markets and taking 'away legitimate opportunities from Aboriginal and Torres Strait Islander arts and crafts practitioners'.[60] The Productivity Commission's draft report into Aboriginal and Torres Strait Islander Visual Arts and Crafts (2022) confirms that fake art causes significant economic harm: accounting for 55–61% of spending of Aboriginal and Torres Strait Islander souvenirs to a total value of $41–55 million.[61] The prevalence of fake art is

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[56] Janke, *True Tracks* (n 28) 326.

[57] See the comments of Stephanie Parkin, Quandamooka lawyer and chair of the Indigenous Art Code, quoted in Anna Henderson and Sarah Collard, 'Commonwealth Vows to Stamp Out Fake Aboriginal Art Made in "Sweatshops"', *ABC News* (online, 2 September 2020) <https://www.abc.net.au/news/2020-09-02/federal-government-moves-to-protect-indigenous-art-from-fakes/12621362>.

[58] NIAAA website content reproduced in Doreen Mellor and Terri Janke, *Valuing Art Respecting Culture: Protocols for Working with the Australian Visual Arts and Craft Sector* (Report, 2001) 88 <https://visualarts.net.au/media/uploads/files/Valuing_Art_Respecting_Culture_2.pdf>. See also Terri Janke, *Our Culture: Our Future* (Final Report, 1997) 37–8 ('*Our Culture: Our Future*').

[59] See eg Arts Law Centre of Australia, 'Fake Art Hams Culture Campaign: Inauthentic Art Inquiry', *Arts+Law* (Web Page, 19 September 2017) <https://www.artslaw.com.au/fake-art-harms-culture-campaign-2/>.

[60] Terri Janke and Co (n 10) 38. She also notes the impact on cultural markets and the perpetuation of stereotypes, and upon consumers: at 39, 45. On the impact of cultural appropriation, see generally Terri Janke, 'Protecting Indigenous Cultural Expressions in Australia and New Zealand: Two Decades after the Mataatua Declaration and Our Culture, Our Future' (2018) (114) *Intellectual Property Forum* 21, 22 ('Protecting Indigenous Cultural Expressions in Australia and New Zealand').

[61] Productivity Commission, *Aboriginal and Torres Strait Islander Visual Arts and Crafts* (Draft Report Overview, July 2022) 9 <https://www.pc.gov.au/inquiries/current/indigenous-arts/draft/indigenous-arts-draft-overview.pdf> ('*Aboriginal and Torres Strait Islander Visual Arts and Crafts Draft Report*'). At the time of writing, the Final Report is pending. The Productivity Commission has indicated that the Final Report will be handed to the Australian Government in November 2022 and released to the public shortly thereafter. For the Terms of Reference of the Productivity Commission Inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts, see 'Terms of Reference', *Australian Government Productivity Commission* (Web Page, 2021) <pc.gov.au/inquiries/current/indigenous-arts/terms-of-reference>.

associated with a loss of consumer confidence, the 'crowding out' of authentic merchandise, and lost opportunities and income for Aboriginal and Torres Strait Islander artists and communities.[62]

Art appropriation is received by Indigenous people and communities as culturally harmful. Of these forms of cultural harm, the most relevant to alleged appropriations like that of Damien Hirst — where the style of a community is imitated but the artist disavows a connection between their artwork and the source community — is the diminishment of the connection between the work and the cultural source of creativity and the foreclosure of financial benefit to Indigenous artists.[63]

The extent to which three areas of Australian law — copyright law, heritage law and consumer law — are complicit in style appropriation will now be explored.

III Appropriation as a concern of Australian law

A *Copyright law*

Style appropriation under the current copyright laws

During the 1980s, there appears to have been some confusion as to whether artworks that draw on Aboriginal and Torres Strait Islander 'folklore' were protected by copyright.[64] That is, whether the connection between Indigenous artworks and tradition rendered them 'unoriginal'. This confusion ignored the fact that the standard of originality required for copyright subsistence is a very low standard: simply that the work originates in some intellectual effort of the author.[65] Such concerns cleared up over the following decade. Throughout the 1990s, Indigenous art copyright cases such as *Yumbulul v Reserve Bank of Australia*,[66] *Bulun Bulun v R & T Textiles Pty Ltd* ('*Bulun Bulun v R & T Textiles*'),[67] and *Milpurrurru v Indofurn Pty Ltd* ('*Milpurrurru*')[68] showed that the courts treat original artworks that draw upon TK as legal objects that subsist in copyright, the same as any other artistic work. Originality was not a live issue in any of these cases, dispelling concern that artworks that draw upon traditional themes do not show sufficient evidence of individual artistic interpretation.[69]

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[62] *Aboriginal and Torres Strait Islander Visual Arts and Crafts Draft Report* (n 61) 11.

[63] Arguments around interference with transmission of knowledge, impacts on cultural integrity and distortion appear considerably less relevant where the work/s in question have not been passed off as authentic Aboriginal or Torres Strait Islander art, or the work of an Aboriginal or Torres Strait Islander artist as the likelihood of confusion by cultural members is much lower.

[64] See eg '[m]ost Aboriginal artists draw upon pre-existing tradition and a question arises as to whether such works satisfy the requirement of originality': Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Report, December 1981) 13–4. See also Attorney-General's Department, *WIPO-Australia Copyright Program for Asia and the Pacific* (Australian Government Publishing Service, 1987) 22.

[65] See David Brennan, *Copyright Law* (Federation Press, 2021) 16–17.

[66] (1991) 21 IPR 481 ('*Yumbulul*').

[67] *Bulun Bulun v R & T Textiles* (n 43).

[68] *Milpurrurru* (n 42).

[69] While not a live issue, von Doussa J directly addressed the relationship between artworks that draw upon pre-existing tradition and designs and originality, confirming that '[a]lthough the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality': ibid 216. See also Janke, *Our Culture: Our Future* (n 58) 52.

There is no doubt that original Aboriginal artworks whose authors are 'qualified persons' will subsist in copyright when they are reduced to material form.[70] The copyright owner of such works will hold the exclusive right to reproduce the work in a material form, to publish the work, and to communicate the work to the public,[71] for a period of 70 years after the death of the author.[72] The creator of an artistic work will also hold moral rights of attribution, not to be falsely attributed, and integrity while copyright subsists in the work.[73]

In circumstances where authors are the default owners of copyright works,[74] formal equality before Australian law provides Aboriginal and Torres Strait Islander artists with strong intellectual property rights to exploit (and prevent others from exploiting) their works. Derogatory treatments of the work will also be actionable. This is undoubtedly beneficial when the infringement or violation occurs within the jurisdiction.[75] Where the unauthorised reproduction of Aboriginal works involves a breach of copyright, Aboriginal customary laws can also be taken into account in quantifying the damage which has been suffered by individual copyright holders.[76] In support, in *Milpurrurru,* the reproduction of traditional paintings on carpets caused significant offence, yet did not cause a palpable economic loss. On this basis, a modest award of damages was made to reflect the effects of the carpets on the reputation of the artworks and their loss of freshness in the marketplace.[77] However, the court also made another award of damages for the personal distress suffered by the artists and their potential exposure to contempt within their communities.[78] In this way, the cultural context within which the artworks were produced and internally regulated was part of the factual matrix as a 'relevant matter' for assessing the loss suffered by the artists whose rights had been infringed under s 115(4) of the *Copyright Act 1968* (Cth) ('*Copyright Act*').[79]

Nevertheless, while customary law can be part of the 'facts' relevant to a case of copyright infringement or a damages assessment, the customary laws that regulate artistic production are not recognised as a standalone source of rights or basis of copyright ownership.[80] That is, the Australian legal system recognises the *Copyright Act* as the source of rights, and not Aboriginal

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[70] Ie, made by a citizen or an Australian resident: *Copyright Act 1968* (Cth) s 32(4) ('*Copyright Act*'). See the requirements of original works in which copyright subsists in s 32(1)(a) for unpublished works and s 32(2)(d) for published works.

[71] Ibid s 31(1)(b).

[72] Ibid s 33.

[73] See ibid ss 193, 195AC, 195AI, 195AM, respectively.

[74] Ibid s 35(2).

[75] On the territorial reach of the *Copyright Act,* see ibid s 4. See also s 196AX that states that it is not an infringement of an author's moral right in respect of a work to do, or omit to do, something outside Australia. Foreign intellectual property claims are non-justiciable in Australia: Brennan (n 65) 193. However, note that under art 1.3 of *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)*, each member country is to accord the treatment regarding the protection of intellectual property provided for under the agreement to the persons of other members.

[76] Note that this does not extend to compensating the communities whose images were used in culturally inappropriate ways: *Milpurrurru* (n 42) 239.

[77] Ibid 243.

[78] Ibid 244.

