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Frauds and fakes in the Australian aboriginal art market

Christine Alder · Duncan Chappell · Kenneth Polk

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Abstract This article examines the topic of problematic art in the Australian Aboriginal art market. For Aboriginal people art plays an important social, economic and political role. It has also become a major source of income for many. Thus when the integrity of that art is challenged by allegations of fraud and deception it is imperative to explore the veracity of these claims and the responses made to them. In the article particular attention is devoted to those responses made through both the Australian criminal and civil systems of justice. This analysis shows that there are special problems associated with establishing the authenticity of Aboriginal works of art which tend to hamper the prosecution of fraud cases while a dearth of expertise and interest in art fraud at large among Australian law enforcement bodies is a further barrier to effective action. The conclusion is reached that at present the Australian legal system is poorly equipped to deal with frauds and fakes in the Indigenous art market—a situation which will take time and more imaginative solutions to remedy.

Introduction

The purpose of this discussion is to review the topic of problematic works in the Aboriginal art market. For the Indigenous peoples of Australia, art plays an important social, economic and political role. What western eyes now call art has

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C. Alder · K. Polk
School of Social and Political Sciences, University of Melbourne, 50 Smith Street, Brunswick West, Victoria 3055, Australia

C. Alder
e-mail: cmalder@gmail.com

K. Polk
e-mail: kenpolk2001@yahoo.com

D. Chappell (✉)
Institute of Criminology, Faculty of Law, University of Sydney, New Law Building F10, Sydney, NSW 2006, Australia
e-mail: duncan.chappell@sydney.edu.au

served for centuries ceremonial purposes of transmitting, and assuring the continuation of, the stories of the "Dreamtime" (a common term used to describe the complex of myths relating to the origins and religious beliefs of Aboriginal groups). Art has come to be a major source of income for many, and a vehicle for communicating their perspective on the many political events that have overtaken them. When the integrity of that art becomes challenged by charges of fraud and deception, it becomes an important matter to examine closely, and from a professional perspective, especially when these challenges upon examination often have an appearance different than the impression that might be found if one only reads media accounts.

Our discussion takes us first to consideration of the scope of the fraud and deception encountered in the Aboriginal art market.[1] Put simply, what is the problem and is that problem significant enough to require intervention by either the criminal or civil justice systems? Having determined that there is a problem, albeit ill-defined and recorded at official levels, we shift our focus to the response made through criminal law and civil law sources, illustrating our analysis by means of a review of several seminal cases, two criminal and two civil. This analysis shows that there are significant barriers to utilising either the criminal or civil law to deal with illicit behavior in the Aboriginal art market, not the least because of the issues of authenticity and deception in cases involving the art world in general, and the Aboriginal art scene in particular. We explore these central issues in more detail before drawing a number of conclusions about the perceived and actual effectiveness

[1] A wide variety of terms, with divergent meanings, can be found in discussions of art which is not authentic. Given the present focus on the role of the criminal justice system, we have tended in the text to focus on "fraud," where the major elements consist of an object which can be shown to be false, harm to a victim results, and criminal intent on the part of a perpetrator can be demonstrated. Especially in media and other less professional outlets, the term "fake" (including "fakery" and "fakers") is commonly found, and is also used here. Following conventional definitions, a "fake" is an object which is not what it appears to be, that is, it is false. A problem can occur because when terms such as "faker" or "fakery" are used, there will often be implied some sense of intent on the part of the person creating or passing off the false object. This is certainly correct in cases involving what we have termed "serial fakers" such as the Liberto case reviewed here, or with such well known fakers as John Myatt [22]. Such individuals repeatedly place false works into the art market, knowing them to be false (and often this leads to a finding of criminal intent by a court, and a conviction for fraud). Unfortunately, there are a number of instances where the discussion identifies a work as a "fake" where the intent element is not present, as in media accounts of prominent works where the authorship is shown to be different than was previously claimed. An example used in the text consists of discussion which resulted when the Van Gogh in the collection of the National Gallery of Victoria was found, after many decades of mistaken identity, not to be by the hand of Van Gogh (NGV 2007). In these cases, the work has often been in public collections for many years, and by then any information about the intent of those placing it onto the market is long lost. While such works are "not authentic" in terms of the original attribution, it is inappropriate to assume a known intent to falsify which is commonly associated with the term "fake." A third frequently used term is "forgery", which we have avoided in the present analysis. In legal discussions, forgery refers to the production of a false document. In an early English case, Closs (1858), the finding was that an art work does not constitute a "document," and therefore a charge of forgery does not apply to a false painting. Since that precedent tends to confuse discussions where English Common Law applies (as in Australia), we do not use the words "forgery" or "forger" here. These are, nonetheless, popular terms, and can even apply in cases of art fraud, for example in the case where John Drewe (the business partner of John Myatt) was convicted of forgery because he had falsified documents in order to provide provenance for the fakes (produced by Myatt) that were being passed onto the market [22].

of current law based remedies directed at preventing art fraud and deception in this important area of the art market, or punishing it when it occurs.

Is there a problem?

