CERTIFICATES OF AUTHENTICITY

Authenticity of Aboriginal artwork

Authentic Aboriginal artwork is artwork that has been made by an Aboriginal or Torres Strait Islander person. The authenticity of an Aboriginal artwork is important not only for ethical and legal reasons but because it has significant value in the art market. The problem facing Aboriginal artists and communities is how to protect authentic artwork from rip offs made by non-Indigenous people. This has become an increasing problem. If fake Aboriginal artworks are sold, eg at tourist shops, this means that the profits from these sales do not go to the Aboriginal artist or community. There are a number of systems that have been developed to try to overcome this problem.

What was the 'Label of Authenticity'?

In 2000, the National Indigenous Arts Advocacy Association (NIAAA) developed the Label of Authenticity. The Label of Authenticity was a national trade mark that encouraged people to buy authentic Australian Indigenous artwork.

The Label aimed to:

a. protect Australian Indigenous artists to make sure that they were adequately paid for the sale of their work;
b. protect buyers who wanted to purchase authentic Australian Indigenous artwork;
c. allow people to see the different styles of Australian Indigenous artwork; and
d. create a system which highlighted the differences between real and copied artworks.

Artists were registered with NIAAA if they could show that they identified as an Aboriginal or Torres Strait Islander and had permission from the relevant community to make the artwork. Registration meant that the artist had permission to attach the Label to their artwork. This meant that buyers were aware that the artwork was authentic.

The Label of Authenticity is no longer in use after NIAAA stopped operating.

What are Certificates of Authenticity?

There is currently no mandatory system regulating how to authenticate works of art made by an Aboriginal or Torres Strait Islander person or group.

Since the Label of Authenticity ceased use, individual artists and organisations have created their own certificates of authenticity that are attached to art products. Many Indigenous art centres supply such certificates for artworks created by their members.

Certificates of authenticity usually include the artist's name, date of birth, artwork name, and photographs of the artist painting the artwork. Some dealers supply videotapes of the artist painting the work as evidence of authenticity.

However such certificates are quite different to the Label of Authenticity. While many such certificates are genuine, a 'private' certificate is not a guarantee that an artwork is authentic. For example, a photograph of an artist holding a work is not reliable evidence that the artist made the work.

Problems that have arisen with certificates include:

a. they do not guarantee that the work is authentic;
b. there has been misuse of certificates by commercial galleries which have attached existing certificates made by an art centre to artwork made by an artist who is not from that art centre; and
c. they can be created by anyone.

What is a 'Code Certificate'?

The Indigenous Australian Art Commercial Code of Conduct **(the Code)** was established in October 2009 and endorsed by the Federal, State and Territory governments. It is a voluntary code of ethical behaviour for art dealers operating in the Indigenous art market.

One of the requirements for dealers who agree to sign up to this voluntary code of conduct is that any dealer who purchases from, or acts as an agent for, an Aboriginal or Torres Strait Islander artist must provide a signed Code Certificate with artwork by that artist which states:

(i) that it is an 'Indigenous Australian Art Commercial Code of Conduct Certificate';
(ii) that the artwork is 'Indigenous Australian Art Commercial Code of Conduct compliant';
(iii) the name of the artist or artists who created the artwork;
(iv) where and when the artwork was created;
(v) the size and medium of the artwork and any other characteristics necessary to identify the artwork; and
(vi) the name, location and contact details of the person or association that is identifying the work.

The Code Certificate can accompany that artwork through all subsequent sales and is intended to ensure the integrity of statements about authenticity. It is a breach of the Code for a dealer to supply a certificate which is not legitimate.

It is hoped that this system will assist not only in creating an objective standard for authenticating genuine Indigenous artworks but will also identify artworks created by artists who have been treated fairly in accordance with the Code.

The Indigenous Art Code has created a resource for artists explaining how the Code works, and containing educational and professional development tools and information. Artists in the Black was involved in developing this resource which is called 'Code World' and can be accessed here.

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For more information on the Code see Arts Law's information sheet on The Indigenous Australian Art Commercial Code of Conduct.

What legal action can be taken if someone buys artwork that is not authentic?

If someone buys an artwork that has a certificate or statement of authenticity (whether a private certificate or a Code Certificate) attached to it and he or she later finds out that the work is fake, they can take legal action against the person who supplied the certificate.

Legal actions include:

- Misleading and deceptive conduct under the federal *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**) on the basis that the seller incorrectly described the goods sold to the purchaser. For example, if a label is attached to a work made by a non-Indigenous person stating that the work is authentic Aboriginal art, the Australian Competition and Consumer Commission **(ACCC)** and the purchaser of the artwork can take action against the person or business that attached the label or sold the work as authentic Indigenous art.
- Breach of contract on the basis that the agreement between the seller and the purchaser was not honoured because the purchaser paid for authentic Indigenous art and received something else.
- Passing off which applies when the seller has falsely attributed a work to a well known Aboriginal or Torres Strait Islander artist whose reputation is then damaged by the art market believing that he or she has created inferior quality works. The artist could bring an action against the person or business for misrepresenting that the artworks were created by that artist.
- Where the false certificate purports to be a Code Certificate, the dealer can be reported to the Committee administering the Code which may then impose sanctions on that dealer.

What are the options for the future?

The Arts Law Centre of Australia supports best practice models to deal with authenticity issues.

Some possibilities include:

- The introduction of a national system where an authorised body issues certificates of authenticity. Before issuing the certificates the authorised body must make sure that the person being issued with a certificate meets certain requirements.
- Legislation making the Code a mandatory code of practice for dealers operating in the Indigenous art industry with the result that the use of Code Certificates would become mandatory and penalties would be imposed for issuing false certificates.
- Changes to the Trade Marks Act to establish a system that recognises and protects Aboriginal and Torres Strait Islander culture and intellectual property. Such a system operates in New Zealand where a Maori Trade Marks Advisory Committee examines all trade marks that contain a Maori sign and advises the Commissioner of Trade Marks if a trade

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mark that contains Maori text and imagery will be offensive. There are also 3 (authentication) trade marks. The 'toi iho' Maori made mark' is a registered trade mark that can be used in relation to Maori arts and crafts made by Maori artists. The other marks are a "mainly Maori mark" which can be applied to artwork made mainly by Maori artists, and a "co-production mark" for works made by Maori artists with non-Maori persons.

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

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