[79] Miller suggests that this 'real effect' of this was to compensate the Indigenous clan or community for the affront that it as a community had experienced: Duncan Miller, 'Restitutionary and Exemplary Damages for Copyright Infringement' (1996) 14(2) *Australian Bar Review* 143, 161.

[80] Marie Hadley, 'The Double Movements that Define Copyright Law and Indigenous Art in Australia' (2010) 9(1) *Indigenous Law Journal* 47, 70.

and Torres Strait Islander law. The practical effect of this is demonstrated in *Bulun Bulun v R & T Textiles* in the context of communal authorship (and by implication, communal ownership). In this case, artist Johnny Bulun Bulun's painting *Magpie Geese and Waterlilies at the Waterhole* was reproduced on clothing fabric. Proceedings were commenced by Bulun Bulun and George M* as a representative of the Ganalbingu people, claiming that the clan were the equitable owners of the copyright subsisting in the painting. Copyright infringement of Bulun Bulun's rights in the work was admitted but not those of the Ganalbingu people. On the matter of equitable ownership, while von Doussa J accepted that Bulun Bulun's painting was created in accordance with the customary law of the Ganalbingu people and expressed their ritual knowledge, he confirmed that copyright is 'entirely a creature of statute'.[81] For communally held rights to subsist, the Ganalbingu people were required to have performed acts of joint authorship. Joint authorship is recognised where the 'contribution of each author is not separate from the contribution of the other author'.[82] As no one other than Bulun Bulun physically created the painting in question, the Ganalbingu people did not qualify as joint authors — they were neither authors nor copyright owners merely by virtue of Bulun Bulun using ritual knowledge in their expression. This case thus confirms that the communal interests of traditional owners under customary law does not create 'binding legal or equitable obligations on persons outside the relevant Aboriginal community'.[83] Interestingly, the question of an equitable obligation in the form of fiduciary duties created by way of holding cultural knowledge on trust for community was left open (yet undecided) by the court.[84] Current law, therefore, continues to lack adequate recognition and protection of Aboriginal community claims, though policies or practice of holding cultural knowledge on trust for communities may fill this gap as a type of 'constructive trust' anticipated in *Bulun Bulun* — this has yet to be tested.[85]

In addition to impacting *who* is considered an author and therefore copyright owner of a work, the lack of recognition of customary law is especially problematic due to the operation of copyright's material form requirement. Under s 22(1) of the *Copyright Act,* works must have material form before the conferral of exclusive rights to an author will be conveyed. This requires the expression or fixation of a work in a more-than-transient form. The practical implications of this are that the underlying ideas and concepts of a work are not protected by copyright, only their combination in a material work. The themes of a work, the artistic techniques used to create it,

[81] *Bulun Bulun v R & T Textiles* (n 43) 525. Von Doussa went on to state that '[t]he exclusive domain of the Copyright Act 1968 in Australia is expressed in s 8': at 525. Section 8 of the *Copyright Act* (n 70) states that 'copyright does not subsist otherwise than by virtue of this Act'.

[82] *Copyright Act* (n 70) s 10(1) (definition of 'work of joint authorship').

[83] Michael Blakeney, 'Protection of Traditional Knowledge under Intellectual Law' (2000) 22(6) *European Intellectual Property Review* 251, 254.

[84] On the community's interests in protecting the copyright artwork (and its underlying knowledge) as part of the basis of a fiduciary relationship between the community and the artist, see *Bulun Bulun v R & T Textiles* (n 43) 527–30. Commentators note that this legal relationship is of limited utility as it does not confer proprietary interests and offers no protections against the actions of non-community members. Nevertheless, technically such in personam rights could prove useful as a stopgap measure in circumstances where the author of a work created with ritual knowledge has died and the trustee of the deceased's estate refuses to take the action required by the clan. On these points, see eg Terri Janke and Co (n 10) 32; Weatherall (n 15) 221–2; Colin Golvan, 'The Protection of *At the Waterhole* by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights' (2010) 80 *Intellectual Property Forum* 38, 47.

[85] See the comments to this effect in *Yumbulul* (n 66) 490 (French J).

and the styles embodied in the work, are not protected by copyright.[86] This has serious implications for Aboriginal and Torres Strait Islander artists who use, for example, cross-hatching, x-ray, or dot painting in their work — these styles are regarded as ideas or 'themes' and not the subject of copyright law. This affects not only originality but also infringement, given that substantiality is required both for copyright to be exercised or infringed.[87]

In the context of direct copyright infringement,[88] substantiality requires an assessment of the quality and quantity of what has been taken.[89] As intellectual property scholar David Brennan observes, the inquiry into whether a substantial part has been taken necessitates a consideration of the nature and quantum of originality in the work.[90] In support, Mason CJ stated in *Autodesk Inc v Dyason [No 2]*[91] that '[t]he reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected'.[92] The copying of a work's non-copyright elements will not infringe copyright — originality lies in the reduction of the work to material form and not the techniques, patterns and styles used to create it. Therefore, according to copyright law, Aboriginal and Torres Strait Islander art styles are public domain, despite style appropriation being offensive and infringing on Aboriginal law and custom. This means that artists from outside the community, such as Hirst, who do not feel compelled to follow customary law are legally free to exploit these characteristics of Aboriginal artworks, including dot painting styles.

Copyright reform and the preference for sui generis legislation

There have only been limited dedicated copyright reform proposals put forward that seek to remedy the gaps between customary law and Australia's copyright regime. These proposals have primarily focused on remedying the lack of communal rights ownership under both the copyright and moral rights regimes. Writing in 1992, barrister Colin Golvan proposed the introduction of communal notions of ownership 'attaching to a tribe as represented by the relevant tribal custodians, being rights which might sit alongside the individual copyright rights of artists'.[93] This right would provide the community with a direct means to contest copyright infringement where ritual knowledge is used in the creation of an artwork.[94] In 1997, Janke proposed the recognition of communal moral rights, favouring the introduction of a communal moral right of integrity in particular to prohibit derogatory uses of Indigenous culture.[95] At that time, there was no moral

[86] See, eg, Janke, *Our Culture: Our Future* (n 58) 60; Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (Report, 2010) 24.

[87] Brennan (n 65) 123, interpreting the significance of the *Copyright Act* (n 70) s 14(1).

[88] *Copyright Act* (n 70) s 36(1).

[89] *Clarendon Homes (Aust) Pty Ltd v Henley Arch Pty Ltd* (1999) 46 IPR 309, 316; *SW Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466, 472.

[90] Brennan (n 65) 132.

[91] (1993) 176 CLR 300.

[92] There was strong support for Mason CJ's approach in *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1.

[93] Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14(7) *European Intellectual Property Review* 227, 230.

[94] Thus addressing the limitations of the in personam right recognised as held by the Ganalbingu people as tribal custodians in *Bulun Bulun v R & T Textiles* (n 43), discussed earlier.

[95] Janke, *Our Culture: Our Future* (n 58) 131.

rights regime in Australia.[96] To further this objective, Janke advocated for the introduction of a new sub-category of works, 'Indigenous cultural works', in which these communal rights would vest, defined as 'works created by an Indigenous person or group that have particular significance to an Indigenous community and are governed by Indigenous customary laws around their use and reproduction'.[97] Such rights would provide a community or communal owners with the standing to remedy moral rights infringements in circumstances where the author is unable or unwilling to restrain the infringing conduct.[98] Like Golvan, Janke thus sought to displace the *Copyright Act*'s preference for individual rights, and ensure that traditional owners could independently take action for moral rights infringement, and secure access to copyright remedies including damages or an injunction.[99]

Neither Janke nor Golvan's proposals have been introduced and there is a general lack of political will around copyright reform.[100] Only one copyright reform proposal has reached legislative drafting stage — the Copyright Amendment (Indigenous Communal Moral Rights) Bill in 2003 — however, it did not progress.[101] The exposure draft of the Bill that was circulated amongst stakeholders was heavily criticised for privileging the interests of uses and shifting the balance away from Indigenous communities.[102] It is worth noting that even if a more effective legislative balance was achieved, securing greater recognition of the unique nature of traditional artistic production in Aboriginal and Torres Strait Islander communities, communal moral rights reform

[96] Moral rights were introduced into Australian law by the *Copyright Amendment (Moral Rights) Act 2000* (Cth) in 2000. See *Copyright Act* (n 70) pt IX.

[97] Janke, *Our Culture: Our Future* (n 58) 126.

[98] This proposal does not appear to include communal ownership of copyright — only communal moral rights. However, note that elsewhere Janke frames this proposal more broadly as involving the introduction of a 'new class of rights within the Copyright Act for 'Indigenous works'' without specifying whether these rights are economic or moral rights. See Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 44) 636.

[99] See *Copyright Act* (n 70) ss 195AZ, 195AZA.

