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Article for Copyright World

Federal Court declares Aboriginal artist owner of copyright in Aboriginal flag

Thomas v Brown & Tennant [1997] 215 FCA (9 April 1997)

Ian McDonald Australian Copyright Council, May 1997

An Australian Aboriginal artist, Mr Harold Thomas, has been declared by the Federal Court of Australia to be the owner of copyright in the design of the Australian Aboriginal flag. Mr Thomas, from the Northern Territory, sought legal recognition of his ownership and compensation following the Federal Government's 1995 proclamation of the design as the official flag of the Aboriginal people of Australia.

Mr Thomas initially applied to the Copyright Tribunal, which has the power to fix the terms upon which the Crown may use copyright material. Under the Australian Copyright Act, the Crown does not infringe copyright by doing acts comprised in the copyright for the services of the Crown. Where acts are done for the services of the Crown, the Federal or relevant State Government must notify the copyright owner as soon as possible. The terms for the use of the material are as agreed between the copyright owner and the relevant Government or, if there is no agreement, as fixed by the Copyright Tribunal. In this case, there were doubts about the Tribunal's jurisdiction to determine the question of ownership, so an application for declaratory relief was made to the Federal Court.

In the course of the Copyright Tribunal hearing, two other people came forward to claim ownership of copyright in the flag. Mr Brown, an Aborigine, claimed he had designed the flag for a national competition in the early 1970s while a student at an Aboriginal community college at which Mr Thomas was a teacher. Mr Tennant, who is white, claimed he had designed the flag in 1971 while a student at the Canberra School of Art. Mr Brown and Mr Tennant were parties to the Federal Court action.

The evidence of Mr Thomas was that he had created the design and had it made into a flag for the Aboriginal Day march in 1971. He said that the flag, the top half of which is black, the bottom half of which is red and in the centre of which is a large yellow circle, was designed to evoke black consciousness and represented the Aboriginal people and the land. There was no direct evidence to corroborate the evidence of Mr Thomas. However, his claim was consistent with surrounding circumstances, attested to by other witnesses and, as a witness, Mr Thomas gave a favourable impression. In contrast, the Court found that the evidence of Mr

Tennant was improbable and rejected it. Mr Brown's case was also rejected due to its inconsistencies and the lack of satisfactory evidence to support his claim.

The Federal Court decision paves the way for Mr Thomas to make a new application to the Copyright Tribunal to determine the remuneration payable by the Federal Government in respect of its use of the flag. It remains to be seen how Mr Thomas will deal with the licensing of other organisations and individuals. However, he has indicated that Aboriginal medical and legal services will be able to continue to use the flag without payment.

Copyright law review committee issues papers and public forum

The Copyright Law Review Committee (CLRC) has released a further four issues papers, *Copying by Libraries and Archives under the Copyright Act 1968* (April 1997), *Educational Institutions and Copying under the Copyright Act 1968* (April 1997), *Copying for People with Disabilities under the Copyright Act 1968* (April 1997), and *Legal Deposit of Copyright Material under the Copyright Act 1968* (April 1997).

On 28 April 1997 the CLRC held a public forum on access to copyright materials to discuss copying by libraries, archives and educational institutions and copying for people with disabilities. The forum was opened by the Federal Attorney-General and Minister for Justice, The Hon Daryl Williams AM QC MP and chaired by Professor Dennis Pearce, the chairman of the CLRC. Representatives of authors and publishers, the library and educational sectors, and people with disabilities formally addressed the forum prior to open discussion on each of the topics.

The CLRC has invited written submissions on each of the issues papers and on matters arising at the forum by 31 May 1997.