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Indigenous Communal Moral Rights

Ian McDonald, Australian Copyright Council, 16 July 2003

It is possible that, by the end of this year, Australia's Copyright Act will contain provisions giving Indigenous communities moral rights in relation to certain types of copyright material embodying their "traditional culture and wisdom".

The introduction of such rights was first proposed at the parliamentary level during the Senate debate on the Copyright Amendment (Moral Rights) Bill 2000 — Senator Ridgeway on behalf of the Australian Democrats moved that that Bill be amended to give Indigenous communities moral rights in "Indigenous cultural works".

The proposal was not accepted by the Senate. However, part of a letter Senator Alston had sent to Senator Ridgeway was read into Hansard (at 21067). The letter assured Senator Ridgeway that the Department of Communications, Information Technology and the Arts would "give serious consideration to the principles underlying [Senator Ridgeway's] proposals' and that he had "asked [his] Department to bring forward a final proposal" for Government consideration "early in the new year" (that is, early in 2001).

This undertaking was later reflected in the Liberal Party's election commitments for the election held later in 2001. The Labour and Democrat parties included similar commitments in their election policies, thus indicating generally non-party partisan support for the introduction of moral rights for Indigenous communities.

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

The media release emphasised that the proposed communal rights would be analogous to moral rights — they 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". (Under the moral rights provisions for individual creators, "derogatory treatment" is treatment which is prejudicial to the creator's honour or reputation.)

The media release also emphasised that communal rights would be exercisable independently of the copyright in the relevant material and independently also of the moral rights exercisable by the creator of the material which embodies the community's "culture and wisdom".

In other words, in relation to some types of material, a potential user might need to consider each of the following:

- whether a copyright clearance is required;
- whether the use of the material raises issues relating to the moral rights of the individual creator (what the potential user needs to do to respect those rights; or, in the alternative, whether a defence applies; or whether they should get a consent from the creator); and
- whether the use of the material raises issues relating to an Indigenous community's communal moral rights (what the potential user needs to do to to respect those rights; or, in the alternative, whether a defence applies; or whether they should get a consent from the community).

The intention behind the proposal is to give Indigenous communities protection against "inappropriate, derogatory and culturally insensitive use of copyright material". However, many people keen to see a greater degree of respect given to the traditional intellectual and cultural property of Indigenous communities may well be disappointed if the rights are enacted in the form as announced.

This is because the communal rights would only apply if there is an agreement in place between the creator and the relevant Indigenous community. It is not clear when that agreement would need to be made or reached.

While the Government appears worried that people using works embodying Indigenous intellectual and cultural property should have certainty as to what their obligations will be, the requirement of having an agreement in place in order to create the communal right is not accompanied by any stated need for anyone to actually sight the agreement, or even for an Indigenous community to make people aware that the agreement exists.

Further, if it is necessary to have an agreement in place before a community has any communal rights in relation to its traditional cultural property, then a community will not have any communal rights where people with whom they have no direct or indirect relationship use Indigenous material inappropriately or offensively.

To be fair to the Government, there appear to have been similar limitations in the proposal as outlined by Senator Ridgeway during the debate on the moral right amendments to the Copyright Act.

It must also be noted that the scope of the proposed moral right, as set out in the press release, does appear likely to be wider than the rights in relation to the copyright which a community has in works created by people operating within that community's traditional culture. This right, based on equitable principles of fiduciary duties, would appear to be exercisable only where copyright in a work made according to customary law is infringed and the copyright owner is either not prepared to bring action him or herself, or cannot be identified. (The right was first

discussed in a case brought by an elder of the Ganalbingu people against an importer and seller of fabric, R & T Textiles: the decision is available at www.austlii.edu.au/au/cases/cth/federal_ct/1998/1082.html.)

It must also be said that, although we understand that the Government is keen to introduce a Bill amending the Copyright Act as soon as possibly (possibly in the Winter sitting of Parliament), it did state in its media release that it will "continue to consult in fine-tuning the new provisions".

However, if Indigenous communities are given a moral right which is as narrow as currently proposed, they will still need to adopt other strategies to encourage or enforce compliance with traditional processes and standards of dealing with their cultural property.

In some cases, it is either unthinking or well-intentioned ignorance that leads to inappropriate use of traditional cultural material that needs to be challenged. In other cases, it is opportunism, greed and/or obstinacy.

Where ignorance is the problem, it is likely that the further development and distribution of codes and protocols for dealing with Indigenous material will assist in providing an environment in which ICIP (Indigenous Cultural and Intellectual Property)[1] is given greater respect. Codes for dealing with Indigenous material have been in place for some years in relation to the use of ICIP by libraries, galleries and museums: see, for example, *Taking the Time: Museums and Galleries, Cultural Protocols and Communities* (Museums Australia Inc. (Qld), Brisbane, 1998); and Alex Byrne et al, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, (Australian Library and Information Association, Canberra, 1995).

See also the range of protocols across various arts-related fields which were published by the Australia Council (the codes, relating to song, performance, new media, writing and visual cultures at www.ozco.gov.au) as well as the protocols and guides developed by other organisations for:

- the visual arts (*Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft sector* by Doreen Mellor and Terri Janke; and the NSW Ministry of the Arts' policy document *Indigenous Arts Protocol — A Guide*, available via www.arts.nsw.gov.au);
- for filmmakers (an issues paper, *Toward a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities*, was published in February 2003 by the Australian Film Commission as part of a process of developing a new protocol, which we understand will build on existing protocols for television and documentaries — Lester Bostock's *The Greater Perspective* and Darlene Johnson's *Indigenous Protocol* for SBS Television); and

[1] This phrase is generally used to refer both to traditional Indigenous culture as well as the rights in that culture held by individuals and communities under customary Aboriginal and Torres Strait Islander laws.

- writers (*Writing About Indigenous Australia*, *Ethics Checklist* and *Indigenous Intellectual and Cultural Property Rights* by Anita Heiss, available from the website of the Australian Society of Authors at www.asauthors.org).

Where the inappropriate use of their culture is caused by greed, opportunism or obstinacy, Indigenous communities wishing to protect their material would need to look closely at whether other areas of law might provide some protections: given the right cases, it may be that trade practices law holds out some hope of limiting the inappropriate commercial use of ICIP. By way of example, we understand that the Australian Competition and Consumer Commission obtained interim orders in the Federal Court in Brisbane restraining an Australian souvenir manufacturer "from describing or referring to its range of hand painted or hand carved souvenirs … as "Aboriginal art" or "Authentic" unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent: see the ACCC's press release of 4 April 2003, "ACCC Obtains Interim Orders Against Aboriginal-Style Souvenir Dealer", available from its website at www.accc.gov.au.