Artists – Indigenous

This information sheet is for Indigenous artists and people interested in copyright issues affecting Indigenous artists. It deals with current protection under the Copyright Act and some proposals for change.

For information about our other information sheets, publications and training program, see our website www.copyright.org.au or contact us.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

Key points

- Copyright law applies to Indigenous artistic works in the same way as it applies to other artistic works.
- Copyright does not protect information, ideas, techniques or styles.
- Copyright in most artistic works lasts for the life of the artist plus 70 years.
- Artists have a separate set of rights, known as moral rights, in relation to their works.
- Performers also have a separate set of rights, known as performers' rights, that give them certain rights over their performances
- Currently there are no intellectual property rights that are owned by Indigenous communities. Only individual rights

Indigenous artists' rights under the Copyright Act

Application of copyright law to Indigenous artistic works

Copyright law applies to Indigenous artistic works in the same way as it applies to other artistic works. There are no special provisions in the Copyright Act for Indigenous works, and no recognition of customary or traditional Indigenous laws. Some of the consequences of this are:

- copyright in an artistic work usually expires 70 years after the death of the creator so there is no copyright protection for old Indigenous artworks such as rock art;
- because copyright does not protect ideas, methods or styles, it does not prevent people using styles belonging to certain Indigenous communities such as dot painting;
- because copyright law only applies to works which have been "recorded" in some way (for example, written down or recorded on film), it does not protect aspects of Indigenous culture which have never been recorded (this is more relevant to music and stories); and
- there is only an obligation to get permission from the copyright owner – there is no obligation to get permission from an Indigenous community whose customary laws apply to uses of a work.

How copyright law works

Under Australian copyright law, certain things – including artistic works – are automatically protected as soon as they are made. There is no requirement to register or to go through any other formal procedure.

Copyright protection means that anyone who wants to use the protected work in certain ways needs the copyright owner's permission. For artistic works, people usually need permission to do the following things:

- reproduce the work (for example, by photographing, photocopying, copying by hand, filming, scanning into digital form or printing);
- make the work public for the first time (for example, by distributing copies); and
- communicate the work to the public (for example, by broadcasting, displaying on a website or emailing).

The exclusive rights to do these things are known as copyright rights.

Doing any of these things without permission from the copyright owner can infringe copyright, and the copyright owner can take legal action.

There are some uses of copyright material that do not infringe copyright, because of special provisions in the Copyright Act. These include fair dealing for research or study, and for criticism or review. In some cases, the uses without permission require payment – for example, educational institutions and governments pay copyright fees to organisations known as copyright collecting societies who distribute the royalties to their members. For more information, see our information sheet *Copyright Collecting Societies.*

As a result of international treaties, Australian works are protected by copyright in most other countries, and most overseas works are protected in Australia. The basic principles of copyright protection are the same in most countries, but there are also differences that may be important if you are marketing work overseas.

Copyright does not protect information or ideas

Copyright protects the way an idea or information is expressed – for example, in a painting or a song or a poem. Using someone else's painting or song or poem may infringe copyright, but using the ideas or information in a new painting, song or poem does not. Similarly, using another person's method, style or techniques does not, of itself, infringe copyright. It is not necessary to copy something exactly to infringe copyright, and sometimes it can be difficult to determine whether a work infringes copyright, or is just based on the same ideas or techniques.

The copyright symbol (©)

You will often see the copyright symbol ©, usually followed by the name of the copyright owner and the year the work was first published. This is referred to as a copyright notice. A copyright notice is not a requirement for protection in Australia. People put copyright notices on their work to remind people that the work is protected by copyright, and to state the name of the copyright owner. You may put the copyright notice on your work yourself – there is no formal procedure. For example, you can paint, write, type or stamp the copyright notice on your work.

How long does copyright last?

Copyright in most artistic works lasts for the life of the artist plus 70 years. Different periods apply in some cases but as a general rule; copyright has expired in artworks created by someone who died before 1 January 1955.

Once copyright has expired, the work is in the "public domain". This means that anyone may use the work without permission from the copyright owner.

There are a number of variations to the rules determining duration of copyright and for more detailed information see our information sheet *Duration of Copyright*.