[100] See generally Marie Hadley, 'Lack of Political Will or Academic Inertia?: The Need for Non-Legal Responses to the Issue of Indigenous Art and Copyright' (2009) 34(3) *Alternative Law Journal* 152, 152–6.

[101] The Bill's stated purpose was to provide Indigenous communities with a 'means to prevent unauthorised and
derogatory treatment of works that embody community images or knowledge': Liberal Party of Australia, *The Howard Government: Putting Australia's Interests First: Election 2001 — Arts for All* (Policy Document, 2001) 21, quoted in Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *University of New South Wales Law Journal* 585, 597.

[102] For criticism of the Bill and/or discussion of its limitations see eg Jane Anderson, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8, 8–14; Jane Anderson, 'Indigenous Communal Moral Rights Bill: Failure of Language and Imagination' (2004) 17(2) *Australian Intellectual Property Law Bulletin* 26, 26–30; Erin Mackay, 'Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach' (2009) 32(1) *University of New South Wales Law Journal* 1, 8–10; Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006* (Report, 10 May 2006) 16–21 <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/terry_janke_icip.pdf>; Jake Phillips, 'Australia's Heritage Protection Act: An Alternative to Copyright in the Struggle to Protect Communal Interests in Authored Works of Folklore' (2009) 18(3) *Pacific Rim Law and Policy Journal* 547, 566–7.

would only affect the material that already subsists in copyright. It would not affect public domain material, such as art styles, because moral rights are enlivened by copyright subsistence.[103]

In recent years, there has been little academic and arts sector interest in copyright reform to address the breadth of concerns about art appropriation. Scholars are typically quite cautious about extending 'copyright protection too far and unnaturally'.[104] This is because copyright depends on the continuing existence of the public domain and cornerstone principles like originality, and Australia is subject to obligations under the Berne Convention.[105] In these circumstances, sui generis reform is seen as 'less difficult' and the preferred option of many commentators.[106] A sui generis right or regime refers to one that is unique or 'of its [own] kind'.[107] That is, one designed for a specific circumstance or purpose, with the legislation conferring the rights sitting apart from the Intellectual Property ('IP') system, although it can refer to new IP or IP-like rights.[108] Were sui generis reform be attempted, starting from first principles such as 'respect, informed consent, negotiation, full and proper attribution, and benefit sharing',[109] it is perceived to offer the most flexible means to centre customary law and in doing so, protect cultural integrity, secure opportunities for commercial exploitation and maintain guardianship relationships, rights and obligations in line with cultural priorities. Yet, to our knowledge, no sui generis legislation has been drafted in Australia although IP Australia recently conducted a scoping study on stand-alone legislation to protect and commercialise Indigenous knowledge as part of their Indigenous Knowledge Work Plan 22–23.[110] Those that support sui generis reform as the preferred course of action typically suggest the suitability of perpetually held, aspirational rights in artistic styles and other intangible forms, and the following rights:

- the right to own and control ICIP and benefit commercially from its exploitation;
- the right to control the commercial use of ICIP in accordance with Indigenous law and cultural rights and obligations;

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[103] Unless perpetual protection of Indigenous cultural works was secured in the manner proposed by Janke, discussed above. On the relationship between copyright subsistence and moral rights see *Copyright Act* (n 70) s 195AZE.

[104] Staniforth Ricketson and Chris Creswell, *The Law of Intellectual Property Copyright, Design and Confidential Information* (Thomson Reuters) [14.132]. See also Stephanie Parkin and Kylie Pappalardo, 'Protecting Indigenous Art and Culture: How the Law Fails to Prevent Exploitation' (2020) 159 *Precedent* 32, 36.

[105] *Berne Convention for the Protection of Literary and Artistic Works*, signed 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887). See eg discussion in Janke, *Our Culture: Our Future* (n 58) 130.

[106] Janke, *Our Culture: Our Future* (n 58) 130; Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future: Australia's Indigenous Visual Arts and Craft Sector* (Report, June 2007) 149, 152–3; Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745, 745–84.

[107] *The Free Dictionary* (online at 2 November 2022) 'sui generis' <https://legaldictionary.thefreedictionary.com/sui+generis>.

[108] See eg '[s]uch [sui generis] rights should be premised on the understanding that Indigenous customary laws concerning the use and dissemination of cultural material are similar to intellectual property laws and the rights of intellectual property rights-holders': Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 44) 635.

[109] Ibid 634–5. See also Recommendation 9.1 in Janke, *Our Culture: Our Future* (n 58) 131.

[110] IP Australia, *Stand-alone Legislation for Indigenous Knowledge* (Fact Sheet, 2022) <https://www.ipaustralia.gov.au/files/interim-report-scoping-study-stand-alone-legislation-protect-and-commercialise-indigenous-0> ('*Stand-alone Legislation for Indigenous Knowledge*').

- the right to prevent derogatory, offensive, and fallacious uses of ICIP;
- provide special protection for sacred and secret materials; and
- the right to have a say in the preservation and care, protection, management, and control of cultural expressions (and that there be no requirement of material form before rights subsist).[111]

Such proposed rights advance a dialogue around finding mechanisms for inclusion in the existing legal order that recognise the unique nature of cultural obligations. They essentially support an unconventional property claim: they have no term, the object of protection need not be fixed or original, and licences are determined by collective procedure. This is deemed necessary to secure a monopoly over decision-making as it pertains to cultural resources, thus minimising cultural incursions and the potential for cultural harm, and remedying the limitations of intellectual property and other laws.[112] If such sui generis rights were introduced, the practical impact would be to force prospective users of Indigenous art styles to seek permission (and presumably enter into a licence agreement and pay a fee) from a representative body or designated guardian prior to creating an artwork in that style. If the proposed use was deemed inappropriate from the perspective of the community, it could be refused. If it was created anyway, remedies under the legislation could be sought. Thus, such sui generis rights would have put the Utopia community at the forefront of decision-making about Hirst's use of dot painting in the style of Kngwarreye or Ngale (were Hirst exposed to the existence of the style and located within the territorial reach of any sui generis legislation). The community would have been able to financially benefit from the use or restrict the use on their own terms. Calls for such legislation persist.[113]

B *Cultural heritage laws*

Style appropriation under current cultural heritage laws

As traditional art embodies and expresses TK, and artistic practices and production can be regulated by customary law, it is useful to analyse cultural heritage laws as a potential source of protection for culture under the western legal system. This is consistent with the fact that art works and practices following traditional cultural forms and regarded by cultural members as meaningful are widely accepted as examples of intangible cultural heritage ('ICH').[114] Under art

[111] Indeed, Janke notes that a sui generis system would likely have to only apply to material outside of the copyright period: 'the legislation is for arts and cultural expression where copyright has expired or never existed', given the potential for overlap with the existing copyright regime: Janke, *Our Culture: Our Future* (n 58) 193. For examples of aspirational sui generis rights see eg Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 44) 634–5, 636–7; Janke, *Our Culture: Our Future* (n 58) 179–96. See also generally Senate Standing Committee on Environment, Communications, Information Technology and the Arts (n 106) 149, 152–3.

[112] Hadley, 'The Politics of Cultural Appropriation Claims and Law Reform' (n 12) 173.

[113] See eg IP Australia, *Enhance and Enable Indigenous Knowledge Consultations 2021* (Report, September 2022) 4 <https://www.ipaustralia.gov.au/files/enhance-and-enable-indigenous-knowledge-consultation-report-2021pdf>.

[114] See eg the annexure to the preliminary draft instrument as submitted by the Intangible Cultural Heritage Experts Committee to the Director-General of UNESCO prior to the completion of the Intangible Cultural Heritage Convention that contains 'floral arts, and textile knowledge and arts' as examples of Intangible Cultural Heritage, as discussed in Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights:

2(1) of the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* ('*ICH Convention*'),[115] ICH is defined as including the 'expressions', 'knowledge', and 'skills' that are 'transmitted from generation to generation that provides cultural members with a sense of identity and continuity'. While this definition is arguably 'open-ended, if not vague',[116] the Convention notes that ICH that manifests in the domain of 'social practices' and 'traditional craftsmanship' are specifically included with the definition.[117] This extends to designs, symbols and styles.[118] As Janke notes, ICIP rights are the rights of Indigenous Australians to their heritage —they are 'Indigenous Heritage Rights'.[119] Further, the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*')[120] recognises 'knowledge' as a form of ICH, though Australia has not comprehensively adopted or ratified it.[121]

While commentators have noted that IP rights offer stronger cultural protection than ICH due to the latter's subordination to the international legal regimes for IP under art 3(b),[122] we assert that analysis of cultural heritage regimes is worthwhile for two key reasons. First, IP law only offers protection where IP rights exist. Second, cultural heritage regimes offer a better *conceptual* fit with Aboriginal and Torres Strait Islander art because they are conceived in terms of individual and collective responsibilities rather than economic rights, and focus on preservation, cultural integrity, and the needs of past, present and future generations.[123]

In Australia, while Aboriginal and Torres Strait Islander people can generally apply to the Minister to take action under the various Australian heritage or environmental protection legislation,[124] they have no standalone right to compel protection of cultural heritage at the Commonwealth level.[125] Australia is also not a signatory to the *ICH Convention*, and all the states and territories

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An Analysis of the Convention for Safeguarding of Intangible Cultural Heritage' (2004) 1(1) *Macquarie Journal of International and Comparative Environmental Law* 111, 125.