Before we turn to any consideration of the use of the hammer represented by the criminal justice system, we need to assess whether it is appropriate to call that system into play in regard to the Aboriginal art market. Right at the start it needs to be emphasised that if there is an issue of bogus art in Australia, it is hardly unique to the Aboriginal art market. In recent times in Australia we have been confronted with images in our newspapers of claims of false works which had been claimed to be the work of the well known Sydney artist the late Brett Whiteley [8, 9], and the unusual image of two elderly artists creating a bonfire of works that had been deemed to be fakes of their works [5]. Since this destruction had been ordered by a judge, we will return to it later in this discussion. When we think of the major fakers of the past, such as van Meegeren, Elmyr deHory, Tom Keating, John Drewe/John Myatt, or the Greenhalgs, all were working within European traditions of art. To be sure, when it comes to problems of potentially bogus works, prominent names within the Aboriginal artistic community have been involved (although the faking might have been done by non-Aboriginals), such as the recent criminal case discussed below in Victoria where Ivan and Pamela Liberto were charged with faking the work of Rover Thomas [11, 12].

Unfortunately, the routine tools available to criminologists to estimate the size of a crime problem are of no assistance to the study of art fraud (or any other art crime). There are no “official statistics” regarding fraud in the art market because no policing agency in Australia (or any other English speaking country) records art fraud as a separate entity from other forms of fraud. Other standard criminological innovations over recent decades, such as victim surveys or self-report techniques, similarly are not applicable to the highly specialized and unique contours of art fraud. We are, therefore, forced to turn to other procedures in our attempt to assess the degree to which this form of fraud, including that found in Aboriginal art, constitute a problem.

There are, without question, numerous informal accounts of problems within the art market generally, and the Indigenous art sector more specifically. Myers (2002) relates the following account of what happened after the death of the highly esteemed Anmatyerre painter Emily Kingwarreye:

> Represented by several dealers and often working in different styles, Emily had a prodigious output, and her work was in great demand. When she died, dealers from across Australia attended the funeral. One dealer told me that “a lot of people were doing copies and fakes of Emily, too, and some very recent Emilys were turning up shortly after she died” (Myers 2002: 327)

No charges were ever laid regarding these allegations, nor, in fact, have we found any sign of initial interest on the part of the criminal justice system. A similar tale of fraud was spread in headlines over a major Melbourne newspaper in 1999 alleging a pattern of nationwide Aboriginal art fraud involving art supposedly created by Ginger Riley in which:

> At least 50 of the fake works done in the unmistakable Riley style are circulating in Melbourne, Sydney and Adelaide. The artist has labeled them all fraudulent, even though he signed them ([23], 1).

Despite initial involvement of police in the Northern Territory, South Australia, and Victoria, the matter did not result in further legal action by the criminal justice system. Comparable tales of fakes with the signature of Turkey Tolson Tjupurrula were circulating at about the same time [17].

All of these, of course, are media accounts or observations, "stories," that suggest the existence of a problem of art fraud. It is difficult, unfortunately, to obtain a precise estimate of the level of such fraud. Some scant data are provided by the Australian Competition and Consumer Commission (ACCC) in a submission to the Senate inquiry into problems in the Aboriginal art market, where it was reported that there were 30–40 "Indigenous specific" calls to that agency per year regarding potential issues relating to fraud and deception ([24], hereafter the *Senate Report*).

Even data for the wider market are limited and difficult to assess. In his book on "fake busting," the former Director of the Metropolitan Museum in New York, the late Thomas Hoving ([14], 17) claimed that fully 40% of the thousands of works he had seen in the course of his career were either "…phonies or so hypocritically restored" that they should be considered as spurious. Over the years the International Foundation for Art Research has served as a major international unit to examine and assess suspect works, and Flesher ([10], 99) observes that close to 80% of the works submitted to that organization for assessment "…have been deemed not to be by the artist to whom they were attributed at the time of submission." Robyn Sloggett, from the University of Melbourne, provides a more modest estimate in her observation that: "About 10% of paintings on the market, both in Australia and internationally, are generally considered to be cases of mistaken identity" (as quoted by [20], 18).

Note that both IFAR and Sloggett are careful with their language. There are many factors that can result in "identity" problems. Works thought to be genuine might turn out to be simple reproductions. As indicated above, works attributed to a famous artist might actually be a product of his studio, or his students. Over time, mistakes can be made (some honest, some not) so that the correct identity of a work becomes confused. This can take bizarre twists, as in the case where a dealer in centuries past decided that a Golden Age Dutch painting in his shop would sell better if he added the name "de Hooch," an act today we would consider sheer madness since the actual painter was Vermeer ([15], p. 45).

A variation on this confusion occurs when the authenticity experts disagree over time. For an example, the National Gallery of Victoria (NGV) faced this situation in 2007 when a work purchased decades before as a painting by Vincent Van Gogh (and so attested by expert advice) was conclusively demonstrated to be the work of another artist working at the same time as Van Gogh, but using techniques which were not consistent with the methods employed by that artist. (National Gallery of Victoria 2007) In a slightly different variation on this scenario, a work originally accepted as that of Titian purchased by the NGV in 1925, on the basis of stylistic and other evaluations subsequently was down-graded to being a work of "15th Century Northern Italy". More recent analysis then established that it can now be, in the words of the National Gallery, "positively attributed" once again to Titian (NGV

2007, p. 10). Similarly, a painting "Doge Pietro Loredano" purchased originally as a Tintoretto but downgraded by experts who thought it was a copy, was in recent times "exonerated" and up-graded to the status of a legitimate work by that artist, or in the words of the NGV it was "…confirmed indisputably to be a Tintoretto" (NGV 2007, p. 10). The point of all this is to underscore the observation that while there are many reasons why a work might prove NOT to be authentic, and in some cases any concern about fraudulent activity is not warranted. Similar conclusions echo through the literature responding to the activities of the Rembrandt study group's downgrading of paintings which previously had been attributed to Rembrandt (see [3]).