Who owns copyright?

The first owner of copyright in an artistic work is usually the artist. An artist can, however, assign copyright in a future work (for example, to a client who has commissioned the work).

In addition, unless there is an agreement to the contrary:

- an employer is the first owner of copyright in a work made by its employee in the course of employment (this does not apply to freelancers, or to a work made outside the duties of employment);
- the Commonwealth and State governments own copyright in anything made, or first published, by them or on their behalf; and
- a person who engages an artist to produce any of the following is the first owner of copyright:
    - a photograph for private and domestic purposes (or any photograph taken before 30 July 1998);
    - the painting or drawing of a portrait; or
    - an engraving, etching, lithograph, woodcut, print or similar work.

There are also special rules for ownership of films. In the absence of an agreement saying who owns copyright in a film, the person who makes the arrangements for making the film owns copyright. A recent case involving the artist Richard Bell highlights this point. Mr Bell had commissioned a film to be made in New York called *Blackfella's Guide to New York*. Mr Bell had the film hosted on his website, to be shown in conjunction with an exhibition. The filmmaker in New York sent a take down notice, asserting her ownership of the film under the law in the United States. The filmmaker did not research Australian law, which says that Mr Bell owns copyright. As a result, Mr Bell took action for groundless threats of copyright infringement and won nearly $150,000 in damages.

Assigning and licensing rights

A copyright owner may assign or license any or all of his or her copyright rights. An assignment transfers ownership of the rights to another person. A licence gives the other person permission to use the work, but not ownership of the rights. Both assignments and licences may be limited in various ways (for example, they may be for a set period of time), and subject to conditions (for example, payment).

Moral rights

People who deal with artistic works have a legal obligation to make sure that:

- the artist is attributed;
- the work is not falsely attributed to someone else; and
- the work is not dealt with in a way that is prejudicial to the artist's honour or reputation.

An artist is entitled to take legal action if any of these "moral rights" is infringed. There is no infringement, however, for something:

- to which the artist consented in writing; or
- which was reasonable.

There are also some special exceptions for the destruction, removal and relocation of moveable artistic works, such as artistic works commissioned for particular sites.

Moral rights are only exercisable by artists (or their legal personal representatives after they die). Unlike copyright rights, moral rights cannot be transferred to anyone else.

For more detailed information, see our information sheet *Moral Rights*.

Performers' Rights

There are rights provided to performers in their performances under the Copyright Act. Types of performances that are covered include performances of 'expressions of folklore' - these are likely to include Indigenous cultural material.

For more detailed information, see our information sheet *Performers' Rights.*

Indigenous art copyright cases

There once was a suggestion that Indigenous art would not be protected under copyright law because the traditional elements were not 'original' in the copyright sense. That is, as the designs and motifs are handed down from generation to generation, copyright would not protect Indigenous art.

However, with the emergence of Indigenous art in the in 1970s and 1980s, together with the bicentennial year in 1998, there was a special focus on Indigenous Australia and its artistic culture. A series of cases in the 1980 and 1990s considered the relationship between copyright law and Indigenous art.

The T-shirts Case[1]

In 1988, the Arnhem Land artist John Bulun Bulun and other Northern Territory artists brought an action for infringement of their works on T-shirts. The parties settled the case for nearly $150,000. This was the first case where Indigenous artists attempted to assert their rights under copyright law. From this case on, there was an understanding that traditional Indigenous designs could be protected by copyright.

The Carpets Case[2]

Between 1992 and 1994, a company called Indofurn made carpets in Viet Nam that reproduced well-known Indigenous artistic works, imported and sold them in Australia. Indofurn had offered a licence fee, but this offer was rejected by the artists. In 1994, the artists and the estates of deceased artists brought an action for infringement against Indofurn.

The judge, von Doussa J, found that Indofurn infringed the artist's work. When determining damages, the judge assessed the economic impact of the copying, but also stressed the cultural harm caused:

> "[I]n the cultural environment of the artists the infringement of those rights has, or is likely to have, far reaching effects upon the copyright owner. Anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering."

