

The Wandjina case demonstrates the lack of protection for Indigenous culture

By Robyn Ayres on 30th September 2010

The Law Report on ABC's Radio National recently ran a story⁽ⁱ⁾ about a gallery in the Blue Mountains which has erected a large outside sculpture featuring Wandjinas, the creation spirit sacred to three Aboriginal tribes in the Kimberley in Western Australia⁽ⁱⁱ⁾. The gallery, in a separate initiative is also encouraging artists to create their own Wandjinas through the Wandjina Rising Dream Art Competition. In the face of criticism gallery owner, Vesna Tenodi, is unapologetic believing she has been chosen to revive the Wandjinas in the Blue Mountains and does not accept the cultural concerns raised by the traditional owners of the Kimberley region⁽ⁱⁱⁱ⁾.

This case highlights the current gaps in protection provided to Indigenous cultural and intellectual property (ICIP) under Australian laws.

To date, in relation the Wandjina case, the Australian Competition and Consumer Commission (ACCC) has stated it is unable to take the matter any further on behalf of the Kimberley Aboriginal elders, there being insufficient grounds under section 52 of the Trade Practices Act which prohibits misleading and deceptive conduct.

The Copyright Act also does not provide any assistance. First, the works created by the gallery are likely to be considered sufficiently "original" only taking their inspiration from the Wandjinas rather than being copied. Secondly, as many of the Wandjinas found in rock art are ancient, the copyright period of life plus 70 years has long expired so they are therefore considered to be in the public domain.

Given the offence the Katoomba sculpture and gallery has caused not only to the Kimberley traditional owners, but also many of the local Aboriginal community in the Blue Mountains, the gallery's development applications (DAs) to the local shire council under the planning laws for its sculpture park and gallery, have been opposed. The outcome of the DA process is yet to be finalised.

Katoomba sculpture by Benedikt Osvath (top), photographs by Reinier de Ruit.

This case highlights the pressing need for better protection of Indigenous cultural and intellectual property in Australia. Whilst Arts Law understands that the Australian Government has been examining the current legislative and other measures in place in order to identify the gaps in protection available^(iv), another initiative of the Government to improve understanding and awareness of Indigenous intellectual property (IIP) issues is the development of an IIP toolkit.