[115] United Nations Educational Scientific and Cultural Organization, *Text of the Convention for the Safeguarding of the Intangible Cultural Heritage* (Web Page) <https://ich.unesco.org/en/convention> ('*ICH Convention*').

[116] Dylan Michael Foster and Lisa Gilman, *UNESCO on the Ground: Local Perspectives on Intangible Cultural Heritage* (Indiana University Press, 2015) 1.

[117] *ICH Convention* (n 115) art 2(2).

[118] Janke, eg, expressly includes designs and symbols as examples of cultural practices, resources and knowledge systems that express cultural identity and are included within the notion of heritage: Janke, *Our Culture: Our Future* (n 58) 11; Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 44) 633.

[119] Janke, *Our Culture: Our Future* (n 58) 11.

[120] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*').

[121] See ibid art 31. Australia has, however, endorsed *UNDRIP*.

[122] On the relationship between art 3(b) and international legal regimes including for IP, see Lucas Lixinski and Janet Blake, 'Part II Commentary, Art.3(b) Relationship to Intellectual Property and Environmental Instruments' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford Scholarly Authorities on International Law, 2020) 117–33.

[123] See eg Phillips (n 102) 549, 570. On Indigenous views of heritage, see Erica-Irene Daes, 'Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples' (Research Paper, Commission on Human Rights, July 1993) [26] <http://www.refworld.org/pdfid/3b00f4380.pdf>.

[124] See eg *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9, 10 ('*ATSIHP Act*').

[125] Moreover, a recent study of the *ATSIHP Act* found that fewer than 5% of applications from Aboriginal people's result in successful declarations under the Act. See discussion in Nicola Winn and Paul Tacon,

with the exception of Victoria and Western Australia have a narrow definition of heritage in their legislation as place-based and protecting sites and, in some instances, objects and/or human remains. Even in Western Australia where intangible heritage is mentioned in the definition of Aboriginal cultural heritage, there are no standalone ICH rights in art or art practices. In support, the *Aboriginal Cultural Heritage Act 2021* (WA) defines Aboriginal Cultural Heritage as 'the tangible and intangible elements that are important to the Aboriginal people of the State, recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives) as part of their traditional and living cultural heritage', but this only pertains to: (i) an area (an Aboriginal place) in which tangible elements of Aboriginal cultural heritage are present; (ii) an object (an Aboriginal object) that is a tangible element of Aboriginal cultural heritage; (iii) a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage; and (iv) the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains).[126]

The focus in heritage legislation is primarily on avoiding disturbances to tangible heritage, rather than promoting the practice or protection of ICH,[127] though there is nuance and some potential for broad interpretations across understandings of connection to land as being intertwined with heritage. For example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*ATSIHP Act*') provides that heritage protect the relationship between persons, areas and objects of 'significance to Aboriginals in accordance with Aboriginal traditions'.[128] Nevertheless, the legislation is designed to protect Aboriginal places of cultural significance without defining how landscape might qualify as intangibly significant to cultural practices and cultural transmission. As there is no explicit recognition in existing cultural heritage legislation or in current case law of the unique relationship between Indigenous peoples and their land, culture *and* creative works, the legislation provides no direct mechanism to contest the use (or cultural harm occasioned by the use) of Aboriginal and Torres Strait Islander art that falls inside of, or outside of, copyright protection.[129]

It has long been anticipated that ICH rights could overcome the limitations of the narrow approach to heritage in existing legislation and protect art from the destruction and/or distortion caused by unauthorised appropriation. Writing in 1992, when the relevant conception of heritage in *ATSIHP Act* protected 'Aboriginal places, Aboriginal objects, and Aboriginal folklore',[130] barrister Colin Golvan proposed expanding the definition of 'folklore' to specifically include artistic works as they are understood in the *Copyright Act,*[131] excluding any notion of a time limitation to heritage

'Managing the Past in Northern Australia: Challenges and Pitfalls for Indigenous Communities, Rock Art and Cultural Heritage' (2016) 9(2) *Heritage and Society* 168, 174.

[126] *Aboriginal Cultural Heritage Act 2021* (WA) s 12(a)(b).

[127] Tran Tran and Clare Barcham, '(Re)defining Indigenous Cultural Heritage' (AIATSIS Research Discussion Paper No 37, June 2018) 12 <https://aiatsis.gov.au/sites/default/files/research_pub/dp_tranbarcham_final_3.pdf>.

[128] See the definition of 'significant Aboriginal object' and 'Aboriginal tradition': *ATSIHP Act* (n 124) s 3(1).

[129] In some instances, specific ancestral rock art paintings could be *indirectly* protected when they are in a significant Aboriginal area. See eg the definition of 'Aboriginal cultural heritage' that includes evidence 'of archaeological or historical significance, of Aboriginal occupation of an area of Queensland': *Aboriginal Cultural Heritage Act 2003* (Qld) s 8 ('*Aboriginal Cultural Heritage Act*').

[130] See definition of 'Aboriginal cultural property': *ATSIHP Act* (n 124) s 21A (reprinted 28 February 1991).

[131] At this time, 'Aboriginal folklore' was defined to mean 'traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs

protection as exists in copyright law.[132] He also recommended extending the role envisaged for Aboriginal communities under the *ATSIHP Act* to secure greater decision-making power and standing to pursue a civil right of action when heritage is at risk of destruction.[133] In 1997, Janke recommended the introduction of a holistic definition of ICH into heritage legislation that included the intangible aspects of objects and sites and local communities' rights as the owners of Indigenous cultural heritage.[134]

Since Golvan and Janke's reform proposals, there has been improvement to the decision-making capacity of Indigenous communities in some jurisdictions.[135] There is also improved recognition of traditional owners as the owners of heritage in cultural heritage legislation, particularly as the owners of Aboriginal ancestral remains and sacred or secret objects.[136] Nevertheless, as previously mentioned, bar Victoria and Western Australia (which take a very limited approach to the definition of heritage as inclusive of ICH) the *Heritage Acts* do not include intangibles as objects of protection. Moreover, it is not clear whether a more inclusive definition of heritage to include intangibles would necessarily effectively regulate the use of public domain art or stylistic features of existing artworks because heritage rights are, in the current understanding of cultural heritage, preservation rights rather than property rights. This is limiting in circumstances where the recent native title 'Timber Creek' decision importantly found there is a legitimate basis for awarding compensation for 'cultural loss' as an aspect of property rights.[137]

Analysis of the recent inclusion of ICH rights in the Victorian *Aboriginal Heritage Act 2006* (Vic) is illustrative of the partial protections that even the recent reforms considered to be most expansive, offer. Since 2016, ICH, including artworks[138] that are only known to the community, have been protected from commercial use by outsiders in Victoria.[139] Section 79G of the *Aboriginal Heritage Act 2006* (Vic) provides that: 'A person must not knowingly use any registered Aboriginal intangible heritage for commercial purposes without the consent of the relevant registered Aboriginal party, registered native title holder or traditional owner group entity.'[140]

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and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal traditions': ibid.

[132] Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 1(56) *Aboriginal Law Bulletin* 5, 8.

[133] Ibid.

[134] See Recommendations 13.1 and 13.3 in Janke, *Our Culture: Our Future* (n 58) 156. See also Janke's suggestion that site specific artwork be protected from misuse through an unspecified heritage legislation amendment/s: Terri Janke, 'The Application of Copyright and Other Intellectual Property Laws to Aboriginal and Torres Strait Islander Cultural and Intellectual Property' (1997) 2(1) *Art Antiquity and Law* 13, 23.

[135] Eg greater advisory rights have been introduced in Queensland: see *Aboriginal Cultural Heritage Act* (n 129) ss 9, 10, 12.

[136] See eg the *Aboriginal Heritage Act 2006* (Vic) s 12(1)(a); *Aboriginal Cultural Heritage Act* (n 129) ss 15, 19, 20.

[137] *Northern Territory v Griffiths (deceased) [No 2]* (2019) 368 ALR 77.

[138] 'Visual arts' are explicitly listed within the definition of Aboriginal intangible heritage in the Act: *Aboriginal Heritage Act 2006* (Vic) s 79B(1).