Understanding this limitation to Sloggett's use of the term "mistaken identity," we can obtain some potential estimates of a size to our present problem. If we start with the Senate Report ([24], 9–10) which reviewed several sources of previous data on the size of the Indigenous art market, and reported a range of estimates of the annual volume of sales between $100 million up to as much as $500 million, and adopt a conservative strategy and presume an annual value of $100 million, and if we assume Sloggett's figure of 10% can be applied to the Indigenous sub-sector of the art market (and there seems no reason why this should not be acceptable), then we are left with an estimate of *at least* $10 million per year in terms of cases of "mistaken identity" flowing into the Aboriginal art market. All of these might create problems for consumers who are purchasing something different than the "identity" that is claimed, and some large but unknown amount of this can be presumed to be made up of deliberate deception.

Art fraud and the role of the criminal justice system

One major system we presume we can call upon if we are confronted with the crime posed by intentional and dishonest deception is the criminal justice system. At first glance, that system would appear to be well suited to meet this challenge. Certainly, the laws on fraud specify what constitutes a fraud, and how such matters should be addressed, although it must be remembered that fraud law can be complex, and there are nine jurisdictions in Australia, each of which will have its own specific statutes defining fraud offenses (note the plural here since there will be different forms and levels of fraud). In Victoria, for one example, the relevant laws are found in S. 81 of the Victorian Crimes Act 1958 which provides, in part:

> [1] A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment [10 years maximum]

There is a long history of prosecution and litigation around issues of fraud, and given the multiple jurisdictions of Australia, a successful traversing of this legal minefield will obviously require considerable skill and expertise on the part of investigators and prosecutors, regardless of the nature of the fraud under consideration. The precise charge[s] which may flow from any fraud investigation will depend very much upon the peculiarities of the fraud law in any given jurisdiction. Even so, there are likely to be a number of common evidentiary issues

and elements which will need to be present before any fraud investigation or prosecution can proceed, namely, there is

[i] some form of deception by a defendant and
[ii] this deception has produced some form of harm
[iii] to a victim who was in fact deceived, and
[iv] there was some level of knowledge, intent, or dishonesty on the part of the defendant (see, in general [16]).

There have been just two cases in Australia over recent years that illustrate the application of the criminal justice system to the problem of fraud involving Aboriginal art. The most recent of these is what might be termed a landmark case in 2008 involving a Victorian based couple engaged in fraudulent practices in Melbourne (R v Liberto and Liberto, 2008), and the second an art dealer with a business in South Australia whose fraudulent activities extended to other Australian jurisdictions, including New South Wales (R v O'Loughlin, 2002). We turn now to a discussion of these cases.[2]

R v Ivan Liberto and Pamela Yvonne Liberto (2008)

Pamela Liberto and her husband Ivan Liberto were involved in the sale of what were alleged to be false art works which they claimed were produced by the well-known Aboriginal artist, the late Rover Thomas. Over a period of a number of years, the pair were alleged to have sold, or attempted to sell, a number of painting said to be created by Thomas for a total sum in excess of $300,000. The sales had been made principally through well known international auction houses such as Christie's and Sotheby's. The careers as art traders of the Libertos began to unravel when the curator of Aboriginal art at Sotheby's noticed that something did not appear right with a painting of a rainbow serpent claimed to be by Thomas that was submitted to Sotheby's in September, 2005, which he then compared with a work previously auctioned at Sotheby's the year before. The curator contacted an authentication expert at the University of Melbourne, who subjected the painting to tests and established that it was not an object produced by Thomas. Police were then called in, and in early 2006 they raided the home of the Libertos, where they found two partially completed "Thomas" paintings, as well as other materials and catalogues associated with this artist (for accounts, see [11–13]).

The Libertos were charged with two counts of attempting to obtain money by deception dishonestly, and four counts of obtaining money by deception dishonestly between May 2002 and March 2006. The jury ultimately convicted the Libertos of all of the offences with which they were charged—a verdict which the presiding judicial officer, County Court Judge Williams, said included a finding by the jury that the art works were painted by the two accused [Liberto, at 3]. Judge Williams described the offences as "deeply premeditated and highly planned", and at a

[2] In describing these cases we have, unless otherwise stated, relied principally upon the accounts given of each matter in the cited published law reports and publicly available trial transcripts. These sources contain very detailed information regarding the nature of the offences involved, the investigations conducted by the police, and the evidence produced at the time of the respective trials. We have also conducted a far more extensive analysis of both cases, largely from the perspective of the criminal law, in [6]

significant cost 'to innocent third parties, in this case the auction houses, and at another general cost to the integrity of the art industry, in particular the Aboriginal art industry which must suffer when this sort of activity is brought to light' [Liberto, at 3]. The Libertos were sentenced to a cumulative total of 3 years imprisonment of which 2 years and 3 months were suspended.

R v John Douglas O' Loughlin (2002)

John O'Loughlin, an Adelaide art dealer, had a long association with the famous aboriginal artist, the late Clifford Possum Tjapaltjarri. The association included a commercial arrangement by which Clifford Possum produced paintings for O'Loughlin which were bought by him and then on sold to other dealers and individuals across the country.

In February 1999 Clifford Possum visited a gallery in Sydney where a number of paintings attributed to him were being displayed for sale. Upon inspection of the paintings Clifford Possum identified a number which he said were not produced by him. The gallery owner indicated that he had obtained the paintings from O'Loughlin. Subsequently, Clifford Possum also identified paintings falsely attributed to him which were in the hands of the NSW Art Gallery and the Museum of Contemporary Art, all of which had passed through O'Loughlin's dealership.

