



Australian Society of Authors

Australian Copyright vs Indigenous Intellectual and Cultural Property

Australian Copyright vs Indigenous Intellectual and Cultural Property Rights: a discussion paper

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It is clear that as we enter the new millennium, the protection of Aboriginal cultural and intellectual property rights must be secured by recognised and respected laws. The need to secure such rights was demonstrated in 1999 by the launch of the National Indigenous Arts Advocacy Association's (NIAAA) Label of Authenticity, and the release of *Our Culture: Our Future - The Report on Australian Indigenous Cultural and Intellectual Property Rights* by Terri Janke. The work of NIAAA and Janke came in response to the increasing level of appropriation of Aboriginal culture and voice, highlighted by a spate of artistic frauds (Elizabeth Durack / Eddie Burrup and Leon Carmen / Wanda Koolmatrie) in the 1990s.

So important are protecting these rights and developing policies and legislation related to such protection, that lawyer Terri Janke's report is generating much public discussion and debate nationally and stands as the most definitive legal and cultural foundation for determining policy on the issues. It addresses, to some degree, the issues relevant to the creation of written literature, issues that have been considered by both Indigenous and non-Indigenous authors and Indigenous communities in years past.

Copyright

The issue of copyright and intellectual property laws are becoming increasingly relevant to Aboriginal people. When research projects involving traditional stories are published, the copyright usually ends up with the non-Indigenous author because of the requirements of the *Copyright Act 1968* that the work must be original, have been reduced to material form and have an identifiable author.

As Janke points out, the *Copyright Act* as it stands is unsuited to protecting Indigenous culture, because it is "focused legally on individualistic commercial concepts, rather than notions of communal ownership or the cultural integrity of a work". [1] Janke also points out that Indigenous cultures, stories, information and knowledge are passed from generation to generation by oral means.

Generally, under the *Copyright Act*, once these stories are published in books and other documents, the person responsible for translating the oral story into written form is recognised as having copyright over the text. [2] Similarly, when a performance of a previously unpublished story or dance is recorded on film or audiotape, the maker of the recording is acknowledged legally as owning the film or tape. [3] In this way, copyright only protects the material medium rather than the idea or concept.

It is also the case that the person who first reduces an oral literature to material form is recognised as the author of the ensuing work, [4] and can exercise the exclusive rights granted to authors under the *Copyright Act* to reproduce the work in material form or to broadcast the work. [5]

In support of recognising joint copyright and providing shared royalties to communities, Pat Mamajun Torres points out that:

The payment of consultancy fees and royalties to key people within Aboriginal communities for their specialised and culturally unique knowledge is paramount towards the legitimisation of the worth and integrity of the information being provided. Payment not only legitimises the worth of the information from a mainstream Australian viewpoint, but it honours the concept of fees for service that is provided to other people with specialised knowledge and which is accepted as a given fact within business and academic circles". [6]

Janke asks: "Whilst there is a strong argument for interviewees and contributors to be joint owners of copyright of resulting work, what about the communal interests of the group who are the Indigenous owners of a story?" [7]

Torres notes that is no secret that over the last two hundred years Indigenous Australians have provided volumes of information for PhDs, research theses, governmental reviews etc, but few have ever benefited personally in terms of financial or academic gain, saying:

This situation is in part due to the fact that many people who have provided specialised information to academics and others have not been seen as co-authors, writers or owners of the information or the copyright holders. [8]

One example of a successful joint copyright /royalties arrangement however is with the book *Jandamarra and the Bunuba Resistance* (Magabala). Howard Pederson holds joint copyright with the Bunuba people, and all royalties are going back to the traditional owners. Another example of joint copyright is witnessed in *Love Against the Law: the autobiographies of Tex and Nelly Camfoo* (Aboriginal Studies Press, 2000) recorded and edited by anthropologist Gillian Cowlshaw where copyright is held by the three.