[139] Ibid s 79G.

[140] Ibid s 79G(1). A 'reckless' use of the same is proscribed at s 79G(2).

Anyone seeking to commercialise any registered intangible heritage recorded on the register must negotiate an agreement with the source community, or face penalties.[141] A breach of s 79G includes penalties for both individual and corporate offenders.[142] The operation of this section means that secret rock paintings, for example, could be protected from being reproduced commercially on T-shirts, where they are recorded on the Register of Aboriginal Intangible Heritage.[143] While this offers some protection of designs, patterns and styles to the extent that they are embodied in unpublished registered artworks, the commercial use of Aboriginal imagery remains permissible under this Act where the general features of images are widely known. As noted in s 79B, 'Aboriginal intangible heritage' includes rituals and visual arts, and any 'intellectual creation or innovation' based on such intangible heritage[144] but excludes 'anything that is widely known to the public'.[145] If such a provision were adopted in the Northern Territory where the Utopia community is located, this would mean that style appropriation would only be actionable where it concerned secret artworks (that had been duly recorded on a register) and not those produced by commercial artists like Kngwarreye or Ngale. This is not commensurate with self-determination over art and culture, nor recognition of customary law. It would not regulate an artist like Hirst seeking inspiration from Utopia desert styles. For more expansive protection of art capturing the defining art styles of communities, the definition of intangible heritage would, as a starting point, need to include things already known to the public.

Cultural heritage reform in New South Wales

In New South Wales, there have been attempts to bring the definition of ICH within new standalone legislation that contains similar provisions to the Victorian Act. The Draft Aboriginal Cultural Heritage Bill 2018 (NSW) ('ACH Bill') was released for consultation in early 2018. It provided for an ICH registration process similar to that in the Victorian legislation.[146] It also prevents the proposed Aboriginal Cultural Heritage Authority registering ICH that is widely known to the public.[147] The ACH Bill contains a broad definition of Aboriginal cultural heritage ('ACH') as 'the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity'.[148]

A separate definition of ICH was provided:

[141] Registration means that traditional owners may make Aboriginal ICH agreements that outline how TK is used and for purpose/s: Janke, 'Protecting Indigenous Cultural Expressions in Australia and New Zealand' (n 60) 27.

[142] *Aboriginal Heritage Act 2006* (Vic) s 79G(1)(2).

[143] Ibid s 79C.

[144] Ibid s 79B(1)(2).

[145] Ibid s 79B(1).

[146] Draft Aboriginal Cultural Heritage Bill 2018 (NSW) s 37 ('ACH Bill') provides a list of who may apply to the Aboriginal cultural heritage ('ACH') Authority for registration of ICH.

[147] The ACH can only register ICH if it is satisfied that the heritage is not widely known to the public and should be protected from commercial use: ibid s 36(2)(a). See also Janke, 'Protecting Indigenous Cultural Expressions in Australia and New Zealand' (n 60) 27.

[148] ACH Bill (n 146) s 4(1).

> any practices, representations, expressions, beliefs, knowledge or skills comprising Aboriginal cultural heritage (including intellectual creation or innovation of Aboriginal people based on or derived from Aboriginal cultural heritage), but does not include Aboriginal objects, Aboriginal ancestral remains or any other tangible materials comprising Aboriginal cultural heritage.[149]

While some commentators have criticised the drafting of these definitions for failing to make it clear that 'Aboriginal cultural heritage' includes the defined term 'intangible cultural heritage', and thus failing to recognise 'the holistic nature of ACH',[150] others such as Janke have welcomed the ACH Bill for its incorporation of 'the inter-related view of ICIP held by Indigenous people' and paving 'the way for greater recognition of ICIP rights, at least where the item is now known to the public'.[151] However, the proposed protections are still limited — art-related practices, representations, expressions, knowledge and skills will only be protected where it is registered, and registration cannot occur in the instance of the ICH being published or known.

The 2018 Draft Bill did not enter into force. Passing reference has been made to the government's view that the Bill in its current form is 'too complex and that the ACH reforms must be made cheaper and simpler' and should instead make use of 'existing structures', as devised through a new co-design process.[152] Even were the Bill to go ahead in its current form, it is anticipated that little protection against style appropriation would occur given that styles like dot painting and rarrk (cross-hatching) are frequently widely circulated in society, thus failing the requirements for registration under both the ACH Bill and the Act in Victoria.

Most recently in June 2022, the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (NSW) ('new ACH Bill') was introduced to NSW Parliament by the Hon Fred Nile as a private members' Bill, with a broad cross-section of co-sponsors from across the political spectrum.[153] The Explanatory Note to the new ACH Bill and the text of the Bill itself specifically provides for recognition of Indigenous rights to be included in the legislation to reflect *UNDRIP*.[154] The terms of *UNDRIP* are engaged with reference to art 31, which protects the right to cultural expression, including protection of intangible heritage. The definition of 'Aboriginal cultural heritage' in the

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[149] Ibid s 4.

[150] See Kylie Lingard et al, 'Are we there yet? A Review of Proposed Aboriginal Cultural Heritage Laws in New South Wales, Australia' (2021) 28(1) *International Journal of Cultural Property* 107, 113.

[151] Janke, *True Tracks* (n 28) 71. Note that Janke has expressed some reservations with regards to the Bill not retrospectively protecting ICH that has been adapted and enjoyed by the general public: Janke, 'Protecting Indigenous Cultural Expressions in Australia and New Zealand' (n 60) 27. For general criticism of the ACH Bill as against human rights principles, see Lingard et al (n 150) 107–35.

[152] *Response of Aboriginal Cultural Heritage Advisory Committee: Question on Notice #1* (Heritage Act Review Hearings, 17 August 2021) <https://www.parliament.nsw.gov.au/lcdocs/other/16125/Ms%20Glenda%20Chalker%20-%20Aboriginal%20Cultural%20Heritage%20Advisory%20Committee.pdf>

[153] As a private members Bill, the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 ('New ACH Bill') is separate from the New South Wales Government's cultural heritage reforms.

[154] Explanatory Note, Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (NSW) <https://www.parliament.nsw.gov.au/bill/files/3993/XN%20-%20Aboriginal%20Cultural%20Heritage%20(Culture%20is%20Identity)%20Bill%202022.pdf>; New ACH Bill (n 153) s 4. Notably, the new ACH Bill does not affect cultural rights recognised by native title law. The law around native title is outside the scope of this article.

new ACH Bill also explicitly includes intangible heritage. Intangible heritage is defined as: 'the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual and historical values, as recognised by Aboriginal people'.[155] The explicit reference to *UNDRIP* principles in tandem with the recognition of ICH captures a broad conception of cultural expression potentially inclusive of art styles and intangible stories. The new ACH Bill is also notable as the proposed s 50 provides that all Aboriginal persons will have the right to use Aboriginal cultural heritage (including ICH) for commercial purposes. This suggests that it is intended that the Bill interacts with the *Copyright Act* and provide pathways both for the protection of ICH and the capacity to exploit ICH commercially. However, whether the new ACH Bill will meet the same fate as the 2018 proposed reforms remains to be seen.[156]

Cultural Heritage reform and policy post-Juukan Gorge Disaster

The 2018 reforms to cultural heritage proposed in New South Wales preceded further recommendations for reform in cultural heritage laws across Australia in the wake of the destruction of 46,000 year old caves (including rock art) at Juukan Gorge, Western Australia in May 2020. A Parliamentary Inquiry into the circumstances leading up to the incident resulted in numerous recommendations for changes to cultural heritage laws, including that the Federal Government act to ratify the *ICH Convention*, amend cultural heritage laws nationally to include a definition of ICH through a co-design process with Indigenous people and decision makers, and endorse the '*Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*' ('*Dhawura Ngilan*') policy developed by and for Indigenous cultural heritage stakeholders.[157] *Dhawura Ngilan* offers a roadmap for ensuring best practice cultural heritage management, including recognition of ICH as a part of protecting cultural heritage through policy and legislation.[158] Prior to the release of the Inquiry's final report, *A Way Forward*, delivered in October 2021, reforms were also proposed for cultural heritage laws in Western Australia, particularly in the context of the impugned s 18 of the *Aboriginal Heritage Act 1972* (WA) which had enabled the Minister to permit destruction of cultural heritage and override the protections of over parts of the legislation, as occurred at Juukan Gorge. The Western Australia law reforms, discussed earlier in the context of legislative definitions of cultural heritage, were passed in 2021, and while the new provisions provide for community consultation and agreement making, they

[155] New ACH Bill (n 153) s 6(a).

[156] The new ACH Bill was referred for inquiry and report on 9 August 2022. The report is due to be handed down on November 2022.

[157] Joint Standing Committee on Northern Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Final Report, October 2021) List of Recommendations [7.30], [7.80], [7.97]. The Terms of Reference of the Inquiry are available at 'Terms of Reference', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Terms_of_Reference>.