After an extensive multi jurisdictional police investigation O'Loughlin was arrested by South Australian police in October 1999 and extradited to NSW where he was charged with a number of offences under the provisions of S. 178BA of the Crimes Act 1900[NSW]. Section 178BA provides, in part :

> [1] Whosoever by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years.

Each of the offences with which O'Loughlin stood charged related to his alleged sale over a number of years of paintings which purported to be the work of Clifford Possum but which were in fact falsely attributed to him.

O'Louglin plead guilty to five counts of somewhat lowered fraud charges (under S.178BB) and on February 23 2002 he was sentenced to a good behavior bond for a period of 3 years—a penalty which may be judged by some to be quite lenient given the systemic nature of the deceptive conduct displayed by O'Loughlin, and the extensive law enforcement resources required to bring the case to trial in the first place. Even so, the case does represent a landmark in the murky world of art fraud, representing the first occasion on which a successful prosecution has been achieved in this country in a case involving Aboriginal art.

Art fraud and the role of the civil justice system

While most laymen are likely to think of fraud as an exclusive province of the criminal law, in fact issues of fraud and deception can be addressed through civil process as well. In fact, some might argue on theoretical grounds that aggrieved individuals might find such an approach more fruitful than pursuing a claim of

deception or fraud through the criminal justice system, since (1) the burden of proof is lower in civil actions (the bar being set at "balance of probabilities", akin to the American civil law test of "preponderance of the evidence", rather than proof of fraud "beyond reasonable doubt"), (2) the claimants have some chance of recovering lost money through such a process, and (3) the parties undertaking civil action will have more control over the legal process than those considered as victims of crimes in a criminal court (to be sure, such advantages have to be balanced by recognition of the huge costs that may be assessed if the claim is not successful). There are, however, a number of different avenues that any civil action can take. In some, plaintiffs seek direct redress of an act of deception which has caused them financial harm, while in others the action might be taken by a governmental agency which has mandated responsibility for addressing particular harms (in Australia, such an avenue, as we shall see, is available through the Trade Practices Act). We turn now to consider two recent civil law cases in Australia which illustrate how such actions can be initiated and with what outcomes.[3]

Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd [2009]

The first case we have found consists of an action undertaken not by an individual, but by an agency of the Commonwealth Government, the Australian Competition and Consumer Commission (ACCC) in 2009 (although there is some reference to a similar case entered into by the ACCC in 2003, which was settled pre-trial in 2004, see [2]) The ACCC was able to proceed under provisions of the *Trade Practices Act 1974* (TPA) which provides that the ACCC will enforce the provisions regarding consumer protection, especially business conduct which "…is, or is likely to be, misleading or deceptive, and prohibiting unconscionable conduct by business in their dealings with consumers" (see *Senate Report*, 107). In its submission to the Senate inquiry into the Indigenous art market, the ACCC described "misleading someone" as including:.

- lying to them;
- leading them to a wrong conclusion;
- creating a false impression;
- leaving out (or hiding) important information in certain circumstances; and
- making false or inaccurate claims about products or services. (*Senate Report*, 109–110)

The ACCC undertook action against one Mr. Tony Antoniou and his company, the Australian Dreamtime Creations (ADC) Pty Ltd alleging a number of examples of deceptive and misleading conduct as covered by the TPA. The court found, for example, that the company had:

- … from at least 19 June 2007 to January 2009, represented in trade or commerce on its internet website that certain artworks promoted for sale by it, including paintings, prints, boomerangs, bull-roarers, carved wooden animals, carved

[3] In describing these cases we have again relied principally upon the reported decisions we have cited.

wooden statues, table platters, didgeridoos, emu eggs and ceramic objects including table platters, vases, wall plates, lidded boxes and bowls were painted by:

- 1.1 a person of Aboriginal descent; and
- 1.2 Ubanoo Brown,
- when those artworks were not, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the TP Act). [1]

The court found for the ACCC and ordered (among other things) that the company, ADC:

> …be restrained, whether by itself or by its employees or servants or agents or otherwise howsoever for a period of 3 years from representing by any means whatsoever, including by any stamp or certificate of authenticity, that any artwork promoted, sold or supplied by it to any person has been made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent unless the artwork was, to the best of its knowledge, made, painted, created, crafted, carved, or otherwise produced, as the case may be, by a person of Aboriginal descent and from using the words “Aboriginal Art” or words describing an artwork as “Aboriginal” unless it has made such enquiries as it considers appropriate to be satisfied that the artist or artists of each such work is a person of Aboriginal descent, and it is directed to retain for a period of 5 years from the time of such enquiries a record of the basis upon which it attained that satisfaction. [at 2–3]

A similar order was made regarding Mr. Antoniou.

Among the number of points which emerge from this case is, first, the determination of the fact that the term “Aboriginal art” can be seen as implying that a person of Aboriginal heritage was responsible for the work, rejecting the view put forward by the defendants that these words simply describe a style of artwork. It asserts the principal that art consumers have the right to be confident that when purchasing Aboriginal art it will, in fact, be Aboriginal art. A second observation is that there were scarce penalties applied for what would ordinarily be considered a rather major deception, since the order merely prohibits the defendants from selling “Aboriginal” art work unless the person who produces that work was, in fact, “Aboriginal” (although, of course, the provision that the defendants would pay the costs of the prosecution could be seen as a form of financial penalty).