The judge considered the harm caused by the copying for the artists and their standing in the community. In Indigenous communities, there can be cultural and social rules determining who is permitted by the community to paint certain stories. The judge noted that these painters are given special responsibilities over the stories. The copying had compromised the artists' position in their communities and the judge awarded additional damages. In total, the $190,000 was awarded against Indofurn.

Bulun Bulun v R & T Textiles Pty Ltd[3]

In another case featuring John Bulun Bulun and von Doussa J, the issue was whether the Indigenous community owned some of the copyright created by Bulun Bulun.

Without permission from Bulun Bulun, R & T Textiles reproduced *At the Waterhole*. The painting represented an important sacred site for the community, which only Bulun Bulun had permission to paint and over which he had special responsibilities:

> "The creation of artworks such as At the Waterhole is part of my responsibility in fulfilling the obligations I have as traditional Aboriginal owner of Djulibinyarnurr [the hole or well from which Bulun Bulun derives his life]"

The infringement caused irreparable harm to the artist's community and his standing in the community:

> "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 threatens 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

1 *Bulun Bulun v Nejlam Pty Ltd*, unreported FCA 1998.

2 *Milpurrurru & Ors v. Indofurn Pty Ltd & Ors*, Unreported, 13 December 1994, per von Doussa J.

3 *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*. Unreported, Federal Court of Australia, von Doussa J.

> Barnda [the long neck tortoise – the ancestor creator], as it has been passed down and respected over countless generations."

The court accepted that the community could not own the copyright, because only the artist could own the copyright. However, the court found that because of the relationship between the artist and his community, and the responsibilities each had, under equity, the community had a special interest in ensuring the artist used their copyright to prevent misuse.

Moral rights

These copyright cases predate the introduction of moral rights in Australia in 2000. At that time, the Government considered introducing Indigenous communal moral rights legislation, but this legislation never passed.

It is an open question whether the equitable principles used by the Court in *Bulun Bulun v R & T Textiles*, could extend to moral rights. In this scenario, there could be a special obligation on an artist to positively enforce their moral rights. This could be relevant where an artistic work has been 'derogatorily treated', prejudicing the artist's or the community's honour or reputation.

Other relevant issues

Finding the way

In 2012, IP Australia and the Ministry for the Arts conducted a public consultation on the relationship between the intellectual property system and Indigenous Knowledge.

For details on that consultation, see the website here:
http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/have-your-say/

Artists' Resale Royalty

The resale royalty right for visual artists commenced in Australia on 9 June 2010 and provides an additional income stream for visual artists and their heirs. It was introduced in recognition of the fact that, while other creative works such as books and music often generate royalties over a period of time, in most cases visual artists only realise value from the principal sale of their artwork, and not from other royalty income streams.

For a resale royalty to be payable, a minimum sale price of $1,000.00 (including GST, but not including any buyer's premium or other tax) must be paid by the purchaser. Any sales for less than $1,000.00 will not attract the royalty.

The right only applies to a resale of an artwork occurring on or after 9 June 2010 and only applies to the second sale occurring after this date. The royalty is 5% of the resale price (inc GST) of the artwork and applies for the life of the artist plus 70 years.

In June 2013, the Australian Government announced a review of the resale royalty scheme:
For more information, see our information sheet *Artists – Resale Royalty*

Senate Committee Report

The Senate Standing Committee on Environment, Communications, Information Technology and the Arts released the report of its inquiry into Australia's Indigenous visual arts and craft sector. The 2007 report is entitled 'Indigenous Art Securing the Future: Australia's Indigenous visual arts and craft sector'.[4]

The report's recommendations included:

[4] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenousarts/report/index

- revised legislation on Indigenous communal moral rights (Recommendation 24)
- appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights (Recommendation 25)
- the Australian Customs Service be given an appropriate role in assisting the protection of Indigenous cultural and intellectual property rights in relation to imported and exported goods (Recommendation 25)
- (by the non-government members of the committee) a resale royalty scheme that is designed to ensure appropriate resale rights accrue to artists, particularly Indigenous artists (Recommendation 26)

The Australian Government's response to the report can be downloaded here: http://arts.gov.au/indigenous/ivais/senate-inquiry-2007

Myer report recommendations

The Myer 2002 report included a number of recommendations relating to copyright for visual artists, including those mentioned above relating to term of protection and resale right.