[158] Heritage Chairs of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* (Report, March 2021) <https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf >.

have been criticised by communities for retaining the power of the Minister to make decisions on cultural heritage protection matters.[159] ICH, however, was peripheral to these concerns.

While the lack of protection of art styles within the context of cultural heritage continues in the wake of the Juukan Gorge Inquiry and Western Australia reforms, the recent attention on cultural heritage does present a strategic context for reopening the debate over recognition of ICH and the form that legislative recognition could and should take. In addition to the new ACH Bill, there has been some debate around the utility of Indigenous-only ICH legislation. For example, cultural heritage scholar Lucas Lixinski argues that ratifying and adopting the *ICH Convention* into domestic legislation with an emphasis on only Aboriginal and Torres Strait Islander ICH would be 'very problematic'.[160] He states that this approach would make it 'easier to separate and insulate Indigenous identity (and corresponding claims) to the special, and separate, realm of "culture", a realm in which non-Indigenous Australians would not participate and therefore about which they do not need to care.'[161] To minimise this possibility, he thus favours the introduction of culturally neutral ICH legislation that protects both Indigenous and non-Indigenous ICH.

Regardless of how the introduction and adoption of the *ICH Convention* is best achieved, at the time of writing, further reform across Australia's cultural heritage landscape has not occurred. The new ACH Bill and its attempted implementation of *UNDRIP* principles could signal a turning point. However, at present, ICH such as the cultural transmission of dot painting styles like that of Utopia artists Kngwarreye and Ngale, remain excluded from the existing protections offered under the Australian legal system.

C *Consumer law*

Style appropriation under current consumer laws

Given the commercial market for Aboriginal and Torres Strait Islander art and craft products, consumer law also intersects with style appropriation. While style appropriation affects the fine art market as illustrated by the Hirst example, it is perhaps most prolific in the souvenir arts and crafts market where it intersects with authenticity and/or provenance issues.[162] The Arts Law Centre has estimated that the trade in fake art is worth $200 million a year and up to 80% of all

[159] See eg Giovanni Torre, 'WA Cultural Heritage Bill Passes without Amendment', *National Indigenous Times* (online, 15 December 2021) <https://nit.com.au/breaking-wa-cultural-heritage-bill-passes-without-amendment/>.

[160] Lucas Lixinski, 'An Intangible Way Forward: The Juukan Gorge Inquiry and the Future of First Nations Heritage Law in Australia', *Australian Public Law* (Blog Post, 10 December 2021) <https://www.auspublaw.org/blog/2021/12/an-intangible-way-forward-the-juukan-gorge-inquiry-and-the-future-of-first-nations-heritage-law-in-australia>.

[161] Ibid.

[162] See eg:

> First Nations fine art does not appear to be affected by authenticity issues to the same extent as the souvenir trade. This is due in part to the buyers being more discerning and the need for galleries to protect thier repuation by ensuring the provenance of more expensive artwork. There are still troubling issues in this part of the market however ... : House of Representatives Standing Committee on Indigenous Affairs (n 29) xii.

Aboriginal-style art products sold in souvenir shops are fake and imported.[163] The most relevant consumer law provisions are: s 18 of the *Australian Consumer Law* ('*ACL*') that 'prohibits a person, in trade or commerce, from engaging in conduct that is misleading or deceptive conduct or is likely to mislead or deceive'; s 29 that pertains to false or misleading representations about goods or services; and s 33 that prohibits misleading conduct as to the nature of goods. These provisions prohibit the fraudulent marketing of arts and crafts featuring Aboriginal and Torres Strait Islander-inspired imagery, painted in an Indigenous style, or that adopt a stylised version of Aboriginal and Torres Strait Islander designs or motifs, as 'Aboriginal'.

Cases such as *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* ('*Dreamtime Creations*')[164] and *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* ('*Birubi Art*')[165] illustrate how misleading and deceptive conduct and false and misleading representation provisions can intersect with style appropriation. In *Dreamtime Creations,* the defendant made misleading representations about artworks that featured a cross-hatching style. In particular, they construed that the artworks were Aboriginal art painted by an artist called 'Ubanoo Brown' from Murchison River, Western Australia. Fake certificates of authenticity were supplied to galleries that described the works variously as 'Authentic Aboriginal Painting', 'Aboriginal Fine Art Canvas', or stamps affixed that said 'Traditional Hand Painted Aboriginal Art Australia' or 'Authentic Original Aboriginal Art'.[166] In reality, the works were painted by a non-Aboriginal artist who had been commissioned by Dreamtime's sole director.[167] Both Dreamtime and the director were held to have breached s 52 of the *Trade Practices Act 1974* (Cth), the precursor to s 18 of the *ACL*, for their multiple false and misleading statements and deceptive conduct.[168] Mansfield J drew attention to the context in which the statements were made and stated that '[t]o a reasonable group of persons who buy or may buy Aboriginal art, to describe a painting as "Aboriginal art" is to convey that it is painted by an Aboriginal person or person of Aboriginal descent'.[169] Moreover, adding the words 'traditional' and 'authentic' to the stamps affixed to the items has the same effect.[170]

In *Birubi Art*, Birubi sold approximately 1,300 product lines (boomerangs, bullroarers, didgeridoos and message stones) to around 150 shops operating in tourist areas around Australia over a 2-year period. These products featured images, symbols and designs associated with Aboriginal art and were represented as 'Authentic Aboriginal Art', 'Hand Painted' and made in Australia. Except for three products made by Aboriginal artist Trisha Mason, the products were not made by

[163] Arts Law Centre of Australia (n 59). See also House of Representatives Standing Committee on Indigenous Affairs (n 29) 5. Other estimates suggest as much as 95% of all souvenirs sold in some shops are fake: see eg, Commonwealth, *Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017,* House of Representatives, 13 February 2017, 671 <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/bb92af69-ccad-4a9d-abf2-195b30e01b0c/toc_pdf/House%20of%20Representatives_2017_02_13_4676_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/bb92af69-ccad-4a9d-abf2-195b30e01b0c/0084%22>.

[164] (2009) 263 ALR 487 ('*Dreamtime Creations*').

[165] [2018] FCA 1595 ('*Birubi Art*').

[166] *Dreamtime Creations* (n 164) 487.

[167] Ibid.

[168] Ibid 487, 508–9.

[169] Ibid 487, 488.

[170] Ibid.

Australian Aboriginal artisans. It was not in dispute that all products were, in fact, produced in Indonesia.[171] Perry J found that Birubi Art had breached ss 18, 29(1)(a), (k) in relation to all products, and s 33 of the *ACL* in the instance of some products, by making false or misleading representations that its products were made in Australia and/or were hand-painted by Australian Aboriginal artisans.[172] A penalty of $2.3 million was ultimately imposed.[173] In coming to this figure, Perry J noted that given that Birubi is in liquidation, it is unlikely that the company would ever pay such a fine,[174] but thought the quantity warranted for its general deterrent effect, stating there is a 'need for robust penalties to strongly discourage conduct of the kind engaged in by Birubi'.[175] She stated that the evidence as to the social, economic and cultural harm caused to Indigenous artists and communities, both indirect and direct, was 'powerful'.[176]

These cases show that courts are willing to hold to account false claims as to the authenticity or provenance of art and craft that misappropriate Aboriginal and Torres Strait Islander art styles. Beneficially, any person can bring proceedings under s 232(2) of the *ACL*, even in circumstances where they have no special interest in the outcome. This means that an Aboriginal or Torres Strait Islander complainant (or even an entire community) would not need to establish 'ownership' over the art styles that are used in the offending works, nor that they have directly suffered a financial loss, prior to commencing a claim.[177] Moreover, when a contravention of s 18 occurs, the court can grant remedies either to 'correct and reverse the adverse impact of the defendant's contravening conduct on the plaintiff so that, as far as practicable, the plaintiff is re-instated to an "as you were" position' *and/or* 'to prevent the continuance of the contravening conduct, where continuing contravention would, or might well, occur if the court did not intervene'.[178] The latter is potentially very valuable where a complainant artist has not suffered financial damage but seeks to restrain particular conduct that they find offensive to Aboriginal law and custom, for example, through an injunction.[179] The court's powers in relation to injunctions are broad, and in the granting of this remedy the court can take into a wide variety of discretionary considerations, including third-party interests or where the public interest tends to favour an injunction being granted.[180] Combined, these factors suggest that an *ACL* claim is potentially a valuable tool in combatting style appropriation.

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[171] *Birubi Art* (n 165) [3].

[172] Ibid [163].

[173] *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq)* (2019) 374 ALR 776, 803 [108].

[174] Ibid 783 [22].

[175] Ibid 799 [93].