Blackman and Ors v Gant and Anor [2010]

The second case we consider here is important since it provides an illustration of individuals seeking redress through a civil process, rather than having that action taken by a governmental body. While it does not involve issues directly relating to Aboriginal art, the nature of the process followed by the case is significant for any Australian artist, including Aboriginal artists, if their work has been the object of serial fakers. In the case, two well known Australian artists Charles Blackman and Robert Dickerson went to the court in an attempt to restrain a Melbourne art dealer,

Peter Gant, and others, from selling works that the artists, or their representatives, had identified as not being produced by them. In what would appear to be an unusual approach to a defense, the defendant, Gant, claimed that the works in question were, in fact, authentic works of the artists (despite artist testimony to the contrary). At that point, then, the proceedings hinged on the question of the authenticity of the three particular paintings that were the target of this action. Testimony from various expert witnesses was presented that addressed the authenticity question. After hearing the various presentations and reviewing the evidence, the court found that:

> The works which are the subject of this proceeding…are not be the hands of those artists and are fakes. [at 42]

The court at this point determined that the appropriate action in this case was to order that the three works at issue would be delivered up to the plaintiffs and that they would then be destroyed (which a few days later, they were). This establishes both the precedent for such destruction, and provides a model of the process by which aggrieved artists might seek this outcome.

Deception, authenticity and the aboriginal art market

A common thread that runs through these accounts is the centrality of the issues of authenticity and deception where fraud or deceptive practices are alleged in cases involving the art world. This is perhaps most obvious in cases involving serial fakers, such as the Libertos, where proving the case hinges in large part on demonstrating that the work is not what it seems. While this, in general, suggests that authenticity is a matter the merits close attention in cases of alleged art fraud, as we shall see, questions of authenticity and deception can become particularly problematic when addressing matters of Indigenous art. When we turn our attention to authenticity as it concerns Aboriginal art, we need to address two quite different questions: (1) is the named artist the author of the work, and (2) is the work being considered a genuine Aboriginal product?

Is the named artist the author of the work?

An obvious form that creates authenticity problems bring us to the question of whether the work at hand is, or is not, the product of the artist claimed as its author. There are at least three forms that this general question can take. One of these, and one that most would identify as a major issue of authenticity, is whether the work which is identified as being produced by one artist has, in fact, been produced by someone else, that is, the classic situation of "fakery"(where the whole work, including the signature, is not genuine). In its common form, this is hardly an issue unique to Aboriginal art. Skilled serial fakers, such as Keating, de Hory or Myatt, were masters at producing works that they passed off as being produced by well known artists. Thus, while the Libertos and O'Loughlin produced false works that were in an Aboriginal medium, they join a long tradition of fraudsters in an art world much wider than the confines of Aboriginal art.

However, there are issues that can emerge with this problem when we consider the context of Aboriginality. Matters can arise which cloud questions regarding the nature of the intent or dishonesty involved, as was found in O'Loughlin when the defendant made the claim to the court that the artist had made him an honorary "cousin" (we have commented elsewhere that problems relating to the intent element of the charge might have contributed to the decision of the prosecution to go to trial on a lesser charge of fraud in the O'Loughlin case where intent was not an issue, see [6]). As recounted by one reporter, O'Loughlin said that:

> … after they ate kangaroo intestines together, Possum asked for his help. "Only on that one occasion did he say to me, you can do the dotting—you are my cousin," O'Loughlin said. "I took it then that I could and he never objected to it after that."… O'Loughlin admitted to embellishing and "finishing off" paintings by Mr Possum. [4]

The same reporter observed that the artist who had been faked, Clifford Possum, said: "I'm really angry… That's his [the accused dealer's] own dreaming. He shouldn't copy mine." [4] This comment reminds us that there are features of Indigenous life that intrude even to what might appear to be a straightforward appearing matter of authorship and fakery. Where the original artist is closely tied to Aboriginal traditions, issues of responsibility and custodianship may arise in situations where someone has copied motifs of an Aboriginal artist. Such fakery may undermine the position of the artist as a senior member of the community, since there may be an expectation that the artist should maintain control over the distribution of sensitive thematic content within any art objects, and be accountable for improper distribution of this content, a consideration quite absent from traditions of European art.

A second problem occurs where an artist signs her or his name to a work that has been produced by someone else (that is, where the work is not genuine, but the signature is). This can occur when a well-known artist signs a work produced by a less known artist as a way of increasing the value of the work for the economic benefit of the less well-established artist. This practice is certainly not unique to Aboriginal art, with stories abounding in the history of art of such nudgings of careers of students by the likes of Rembrandt or Corot. In the world of Aboriginal art, over the recent years claims have been made that such well known Aboriginal artists as Turkey Tolson and Ginger Riley have signed their names to work produced by others. In the case of Tolson [7], the allegations involved claims that the artist had signed his name to works produced by less well-known members of his family. The case of Ginger Riley was a bit more complicated, since the tale allegedly involved members of another Aboriginal community spending some time with the artist in his remote bush home territory, working alongside of him for an extensive period, and then with some amount of coercion inducing Riley to sign works he had not produced [23].

