



Indigenous Artists

January 2006

This information sheet is for Indigenous artists and people interested in copyright issues affecting Indigenous artists. It is based on an information sheet prepared for the Australia Council for distribution at a forum session on Indigenous artists' rights at the Garma Forum in August 2003. It deals with current protection under the Copyright Act and some proposals for change.

For more information, see our practical guide B104 *Indigenous Arts & Copyright*.

For information about our other information sheets, publications and training program, see our website <http://www.copyright.org.au> or contact us (see contact details at the bottom of the page).

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.

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, governments and libraries. For further information about the service, see <http://www.copyright.org.au> (click the Advice button) or our information sheet *Australian Copyright Council: who we are, what we do*.

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

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 also have a separate set of rights, known as moral rights, in relation to their works.

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 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 or rarrak;

- 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 may be an infringement of copyright, and the copyright owner may take legal action.

There are some uses of copyright material that do not infringe copyright, however, because of special provisions in the Copyright Act. These include fair use 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 for uses of artistic works to two non-profit copyright collecting societies: Copyright Agency Limited and Screenrights. Copyright fees are distributed by those societies and by Viscopy, the artists copyright collecting society. 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. Note, however, that 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 – for example, copyright in a work created by someone who died before 1 January 1955 generally only lasts for 50 years from the end of the year the person died.

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.

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.

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.

Some proposals for change

Indigenous community moral rights

The federal government announced in May 2003 that it would introduce changes to the Copyright Act that will entitle Indigenous communities to “take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material” and give them “legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom”. The legislation would:

introduce Indigenous communal moral rights in relation to a work (including an artistic work) or film based on an agreement between the author/artist and the Indigenous community. These rights could be independently exercised by the community and would mirror the nature and scope of authors’ moral rights as far as possible.

The policy originates from amendments introduced by Senator Aden Ridgeway in December 2000 when the provisions in the Copyright Act dealing with moral rights were passed. The amendments were not passed, but the government undertook to introduce provisions recognising the rights of Indigenous communities in relation to moral rights.

The aspect of the government’s proposal that has generated most discussion is the requirement of “an agreement between the author/artist and the Indigenous community”. One concern is that a community will have no rights if no agreement is reached, and another concern is that the requirement will be difficult in practice for communities to meet.

The government re-affirmed its commitment to introduce Indigenous communal moral rights in its pre-election arts policy for the 2004 election.

A resale right

The copyright laws of some countries include a resale right for artistic works. This right entitles artists to a share of the sale price each time their work is resold. A resale right would give the artist the right to share in profits if their artwork is later resold. The right particularly benefits artists, including Indigenous artists, whose work rapidly increases in value. The report on the Contemporary Visual Arts and Craft Industry (Myer report), released in 2003, recommended the introduction of a resale right in Australia.

The government released a discussion paper on resale royalty in July 2004. The paper, and responses to it, is available from http://www.dcita.gov.au/arts/consultation/resale_royalty.

Myer report recommendations

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

It also includes 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.*

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 <http://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 could be extended to protect Indigenous intellectual property.

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. It can be used both in relation to original works and items containing Indigenous material made under licence.

In practice, the label has not been widely used, and NIAAA, which was administering the mark, is no longer functioning. More recently, some Indigenous organisations are looking at developing their own trade marks to denote authenticity.

Protocols and ethical guidelines

Protocols and policy papers for dealing with Indigenous material are available in a number of areas. The Australia Council has recently developed a series of protocols, which are available on its website. Protocols have also been developed by other organisations including the Australian Film Commission, the Australian Society of Authors, the museum sector, the library and archive sector, and the public and commercial broadcasters.

Further information

For further information about copyright, see <http://www.copyright.org.au> or contact us.

In 2004 the Arts Law Centre of Australia launched a legal advice service known as “Artists in the Black”, to specifically meet the needs of Indigenous people and organisations. For more information see <http://www.artslaw.com.au/Indigenous> or telephone (02) 9356 2566.

Reproducing this information sheet

You may download and print one copy of this information sheet from our website for your reference, or you may purchase a printed copy from our online shop – <http://shop.copyright.org.au> – or direct from us.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government

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



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