[176] Ibid 801 [102].

[177] Note that if they wanted to claim damages they would still need to establish that they have suffered some kind of loss: McKeough and Stewart (n 50) 75.

[178] Graeme S Clarke, 'Misleading or Deceptive Conduct Cases – Remedies' (Report) 1 <https://www.barristers.com.au/wp-content/uploads/2019/02/Misleading-or-Deceptive-Conduct-Cases.Remedies.pdf>

[179] *Competition and Consumer Act 2010* (Cth) sch 2, s 232(4) ('*ACL*').

[180] Clarke (n 178) 4.

While the usefulness of s 18 should not be understated, the *ACL's* regulation of style appropriation is indirect and falls short of recognising ICIP rights over ownership ofcultural material.[181] Style appropriation is not *of itself* considered to be misleading, deceptive or constitutive of a false or misleading representation. It only meets the threshold when there is a positive indication of authenticity (or a badge of overseas origin has been omitted). In Hirst's case, there was a denial of any connection to Utopia art. Therefore, even if his conduct had been within the jurisdictional reach of the *ACL*,[182] he has not identified *The Veil Paintings* as having a connection to Aboriginal art and culture. His use of an art style similar to Ngale and Kngwarreye is not 'misleading and deceptive' per s 18 of the *ACL*, even if it is a violation of customary law or otherwise harmful.

This limitation of consumer law in the context of the extant gaps in copyright law and heritage law has resulted in increasing attention on soft law and consumer law opportunities to educate the public, disrupt the economic imperatives of fake art, and minimise emotional and spiritual impacts.[183] Most recently, the focus has been on art protocols as a contractual stopgap measure,[184] industry-specific codes of practice and public education campaigns.[185] One such campaign, Fake Art Harms Culture, has sought to increase public awareness of the lack of legal infrastructure for the regulation of Indigenous 'look and feel' souvenir products created by non-Indigenous artists and/or overseas manufacturers since December 2016. Two private member Bills have been drafted in support of the campaign:[186] the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth) ('Katter Bill'), introduced into Parliament by

[181] Terri Janke, 'Indigenous Cultural Expression and Intellectual Property' in Martin Hinton, Daryle Rigney and Elliot Johnston (eds), *Indigenous Australians and the Law* (Routledge, 2nd ed, 2008) 61, 83.

[182] The *ACL* requires that there be a relevant connection between Australia and the activities called into question by the *ACL*. The *ACL* only operates extraterritorially through its application to companies incorporated in Australia, companies carrying on a business within Australia, Australian citizens, and persons ordinarily residing in Australia. See eg *Vale Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 that confirms that overseas-based businesses are within the territorial reach of the *ACL* when they sell a product to Australian consumers and therefore, carry on a business in Australia.

[183] On the emotional and spiritual impacts of the sale of inauthentic art and craft, see Parkin and Pappalardo (n 104) 33–4.

[184] See eg Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (n 17) 20. Key art protocols include the Australia Council Protocols: 'Protocols for Using First Nations Cultural and Intellectual Property in the Arts', *Australia Council for the Arts* (Web Page) <https://australiacouncil.gov.au/investment-and-development/protocols-and-resources/protocols-for-using-first-nations-cultural-and-intellectual-property-in-the-arts/>; Create NSW, *Aboriginal Arts and Culture Protocols* (Report) <https://www.create.nsw.gov.au/wp-content/uploads/2021/06/Aboriginal-Art-and-Culture-Protocols-interactive-1.pdf>.

[185] See eg *Indigenous Art Code: A Code to Promote Fair and Ethical Trade in Works of Art by Indigenous Artists* (Code) <indigenousartcode.org/wp-content/uploads/2021/09/Indigenous-Art-Code.pdf>; 'Code of Practice for Visual Arts, Craft and Design', *National Association for the Visual Arts* (Web Page) <https://code.visualarts.net.au/>.

[186] Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth) ('Katter Bill'); Competition and Consumer Amndement (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) ('Hanson-Young Bill'). The campaign also resulted in the 2017 Parliament Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander-style art and craft products. See the terms of reference for this inquiry at 'Terms of Reference' (n 157).

Federal MP Bob Katter in February 2017,[187] and the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) ('Hanson-Young Bill'), introduced into Parliament by Australian Greens Senator Hanson-Young in February 2019. Both Bills propose consumer law reform to prohibit style appropriation loosely defined. These will now be considered in more detail.

Legislating against the appropriation of cultural expressions

The primary purpose of the Katter Bill was to prevent non-Indigenous businesses and individuals from benefiting from the sale of Indigenous art, souvenir items and other cultural affirmations and to protect 'Indigenous cultural expressions from appropriation by persons who do not identify as Aboriginal or Torres Strait Islanders'.[188] Its reforms are motivated by a concern 'that an influx of mass-produced Indigenous-style artwork, souvenirs and other cultural affirmations are being imported from overseas and undermining: 1. the ability of Indigenous artists to gain economic benefit from their work; and 2. Indigenous culture'.[189]

The operative proposed provision, s 50A, provided that:

> (1) A person must not, in trade or commerce, supply or offer to supply anything to a consumer that includes an indigenous cultural expression unless:
>
> (a) the thing is supplied by, or in accordance with an arrangement with, each indigenous community and indigenous artist with whom the indigenous cultural expression is connected; and
> (b) the thing is made in Australia.

The proposed s 168A(1) provided a strict liability offence where a person supplies (or offers to supply) a thing that includes an Indigenous cultural expression, with a $25,000 fine for individuals and $200,000 for a body corporate. An 'indigenous cultural expression' is broadly defined as an expression of Indigenous culture that:

> (a) has archaeological, anthropological, contemporary, historical, scientific, social, or spiritual significance to an indigenous community; or
> (b) has its origins in an indigenous community; or
> (c) is made by an indigenous artist; or
> (d) is derived from, or has a likeness or resemblance to, one or more indigenous cultural expressions above.[190]

The definition of Indigenous cultural expression would capture art styles, designs and symbols where these stylistic features carry social and spiritual significance to an Indigenous community as well as have their origins in or are otherwise made by an Indigenous artist. Moreover, style appropriation is clearly covered by the definition discussed above, which specifically mentions

[187] After the expiry of the notice paper on 5 September 2017, the Bill was re-introduced the following week.

[188] Explanatory Memorandum, Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth) 4 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5810_ems_f8371615-c53d-4434-a0a7-fb06dd667dbb/upload_pdf/17027EMKATTER.pdf;fileType=application%2Fpdf>.

[189] Ibid 2.

[190] Katter Bill (n 186) sch 1 (definition of 'indigenous cultural expression').

derived works that merely have a 'likeness' or 'resemblance' to an Indigenous cultural expression.[191] The terms 'likeness' and 'resemblance' suggest that direct copying is not required; seeking inspiration from the uncopyrighted aspects of Indigenous art — such as a style — could be sufficient.[192] As such, per the proposed s 50A, where a person has not made an agreement with the relevant Indigenous community and/or Indigenous artist with whom the cultural expression is connected, they are prohibited from supplying or offering to supply anything to a consumer that includes that cultural expression (regardless of whether or not they have falsely marketed the product).

If this Bill was made law, the sale of paintings like Hirst's *The Veil Paintings* in Australia would be unlawful. Hirst's paintings bear a striking resemblance to the culturally significant artworks created by Ngale and Kngwarreye, who are Indigenous artists. As Hirst did not secure an arrangement with Ngale or Kngwarreye's estate, or their community, offering the paintings for sale in Australia would violate s 50A, triggering the strict liability offence in s 168A(1). Yet, the Katter Bill did not prosper. It was examined by the House Standing Committee on Indigenous Affairs and tabled in December 2018 but rejected by Parliament.

Two years later, the Hanson-Young Bill was introduced. While similar in material respects to the Katter Bill,[193] the Hanson-Young Bill also included an attribution provision,[194] a prohibition on selling ceremonial or sacred artefacts,[195] and an 'Indigenous cultural expression contract' requirement. This latter requirement, outlined in the proposed s 23(6), makes any contract entered into for the licensing of an Indigenous cultural expression void 'if the term is unfair'.[196] An Indigenous cultural expression contract is that which

> provides for the grant of consent by an Indigenous artist or Indigenous community to a person to supply, or offer to supply, a good to a consumer that includes an Indigenous cultural expression, with whom the Indigenous artist or Indigenous community is connected.

In including this requirement, the Hanson-Young Bill thus sought to not only ensure licensing arrangements with Indigenous artists and communities for the sale of Aboriginal-style products through the Bill, but also to actively protect against predatory arrangements.

At present, the unfair contract term provisions in the *ACL* apply to standard form consumer contracts.[197] Standard form contracts are not defined in the *ACL* but are generally understood to

[191] Ibid.