A third problem occurs when works are produced collectively, but where a well-known artist signs the work and the contribution of others is thereby not acknowledged (that is, where some part of the work might be considered genuine). Again, this is a problem with a deep history in the world of art. One of the leading

art texts states, without elaborate comment, that of the artist Paul Rubens, "In the practice of his art he was assisted by scores of associates and apprentices, turning out large numbers of works for an international clientele" (de la Croix and Tansey, 1975: 603). In short, when one bought a work signed by Rubens it would be an open question exactly how much, if any, work Rubens actually did on the painting. Hoving is somewhat more pointed in his comments:

> Everyone with a familiarity with art history knows that Peter Paul Rubens (1577–1640) supported a vast studio with enough assistants to churn out dozens of commissions a year. Most, by contract, did not specifically call for the master himself to design and complete every centimeter of the works for which he was paid lavish sums by the most astute collectors in the world. Some of them, queens and kings, knew enough about Ruben's activities to insist in writing that at the least he paint every figure, man, god, putto, and animal ([14]: 60–61).

There are particular features of Aboriginal life that contribute to the collaborative involvement in the production of what become works of art that can lead to confusion about the whole concept of "authorship." It is important to bear in mind that what is now called art, and which has definitely become a "commodity," in traditional communities has its origins in the fundamental collective practices of learning and teaching of the basic norms and folkways of the society. In non-literate societies, images are created in a variety of ways as part of the complex process of passing on "stories" which provide the mainstay of socialization. Inevitably, some parts of this process are inherently collective, and this collective element may become passed on when the activity becomes more oriented to producing a potentially valuable "commodity."

Pictures taken by persons such as anthropologists showing life in the camps of Aboriginal artists of the Desert frequently show groups of artists working together in the production of especially the large scale works (although it is certainly true that many artists work alone on works as well). As an illustration, on p. 137 in one of the major works on Aboriginal art, Peter Sutton's *Dreamings: The Art of Aboriginal Australia* [26], there is a photograph of an intricate Desert painting, *Yumari*, which is credited in the text on this page to the highly regarded Uta Uta Jangala, one of the original Papunya artists. On an earlier page of the same book (p. 105), however, is a picture of the artist being assisted in the production of this same work by six others. The text accompanying the picture indicates that the credited artist is "directing" the work of the others (interestingly, [18]: 255, also has a picture of this work being produced collaboratively, but in that photo there are three assisting the artist). Anderson and Dussart have these comments regarding the participation of a group in the production of this painting:

> Who is listed as the artist for a particular work generally depends on the knowledge of the art adviser keeping such records and the willingness of the owner of the Dreaming to have other people cited as co-painters. In our view, many paintings are listed as having been done by a single artist when, in fact, several people were involved. One example is the large painting *Yumari*, for which Uta Uta Jangala is listed as the only artist. In fact, Uta Uta blocked out

the main elements and directed eleven other men in the execution of the rest of the painting (Anderson and Dussart, in [26], 105).

At this point, of course, issues of "authorship" may become a bit confused because of different conceptions of the nature of ownership between those raised in European traditions of art and "authorship," and the Aboriginal communities with their rather different notions. In the Aboriginal community, it is likely where a work is being produced collectively that the various themes and images being produced are seen as the "property" of the individual who has the custodial responsibility for the elements of the story that is involved in the work. Where this individual is the major artist, and the person doing much of the work, there may not be great problems with the resultant "authorship." But it may be that the traditional "owner" of the story being told through the work actually has little or nothing to do with its production.

One arts centre coordinator tells the tale (Dayman 1999) of one of the artists in her community returning from a successful trip to a metropolitan centre where a number of works had been sold, and the "owner" of material presented in one of the works (who had not travelled with the group) demanded at least half of the money obtained for the work, since this is what she was entitled to, in her view, as the custodian of the story although she had not done any of the work on the painting. This story provides an example of how one of the important contributions of the art centre coordinators is help the artists provide a clear attribution of authorship for works produced at the centre, that attribution respecting both Aboriginal and art market expectations regarding the nature of "ownership."It is also worth pointing out that in these cases there is no evidence of clear intent on the part of the Aboriginal groups to deceive. This is in contrast to some historical examples, such as the artistic communities of fakers which emerged in the Ming period in Suzhou, China (Clunas 1997) where the faking was clearly both intentional and collective, with different groups of artists specialising in particular aspects of the knowingly deceptive works being produced, such as line drawing, coloring, or signature writing ([28]: 156–160, devotes a special chapter to the works produced by these Suzhou fakers).

Is the object an authentic aboriginal work?

A second general problem that has emerged in the Aboriginal art market concerns regarding whether the work is an authentic Aboriginal product. This issue, too, can take a number of forms. In the Antoniou case reviewed above, the issue was a straightforward one of a commercial enterprise claiming a large variety of handicraft objects as being "authentic Aboriginal" products when most actually had been manufactured in Indonesia. Closer to the fine arts market, considerable controversy has emerged in recent years when material is produced which is claimed to be Aboriginal, but where the authors of that work are themselves not Aboriginal. One of the more notable of these examples concerned the works created by a well-established non-Aboriginal artist, the late Elizabeth Durack, who created works in an Aboriginal style which were signed with the name "Eddie Burrup" [7]. But Durack was hardly the only non-Aboriginal seeking to cash in on the popularity of Aboriginal art. For a brief period in the middle 1990s, one could buy at Australian Post offices the apparently "Aboriginal" creations of the non-Aboriginal Sakshi

Anmatyerre, an Indian from Calcutta who changed his name from Farley French in 1992 (Goldsmith 2000). In these cases, the question of "authenticity" concerns the status of the artist, not the objects produced. The works of these artists may appear to be "Aboriginal," but their authenticity is in doubt because they have not been produced by an individual who can claim to be, "authentically," Aboriginal.

