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Article for Screenrights

Indigenous Communal Moral Rights

Ian McDonald, Australian Copyright Council, 2 March 2004

The Federal Government is currently working on amendments to the Copyright Act that will provide “moral rights” style protection for material embodying the traditional culture and wisdom of Indigenous communities.

Ian McDonald, Senior Legal Officer with the Australian Copyright Council, explains how these rights could impact upon filmmakers.

The Copyright Act deals with a range of rights: copyright rights; performers’ rights; and moral rights.

Copyright rights are economic in nature: they give a copyright owner the legal ability to control activities such as making copies; posting to the Net; broadcasting; and screening in public. Performers’ rights are very narrow in scope, but they essentially enable people such as actors and musicians to control when their performances are recorded or broadcast, and on what terms. Moral rights, on the other hand, protect the interests of individual creators, including film producers, screenwriters and directors, by creating obligations on people using their work to credit them for their work, and not to use their work in ways that damage their reputation or honour.

Over the past year, the Federal Government has been working on amendments to the Copyright Act which will create an additional set of rights: rights for Indigenous communities. These rights are generally referred to as “Indigenous Communal Moral Rights” (ICMR), and are likely to exist in copyright material which embodies an Indigenous community’s “traditional culture and wisdom”.

Why is there a need for these rights?

There have been a number of studies and reports over the years documenting the concerns of Indigenous communities over the misrepresentation, misuse or hijacking of their culture. See, for example, the report *Our Culture: Our Future* by Terri Janke (Michael Frankel & Co, Sydney, 1998).

Sometimes, hurt and cultural damage result from misunderstandings or ignorance; in other cases, people who use Indigenous cultural material may have no regard for the way in which their use of that material is perceived by the communities from which it is derived. Whatever the cause, the end result is the same: uses of Indigenous cultural traditions or knowledge that are deeply resented

as cultural misappropriation.

What the Government has proposed

On 19 May 2003, Senator Alston, together with the then Attorney-General and the then Minister for Indigenous Affairs announced in a media release that “Indigenous communities [would] get new protection for creative works”—ICMR.

The media release emphasised that the proposed communal rights would “mirror the nature and scope of authors’ moral rights as far as possible”. Indigenous communities would have the right to be attributed (and also not to be falsely attributed) when material embodying their “traditional culture and wisdom” is, for example, reproduced, performed in public or displayed. An Indigenous community would also be able to take action if its material is subjected to “inappropriate, derogatory or culturally insensitive use”.

In addition to this, the release indicated that communal rights would be exercisable independently of the copyright in the relevant material and also of the moral rights exercisable by the individual creator of the material. Although we understand that the Government was keen to introduce a Bill amending the Copyright Act as soon as possible (initially planned for the 2003 Winter sitting of Parliament), it has continued to consult “in fine-tuning the new provisions”.

What effect might ICMR have on filmmakers?

Depending on the circumstances, filmmakers might need to consider each of the following when including Indigenous cultural material in their films:

- whether a copyright clearance is required;
- how moral rights will impact on the use of the material;
- whether there are any performers’ rights issues; and
- whether the use of the material raises issues relating to an Indigenous community’s ICMR.

While the intention behind the proposed ICMR is to give Indigenous communities protection against “inappropriate, derogatory and culturally insensitive use of copyright material”, filmmakers will have a degree of choice as to whether they will create or be bound by any ICMR when making a film incorporating an aspect of Indigenous culture.

This is because, under the current proposal, ICMR would be “based on an agreement between the author/artist [or filmmaker] and the Indigenous community”. In other words, if a filmmaker incorporates an aspect of Indigenous culture into his or her film *without* reaching an agreement with the relevant community, there won’t be any ICMR rights in the film.

In some cases, however, the “choice” that a filmmaker would otherwise have as to whether ICMR will be created in a film might depend on factors such as who they are dealing with, where they want to film, or what pre-existing footage they want to

include in the film.

For example, under the current proposal, while it might be culturally inappropriate, there would be nothing to stop a filmmaker including shots of a woman playing the didgeridoo, using a Dreamtime story as a plot, or having a set painted up with “X-ray” style koalas (this is seen as inappropriate because “X ray” style comes from areas of Australia that don’t have koalas).

However, if a filmmaker wants the co-operation or endorsement of an Indigenous community, or wants access to something such as Indigenous controlled land, then the terms or conditions of the co-operation, endorsement or access may include the creation of ICMR in the resulting film.

This will particularly be the case in relation to any areas of Australia which are subject to regulation under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999. These regulations mean that just about any commercial filming in these areas or use of existing footage needs consent from the Director of Parks Australia. We understand that, at least in relation to Uluru Kata Juta National Park, consents are handled locally, with considerable input from the relevant Indigenous communities.

Of course, while ICMR are not currently legal rights under the Copyright Act, and while respect for Indigenous culture will not be compulsory under the proposed amendments, filmmakers can still handle cultural issues sensitively.

In particular, filmmakers can follow the range of protocols across various arts-related fields which were published by the Australia Council in 2003 (available at www.ozco.gov.au). There are also protocols and guides that have been or are being developed for filmmakers, including the issues paper, *Toward a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities*, published in February 2003 by the Australian Film Commission; Lester Bostock’s *The Greater Perspective*; and Darlene Johnson’s *Indigenous Protocol* for SBS Television.