In line with this concept Bruce Sims, former publisher at Magabala Books, says there are a number copyright concerns when working on Indigenous books, beginning with the recording of the material. At the Australian Publishers Association Residential Editorial Program in 1998, Sims acknowledged that copyright at present is held by the person who takes the tape or photo and that the person recorded or photographed has no further rights, and that copyright must be assigned back to the person telling the story from the person doing the recording. [9] Sims notes that with collaborative works, where the copyright holder is often white, there are a range of options for dealing with the situation in contractual terms. Firstly all copyright may be assigned to the Indigenous writer (informant, storyteller, collaborator or co-author) or an escape clause might allow joint copyright until an established cut-off time, with ownership then reverting to the Indigenous writer. Or the third option may be to have an "heir letter" attached to the contract that assigns royalties to someone else. [10] The final issue for the publisher concerned is permissions. Sims says the publisher must inform the author what a permission is, and what permissions might be sought for a property. [11]

Nadia Wheatley looks at the questions of copyright faced by non-Indigenous authors who may want to write a Dreaming story, for example. She asks:

Do we need to get permission from the community whose story it is, in order to re-tell it and make money out of it? Or can we just claim full copyright and full royalties? If we don't have to get permission, why do people like Lionel Fogarty and Pat Torres have to? And if we don't want all the hassle, why can't we just make up a Dreaming? [12]

Wheatley is obviously aware of the protocols facing authors, regardless of race, when it comes to reproducing a Dreaming story from someone else's area. Her question of what to do if an author can't

access such permissions needed, or simply can't be bothered, and what next to do, is a relevant one. And if the protocol is not followed, is there any mechanism for redress? At this stage it appears not.

Fiction writer and editor Bruce Pascoe of the Wathaurong Language program reminds researchers, linguists and oral historians that they do not own what they write about Indigenous people. He says:

“ Academics would never consider that they owned the bible or Hansard and they expect to pay for the use of Bob Dylan's song lyrics, or at least acknowledge the source. If someone reproduced *Sinbad the Sailor* as if it were their own work it would keep 20 QCs in Volvos for a decade. [13]

Janke says that an Indigenous collecting society or societies which could authorise the use of Indigenous cultural materials should be established. These Indigenous collecting societies could be set up either by Indigenous communities themselves or under specific legislation. Once established, the societies would have the role of negotiating use of rights and payments, in accordance with the wishes of the communities. [14]

Janke suggests that these Indigenous collecting societies could distribute monies to communities (setting up trust arrangements, and the like), address specific Indigenous issues like communal ownership and assist Indigenous writers and publishers in developing models of practice and protocols. Indigenous informants would then be informed about income streams so that they could negotiate terms at the time of speaking with white authors. [15]

The Institute for Aboriginal Development (IAD) Press also express their concerns with copyright saying that the greatest problem area for them as publishers is oral history, as it is fraught with unresolved difficulties. [16] The second most contentious area is copyright itself: whether ownership of a story is vested in an individual, family or kinship group(s), community/ies, language group(s). This issue is particularly difficult when it comes to royalty payments time, [17] especially when you consider the average 10% payment due to the owner of the copyright of the text then being divided by possible multiple owners. It could lead to questions of whether such copyright terms are worth the financial outcome and administrative process such laws would create.

Due to all the copyright issues facing publishers and authors, IAD Press believes a specific strategy is needed to address the problems. They believe the Aboriginal and Torres Strait Islander Commission needs to provide assistance for Copyright Council regional workshops focussed specifically for Aboriginal people with the aim of increasing their knowledge and understanding of their rights and entitlements. [18]

An added problem for traditional artforms is that copyright lasts for the author's life plus 50 years: therefore, because Indigenous stories are passed on through generations, they do not qualify for copyright protection. As Janke says, “many works of Indigenous arts and cultural expressions have been in existence since time immemorial and those that are newly created today will remain significant beyond this period. [19] Pat Mamajun Torres had the following concerns about the 50 year cut-off date:

Copyright exists in Australian law, material that is put into books, is only copyrighted for 50 years after you are dead. So your children and your grandchildren will not own the copyright of your work. So it does not take in the life, cultural and traditional realities of Aboriginal people. It is okay if you are making a book that is made up about any kind of story, but if it is a Dreaming story and it is your tradition and your culture, having a 50 year life on your works is really acting against us. [20]

Intellectual Property

In *Our Culture: Our Future* Janke says that “Indigenous Cultural and Intellectual Property Rights” refers to Indigenous Australians' rights to their heritage, and that heritage consists of:

The intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity. [21]

The term “heritage” also includes literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry) as well as languages, spiritual knowledge, Indigenous ancestral remains and other aspects of Aboriginal society and culture. [22]

In discussing the need to develop strategies for the protection of Indigenous culture and intellectual property rights, Janke suggests that consideration be given to amending the *Copyright Act 1968* to provide moral rights (rights of attribution, no false attribution and cultural integrity) for Indigenous cultural groups whose traditions are drawn upon to create a copyright work. Janke says

Where ownership of an Indigenous cultural work is communal, as opposed to individual, then the “Indigenous owners” should be given a right of attribution, a right of no false attribution and the right to cultural integrity. However, this might only cover Indigenous cultural works within the copyright period and will not refer to Indigenous material currently considered in the public domain. [23]

In discussing issues of concern to Indigenous people in the use of their languages, Janke notes the use of Indigenous languages within literary and performance work, including books, songs, plays, poetry and other works. As well, translations into Indigenous languages also need protection. [24]

The appropriation of Indigenous spirituality is another concern of Indigenous peoples expressed in Janke’s report, which compares it to Indigenous American’s outrage at the commercialisation and derogations of their rituals (including medicine wheel ceremonies and sweat lodges), often by non-Indigenous people. Janke cites Marlo Morgan’s *Mutant Message Down Under* as an example of such appropriation as the book had been marketed as a true account of the author’s “real spiritual experience among a group of Aboriginal Australians known as ‘Real People’”. [25]

In terms of those adopting Indigenous persona like Leon Carmen /Wanda Koolmatrie and Elizabeth Durack / Eddie Burrup, Janke says that law relating to fraud and misrepresentation may offer assistance where false documents are used or when contracts and agreements are signed. She also suggests that laws relating to misleading and deceptive conduct under the *Trade Practices Act 1974* (Commonwealth) may also be useful. [26]

Janke also points out that there is no protection against culturally inappropriate treatment of Aboriginal works, saying:

For Indigenous people, cultural integrity in reproductions of Indigenous cultural material is important. Under customary law, Indigenous custodians are collectively responsible for ensuring that important cultural images and themes are not reproduced inappropriately. The Indigenous creator must be careful not to destroy or misuse the cultural knowledge embodied in a work. Although an author is the creator of the artwork, song, or story, he or she cannot authorise reproduction of it without ensuring the reproduction complies with Indigenous customary law. Such rights are not recognised under current copyright laws. [27]

Sam Cook, former designer at Magabala Books, believes that Aboriginal intellectual property rights - all of the knowledge that has been accumulated over tens of thousands of years by Aboriginal people - must be protected. She says that with the movement of Aboriginal people away from their traditional lands, usually forcibly, ownership of information is not as clear-cut as it used to be, adding:

We must guard against utilising a design in the wrong context. Traditional designs invariably belong to certain community groups, and the relevant elders and / or traditional owners must give permission before they can be reproduced. It would be wrong, for example, for an image from one region to be placed alongside a story from another region of Australia, unless permission has been obtained. [28]

Contracts

To an extent, Aboriginal writers face the same professional industrial problems as all authors. Thus they need to know how to protect their rights in a contract. They need to know: how to apply for Public Lending Right and to access the Copyright Agency Limited; what rights (electronic, digital, moral)

they should retain and what the publisher is entitled to; and what they should be paid for a piece of work or a public appearance. At the same time, some Aboriginal writers face additional contractual and copyright issues, because there are sometimes matters of community ownership and collaboration that have to be sorted out. [29]