A somewhat more subtle problem hinges on the precise understandings of the meanings of both "authentic" and "Aboriginal." Recently in the Northern Territory, for example, there were interesting small wooden sculpted objects, painted with natural ochres, on offer in many of the leading galleries. These looked "authentic" to a non-expert, and if pressed, the staff of the galleries where the objects were being sold would assert, correctly, that the artist was authentically "Aboriginal." The problem arises in this instance because while there is no question that the artist was Aboriginal, the objects were prepared in an imitation of a Tiwi style which in the view of many close to the Aboriginal community was not part of the actual heritage of the particular artist. In their view, this object was not authentic, and one well placed observer in fact referred to it as "rubbish." This serves to underscore the observation that there are two rather different questions that arise regarding this particular context of "authenticity": (1) is the artist Aboriginal? and, (2) is the Aboriginal artist in question making use of thematic material to which to artist is entitled, and to which the artist has cultural linkages?

Comments on problems of "authenticity"

In the context of the Indigenous fine arts market, in other words, the issue of authenticity may involve complications rather different than encountered in other segments of the art market. Understanding many of these requires some background regarding the nature of Aboriginal society, and how conflicts in beliefs and practices between traditional Aboriginal ways and those of the Western art markets create numerous possibilities for mutual confusion. Errington (1998) has pointed out that many of the objects from "primitive" societies, and he used the example of the products of Australian Aboriginal societies, were not originally created as art, nor intended by their creators as art. In his discussion, Errington differentiates things that were intentionally created as works of art (as in Western understandings of art), in contrast to objects which undergo a "metamorphosis" and become transformed into art objects:

> Art by intention was made as art, created in societies and eras that had a concept of art approximating what we now hold. Art by intention consists paradigmatically of the kinds of objects created in the Italian Renaissance as art. Art by appropriation consists of the diverse objects that became art with the founding of public fine arts museums at the end of the eighteenth century and continuing through the nineteenth More and more objects gained status as art during the nineteenth century and entered museums; one thinks especially of religious objects, like Byzantine icons and Christian triptychs, but there were many more. (Errington 1998: 78–79)

Using these concepts, the early ethnographic material (such as bark paintings, shields, baskets) from Aboriginal Australia that entered the collections of museums

was "art by appropriation," but over the course of the decades this has become transformed. With the evolution of styles, and the emergence of a new market for works that are increasingly produced as art, there is the chance that the works may lose "…any claim to be primitive and authentic…"and that ultimately "…what counts authentic is becoming more and more of a problem" (Errington 1998: 141).

Aboriginal art in Australia has in recent decades, especially since the onset of the 1970s, been going through major transformations that are clearly driven by market demand. Artists are using materials far removed from those found in original, "authentic" works, so that now major paintings are produced using acrylics and canvas and artists are experimenting in such media as ceramics, glass and textiles. Vibrant new colors, patterns and textures are being produced that are dramatically different than "original" Aboriginal objects.

The very term "authentic" thereby becomes highly contested territory. If one applies a standard that argues that only work done with original materials and originals styles (if such can be defined) are "authentic," it then follows most of the contemporary art designed for a Western market is not authentic.

This is an argument, of course, that flows out of esthetic and political concerns regarding the nature of "Aboriginality" in the contemporary context, and can't be used to infer that the conduct involved in creating virtually all of contemporary Indigenous art in Australia is either "misleading" or "deceptive" as these terms would be used within legal proceedings. In both the souvenir and fine arts sectors of Aboriginal art production, legal proceedings may require consideration of "authenticity," but in that legal context the issues are likely to shift to the question of deliberate deception, and the nature of any intentional dishonest conduct involved.

This discussion has concerned problems relating to authenticity and fraud in the market for works found in the Australian Aboriginal art market. There are, of course, other nations where there can be found material defined as art produced by indigenous peoples, such as the works of the Huichol tribes of Mexico, or the Kachina dolls produced by the Hopi Indians of the Southwest of the United States. Our expertise does not extend to these materials, and we must leave it to others to establish if the present observations from Australia apply. We suspect that a closer match with the present observations might be found in terms of indigenous groups in Canada, where a wide variety of materials are produced for a diverse art market. Further, the various forms of art have been undergoing changes comparable to what are observed in Australia, since the demands of the market are now producing new art forms in Canada. Unfortunately, we are unable to comment about the implication of the present analysis for this market, since we are not familiar with the specific contours of that market, and we lack recent knowledge of developments in Canadian criminal law, especially that relating to fraud. We are forced to leave it to others to demonstrate if the ideas established here have wider currency.

Conclusion: the illusion of effectiveness of the legal system

This discussion has had as its primary focus the question of deception and fraud in the contemporary Aboriginal art market. We have reviewed what little evidence that is available, and would suggest that a reasonable conclusion would be that there is

some small but significant amount of works in the Aboriginal art market that are both deceptive and fraudulent. As such, the works being produced are deliberately not what they are claimed to be, and that the actions that create such works are clearly intentional, or dishonest, in a criminal sense.

As criminologists we should not in many ways be surprised by this finding. Criminals are always seeking new and lucrative ways of plying their trade, including those operating in the fertile and multi-various fields of fraud. Indeed, fraud has been termed the "characteristic crime of the twenty first century", supplanting the role played by larceny in much of the twentieth century ([1]: 6). With the rapid growth in the size and value of the Aboriginal art market over recent decades, the opportunities for fraud have also increased. This trend mirrors the reported burgeoning opportunities for other forms of fraud in Australia and other developed nations. Thus it has been estimated that fraud costs the Australian economy at least AUD 5.8 billion each year, while the cost of identity related fraud alone has been conservatively estimated at AUD 1.1 billion ([25]: 379).