[192] This is regardless of whether the appropriation violated customary law. The Bill only refers to this standard, and not customary law as the relevant standard of whether an incursion has occurred.

[193] The Hanson-Young Bill (n 186) similarly makes it an offence for a person, in trade or commerce, to supply or offer to supply a good to a person that includes an Indigenous cultural expression unless the good is made by an Indigenous artist or members of an Indigenous community or the good is sold subject to an appropriate written licence from the Indigenous artist or Indigenous community community: see at s 50AB. A substantially identical definition of Indigenous cultural expression to the Katter Bill is also relied on in the Hanson-Young Bill.

[194] Hanson-Young Bill (n 186) s 50A(1)(b).

[195] Ibid s 50A(2).

[196] Ibid s 23(1A).

[197] The unfair contract term provisions are found in the *ACL* (n 179) pt 2-3.

refer to those contracts offered on a 'take it or leave it' basis, without any negotiation of terms.[198] The unfair contracts regime does not apply to contracts where there is some negotiation of terms, as is typical in the licensing of artworks or art services. If Indigenous cultural expression contracts were brought within the bounds of this regime in the manner suggested in the Hanson-Young Bill, where a contract term was found to be 'unfair'[199] the court could grant an injunction restraining the other party from acting on the term, demand compensation, make an order to provide redress, and any other orders the court thinks appropriate.[200] In effect, this inclusion in the Hanson-Young Bill safeguards the interests of communities and individual artists when cultural outsiders seek to license art styles and other Indigenous cultural expressions for commercial use.

Following a period of consultation and public submissions, on 16 April 2020 the Senate Committee released a report in response to the Hanson-Young Bill.[201] While the Committee stated that it 'is clear that the misuse and appropriation of First Nations cultural designs, arts, and practices is a matter of deep concern for both Australian consumers and First Nations people',[202] they did not recommend that the Bill be passed.[203] Instead, more consultation with Indigenous artists, organisations and communities was suggested,[204] as a pathway to 'a comprehensive, standalone legislative framework to protect the various complex forms of Indigenous cultural expression' outside of the consumer law framework.[205] The subject matter of the proposed sui generis legislation was not outlined, nor how it might interface with existing copyright, heritage, or consumer laws.

In September 2020, Federal Minister for First Australians Ken Wyatt stated that the Federal Government is interested in considering the 'scope and feasibility' of standalone legislation to 'stamp out' fake art and consultation with Indigenous communities to develop a TK and cultural expressions Bill, yet no timeframe nor details have been put forward. [206] Commentators are also generally supportive of a sui generis regime to remedy the limitations of the *ACL*.[207] Yet to date,

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[198] For factors that the court may consider when determining whether a contract is a standard form contract, see ibid s 27(2).

[199] Ibid s 24(1) provides that a term will be 'unfair' when it is proven, on the balance of probabilities, that it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on. Examples of unfair terms are found at s 25.

[200] See eg ibid ss 232, 236, 239, 243.

[201] Environment and Communications Legislation Committee, *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (Report, April 2020) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024309/toc_pdf/CompetitionandConsumerAmendment(PreventionofExploitationofIndigenousCulturalExpressions)Bill2019.pdf;fileType=application%2Fpdf>.

[202] Ibid [1.15].

[203] Ibid [2.67].

[204] Ibid [2.61], [2.66].

[205] Ibid [2.63].

[206] Ken Wyatt quoted in Henderson and Collard (n 57).

[207] Parkin and Pappalardo (n 104) 36. See also eg IP Australia's inclusion of measures to deter the trade and import of inauthentic products alongside new legal rights where IP protections do not apply as potential subject matter of a new stand-alone legislation: IP Australia, *Stand-alone Legislation for Indigenous Knowledge* (n 110) 1.

neither consumer law reform nor sui generis legislation has eventuated in the years that have followed, suggesting that Parkin and Pappalardo's concern that the Senate Committee's 'recommendation for further consultation carries a risk of devolving into an interminable series of consultations without any action' may be correct.[208]

While advocacy around fake art has contributed to the development of industry norms around ethical conduct and increased public awareness of appropriation, law reform is yet to attract support from the major political parties. Consumer law, like heritage law and copyright law, remains complicit in the cultural appropriation of Aboriginal and Torres Strait Islander art, including the expressive, diverse dot-painting style of Utopia artists Ngale and Kngwarreye.

IV Conclusion

When Damien Hirst raised his brush and started applying daubs of paint to what were to become *The Veil Paintings*, he allegedly committed an act of cultural appropriation. According to some critics, the paintings mimic the artistic style of the Utopia community in Australia, specifically that of the world-renowned artists Kngwarreye and Ngale. We have used this controversy as a point of departure for exploring the fraught issue of cultural appropriation, when viewed through a legal lens. When non-Indigenous artists create works that draw upon, or are inspired by, longstanding cultural stories and traditions (or appear to do so), their actions can amount to a violation of customary law or otherwise cause cultural harm or offence. Yet, the laws of the state are not, by and large, receptive to such perspectives. In failing to protect Indigenous culture, current legislation is complicit in cultural harm by providing a safe haven for cultural appropriation.

In this article we considered how the appropriation of artistic 'styles' falls within the contemporary art law and policy framework in Australia, as against the potential for the misuse of styles embedded within TK systems. Our primary purpose was to contribute to existing cultural appropriation and law reform discourse by determining the legal status of style appropriation. We first analysed the status of style appropriation under customary law and with reference to customary rights and obligations, showing that there can be a significant link between the style of a particular Indigenous community and the artwork it produces as connected to place-specific Dreaming stories and cultural history. We subsequently determined that unauthorised appropriation occurs outside of the complex system of regulation and consent processes that surround the production of traditional art and can interfere with the cultural rights and responsibilities of cultural members and custodians. We then examined the legal status of style appropriation under three areas of Australian law: copyright law, cultural heritage law and consumer law; and analysed the intertwined policymaking impacting upon the current legal context.

In relation to copyright law, we showed that 'styles' are not protected by Commonwealth legislation or case law, even though there has been some protection of the cultural context within which art is produced as part of the 'facts' of a case. Problems associated with communal authorship and ownership were identified and noted to be exacerbated by other cornerstone copyright principles; namely, the material form requirement. Viewed as an 'idea' rather than expression of an idea, art styles are not protected by copyright, which has implications for both subsistence and infringement. Individual artistic works that draw upon traditional themes *are* protected by copyright, but distinctive cultural painting styles, such as the dot painting styles

[208] Parkin and Pappalardo (n 104) 36.

distinctive of the Utopia community, are in the public domain and able to be used without restriction. The copyright regime's inability to recognise styles as a legitimate source of artistic work worthy of protection lies in its focus on 'individual' and 'economic' rights as property rights, in contrast with more expansive views of cultural property as communal.

Cultural heritage laws across Australia were also analysed in terms of their potential to protect not only physical cultural heritage (objects, places, and landscapes) but also ICH such as art styles. We found limitations in the jurisdiction of ICH, with only Victorian legislation currently offering a definition and reform slated for New South Wales but nowhere else. Furthermore, the limitations of ICH in protecting styles or stories that may already be known to the public were identified. This leaves even those communities residing within ICH jurisdiction in a precarious position. They can, on the one hand, seek protection under cultural heritage laws by never expressing stories through art in order to maintain knowledge as 'secret and sacred' or, on the other, reveal their communally owned styles through artistic works and thereby forfeit protection against cases of appropriation, as in the example of *The Veil Paintings*.

Finally, we reviewed the creative use of the *ACL* through case law, legislative reform and policymaking to explore when style appropriation may constitute misleading and deceptive conduct. The practice of describing styles as 'Indigenous' or 'Aboriginal' to mislead consumers into viewing (and ultimately purchasing) 'fake art' raises options for litigation. We also reflected on the ongoing public awareness campaigns and education advocacy in initiatives such as Fake Art Harms Culture and draft legislation. Several Bills introduced to Parliament have sought to combat fake art through the introduction of offences for appropriation. Yet, ultimately, an enduring preference for sui generis legislation was identified as a key reason for the stalling of consumer law reform.

The cultural appropriation controversy that surrounds *The Veil Paintings* highlights the inefficacies of the legal and policy framework in Australia for protecting Aboriginal and Torres Strait Islander knowledge, stories and art. There has been much consideration by critics, commentators and governments of the potential for law and policy to extend towards a more holistic view of culturally significant art styles and their protection from appropriation. There has also been much acknowledgment of the cultural harm and reduced economic opportunity for Indigenous artists and communities in light of the current legal context. Nevertheless, at present, despite three decades of demands for reform, much style appropriation remains legal under the Australian legal system. It remains to be seen whether the customary laws and practices that are operative within communities like Utopia will be respected in the future as a viable source of rights, enforceable against cultural outsiders.