In her “Report on Preparation for Indigenous Writers’ Series” Anthea Wu recommended that University of Western Australia Press contracts “be modified in accordance with these suggestions from Bruce Sims” (mentioned above) given at the Residential Editorial Program. [30]

As few mainstream publishers have extensive Indigenous lists, the issues discussed by Sims have yet to be taken on board by most, aside from the efforts of University of Western Australia and perhaps Fremantle Arts Centre Press who have published a number of successful works by Aboriginal authors. Because of this, only authors with contract advice from specialist industry advisers or legal representatives who are “up-to-speed” with intellectual property rights for Indigenous people would, at this stage it appears, be benefiting from the new discussions on such protection issues.

As an editor at Magabala Books, Rachel Bin Salleh says she can’t even start editing until issues of ownership, authorship and copyright have been sorted out. She says it is these areas that cause the most headaches because people are generally not aware of the issues, and in turn can halt the book process for good. She adds:

In a sense getting correct ownership of a story is more important than the process of editing or publishing. Also, if a section in the book is appropriate. Maybe there are sections interwoven into a book about men’s law or women’s business. Is it appropriate to be there? I mightn’t think so, but maybe the women/men do. Maybe they are unaware that it has been included? If so then negotiations must start as to what should be there. How it should be portrayed. Who is the custodian for the story, is it appropriate for that person to be telling that story. There has to be some amount of tact - as these questions can be quite offensive to a lot of people. [31]

footnotes

1. Terri Janke, “Protecting Australian Indigenous Arts and Cultural Expression: A Matter of Legislative Reform or Cultural Policy?”, *Culture and Policy*, vol.17, no.3,1996, p.14
2. Section 35 (2) Copyright Act 1968, in Janke, Terri, *Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Michael Frankel & Co, Sydney, 1998, p.31
3. Section 98(1) & (2) and Section 22(4) Copyright Act 1968 in Janke, *Our Culture, Our Future*, op.cit. p.32
4. *Walter vs Lane* [1900] AC 539 in Janke, *ibid.*, p.53
5. *Ibid.*
6. Pat Mamajun Torres, “Interested in Writing About Indigenous Australians?”, *Australian Author*, vol.26, no.3. Spring 1994, p.25.
7. Terri Janke, comments to the author, 13 April 2000
8. Torres, *op.cit.*, p.25.
9. Sims, Bruce, *APA Residential Editorial Program 1999 Report* p.26
10. *Ibid.*, p.22

11. Ibid.
12. Nadia Wheatley, "Black and white writing: the issues", *Australian Author*, vol.26, no.3. Spring 1994, p.22.
13. Bruce Pascoe, letter to the author, 23.10.00
14. Terri Janke, email to the author, 20 April 2001
15. Terri Janke, comments to the author, 13 April 2000
16. *Report of Strategies for the Further Development of the National Aboriginal and Torres Strait Islander Arts and Cultural Industry, Arts Training North Territory*, 1994, pp.273-274
17. Ibid.
18. Ibid.
19. Janke, "Protecting Australia Indigenous Arts and Cultural Expression", op.cit., p.18
20. Arts Training Northern Territory, op.cit., p.273
21. Janke, *Our Culture: Our Future*, op.cit .p.xvii
22. ibid.
23. ibid., p.xxix
24. ibid., p.21
25. Janke, *Our Culture, Our Future.*, op.cit., p.23
26. ibid.,p.39
27. Ibid.p.55
28. Maria Mann interviews Sam Cook, "Magabala Books: The Politics of Design", in *Artlink*, vol.17., no.1, 1997, p.37
29. Wheatley, op.cit., p.21
30. Anthea Wu, "Report on Preparation for Indigenous Writers1 Series" UWA Press, September 1998.
31. Rachel Bin Salleh, email to the author, 29 March 2000



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