It also included recommendations relating specifically to Indigenous communities as follows:

> *To protect the rights of Indigenous people, the Inquiry recommends that the relevant Commonwealth government departments take action in relation to the Indigenous copyright and Indigenous intellectual property issues identified by the Inquiry in its findings, including:*
>
> ☐ *the extension of moral rights to Indigenous groups;*
>
> ☐ *misappropriation of Indigenous cultural imagery and iconography;*
>
> ☐ *importation of works purporting to be of Indigenous origin; and*
>
> ☐ *exportation of Indigenous art under cultural heritage provisions.*

Label of authenticity

On 16 November 1999, a "label of authenticity" was launched by the National Indigenous Arts Advocacy Association (NIAAA). The label was developed to deter people from selling "copycat" and "rip-off" Indigenous designs and products. The label offers a national certification trade mark that can be placed on art or cultural products to denote genuine Aboriginal or Torres Strait Islander origin.

In practice, the label has not been widely used, and NIAAA, which was administering the mark, is no longer functioning.

International Organisations

Those with an interest in international developments toward protection of Indigenous culture should visit:

- WIPO's Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore at: www.wipo.int/tk/en/; and
- UN's Permanent Forum on Indigenous Issues at: http://undesadspd.org/IndigenousPeoples.aspx

Payment for commercial uses of public domain works – "domain public payant"

Some countries have a law requiring payment for commercial uses of works in the public domain – including works in which copyright has expired, works by unknown authors and traditional works. These laws are referred to by the French phrase "domain public payant". In most cases, these laws require payment to collecting societies or government agencies, and the money collected is used for the benefit of artists and other creators.

Design law

It has been suggested that the Designs Act might be amended to include provisions for the registration of Indigenous cultural designs, such as cross-hatching styles, and that the period of protection for such designs could be in perpetuity. Under the current law, registering a design gives protection for the form or shape of functional articles based on the design. Designs registration also provides protection for the ornamental aspects of useful articles – such as the patterns on crockery or artwork on fabric. Information about registration under the Designs Act is available from IP Australia at www.ipaustralia.gov.au

Developments by judges through cases

Some commentators have suggested that cases should be brought to see whether various types of laws can be extended to give better protection to Indigenous intellectual and cultural property. The sorts of areas that have been discussed have included:

- *Mabo*-type principles*;*
- blasphemy laws; and
- government prerogative powers.

However, it is not clear that any of these areas of law are likely to give much in the way of protection to Indigenous intellectual and cultural property.

Heritage legislation

It has been suggested that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1994* could be extended to protect Indigenous intellectual property.

Protocols and ethical guidelines

Protocols and policy papers for dealing with Indigenous material are available in a number of areas. Protocols generally set up a structure for gaining permission from appropriate sources for using Indigenous cultural material and subsequent use of this material. The Australia Council has developed a series of protocols, which are available on its website.[5] Protocols have also been developed by other organisations including the Screen Australia,[6] the Australian Society of Authors,[7] the museum sector, the library and archive sector, and the public and commercial broadcasters.

Further information

The “Artists in the Black” is a service operated by the Arts Law Centre to specifically meets the needs of Indigenous people and organisations. For more information see www.aitb.com.au.

The Arts Law Centre also administers the “Solid Arts” website, which contains information for Indigenous artists as well as those dealing with Indigenous art and can be accessed at: www.solidarts.com.au

A Copyright Council lawyer may be able to give you free legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions and libraries. For further information about the service, see http://www.copyright.org.au/legal-advice/

[5] http://www.australiacouncil.gov.au/grants-2012/information-for-applicants/indigenous_protocols

[6] http://www.screenaustralia.gov.au/filmmaking/Indigenous_protocols.aspx

[7] https://asauthors.org/files/pages/writing_about_indigenous_australia.pdf

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About Us

The Australian Copyright Council is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.

We are advocates for the contribution of creators to Australia's culture and economy; the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and affordable practical, user-friendly information, legal advice, education and forums on Australian copyright law for content creators and consumers.

Australian Government | Australia Council for the Arts

The Australian Copyright Council has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.

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