It has been argued that a major institution for addressing such problems of deceptive and misleading behavior is the law. It strengths reside in the formal statement in both criminal and civil law regarding what constitutes misleading or fraudulent behavior, and what procedures might be followed to address these. At the same time we are forced to acknowledge that regarding this problem legal action is rare. We have identified only two criminal cases over the past 30 years in Australia that have dealt with fraud concerning Aboriginal art, and but two civil cases involving deceptive practices regarding Aboriginal material. If the justice system is a hammer, in this arena it is a rusty one, rarely used. However effective the legal system might be on theoretical grounds to address problems of fraud, in this arena, and many others [21, 27], that effectiveness is an illusion.

Any complex crime involves a number of moving parts, each of which may contribute to the failure to respond by agents of the justice system. Often the perpetrators of art fraud are quite skillful, and carry out their work so successfully that the crime goes undiscovered, at least by the victim. The victims of art fraud, in particular those who lose their money through the purchase of bogus art, are in a unique position as victims. Assume for a moment the situation of an individual who purchased one of the early Liberto creations which masquerades as a work of Rover Thomas, but which was not named in the court case. An outraged and righteous victim might, when the case surfaces, come forward and claim to the police that they, too, have been victimized by this scheme. At that point, of course, any investment value of the work will vanish instantly. On the other hand, if they keep quiet, and later surreptitiously place the work into a minor auction, they may be able to gain a return on their initial investment (while, of course, committing a fraud themselves, since such a sale would be intentional and dishonest). Some victims, in short, have a financial stake in *not* bringing their case into the criminal justice system.

For a case to proceed as a crime within the criminal justice system, it must be considered worthy of investigation and action by the police. Unfortunately, it seems clear that this is a major barrier preventing cases from proceeding deeper into the system. Those in the art world generally are becoming more vocal in their complaints about the unwillingness of police to respond to cases of art fraud. In a recent series of articles regarding the discovery of fakes of the non-Indigenous

Australian artist Brett Whiteley, the artist's widow (who serves as a main authenticator of the works of Whiteley) was described as being "furious" that the potential fraud was not being investigated by the police (Coslovich, (a), p. 3), while a prominent Melbourne art dealer, Stephen Nall, was said to have "criticized police" for their "…failure to deal with art fraud after three more dubious works attributed to the late Brett Whiteley have emerged" (Coslovich, (b), p. 3). Further, Nall was instrumental in the Blackman/Dickerson case discussed above (he is the step-son of Dickerson), and states emphatically that the major reason that the group sought redress through civil action was that neither the Blackman nor the Dickerson groups had been able to obtain any cooperation at all from the police (private interview, August 17, 2010). There are many reasons why police can be reluctant to address such offenses: (1) the amounts involved may appear small compared to other major frauds, (2) the victims may not seem by the police to be as "worthy" as other victims, (3) such offences may not be viewed as "real crime," and thereby given any priority by police leadership, and (4) there may be little to guide police inexperienced with the art world (as virtually all police will be) in terms of how they should proceed in terms of gathering evidence regarding such matters as proving deception or addressing "dishonesty".

Similar issues may arise as the case moves deeper into the justice system. The absence of prior cases of art fraud, and therefore precedents, especially involving Indigenous art, may also make prosecutors overly cautious in addressing such cases, given that proof of deception, as well as the various somewhat unique circumstantial bits of evidence that may be necessary to establish dishonesty, may not be as clear cut as they are in other more traditional fraud offences.

There are few pressure points in this complex where intervention is possible. From the viewpoint of public policy, and justice, some initiative regarding police inaction would have some merit, but even here obvious solutions are elusive. One that might be suggested is to increase police presence through the creation of specialized art crime squads such as are found in England, Italy and the United States. This is probably not going to be brought forward because however common art fraud might be in the newspapers, there are simply not enough cases in a typical year in most jurisdictions in Australia to justify the expenditure. Instead, a more likely suggestion would be to obtain support from the various jurisdiction police commissioners for the creation of a team of police, legal, art and criminological experts to prepare briefing documents so that police have available to them, when cases of suspected art fraud arise, written material they can consult which inform them how they might respond to such issues as obtaining expert advice regarding the authenticity of works that are suspected to be fakes, and what evidence is appropriate in approaching proof regarding intent and dishonesty in such cases.

Certainly it would seem that much more needs to be done to improve the response and performance of the justice and legal systems when cases of fraud of many types arise [19], and especially so regarding Indigenous art. While important, more is at issue in fine arts cases than simple authenticity labels for souvenirs. Further, our discussion has underscored some of the many complex issues that can arise in the application of laws and procedures designed to address deception and dishonesty in non-Indigenous commercial life to the distinctive contours of Aboriginal communities. Common Aboriginal practices in the creation of art objects may cause

confusion in terms of art market understanding of authorship and authenticity, and cloud questions of "dishonesty" fundamental to non-Indigenous approaches to what may appear to an outsider to be fraudulent practices.

In many Aboriginal communities, fine art in its various forms is a major source of income, and it becomes an important vehicle for communicating their particular point of view on a range of social issues. The integrity of that market needs to be protected, and those of us close to the legal system can play a role in providing that protection. Doing so will require an understanding that issues of authenticity, deception and intent, so central to common law legal process, may become confused by everyday understandings and practices within Indigenous communities. Negotiating this terrain will require some understanding of the social context involved in the creation of Aboriginal art, and some amount of good faith in searching of mutually acceptable solutions to problems as they arise.

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