



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.

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 and libraries. For further information about the service, see www.copyright.org.au.

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 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

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 or rarrk;

- 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, 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 and Screenrights. Copyright fees are distributed by those societies and by Copyright Agency | Viscopy, the artists copyright collecting society. Viscopy’s business is now managed by Copyright Agency. Viscopy remains a separate legal entity, with members and a board. 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.

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.

Performers' Rights

There are three separate areas of rights relating to performers under the Copyright Act. These are:

the right to grant or refuse consent to the reproduction and communication of a performance;

- A performer's consent is generally needed to film or record a performance, and to broadcast or otherwise communicate a performance.
- Types of performances that are covered include performances of expressions of folklore (these are likely to include Indigenous cultural material).
- Performers have a number of rights in relation to **unauthorised** films, recordings and broadcasts of their performances - a use is "unauthorised" if the performer has not consented to it.
- Certain recordings are "exempt" for the purposes of performers' rights.

co-ownership of copyright in a sound recording of a performance; and

- Unless a sound recording was commissioned, then performers on that sound recording share ownership of the the copyright in that sound recording unless they have agreed otherwise
- There are number of limitations on how these rights operate in relation to material recorded before 1 January 2005

moral rights.

- Performers whose performances are captured on sound recordings have (since 26 July 2007) a number of moral rights in their performances. These include the right to be attributed (identified) as a performer, a right against having performership falsely attributed; and the right not to have a live or recorded performance subjected to derogatory treatment.

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

Other relevant issues

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.

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'.

The report's recommendations included:

- 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 report can be downloaded from:

www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/index.htm

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.*

Cultural Minister’s Council Indigenous Intellectual Property Toolkit

The Cultural Minister’s Council has established a working group focusing on Indigenous Intellectual Property, including the development of an Indigenous Intellectual Property Toolkit. For details of the working group, see their website at:

www.cmc.gov.au/working_groups/indigenous_intellectual_property_toolkit

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: www.un.org/esa/socdev/unpfii/

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 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.

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

The “Artists in the Black” service specifically meets the needs of Indigenous people and organisations. For more information see www.aitb.com.au or telephone 1800 221 457.

The “Solid Arts” website contains information for indigenous artists as well as those dealing with indigenous art and can be accessed at: www.solidarts.com.au

Reproducing this information sheet

Our information sheets are regularly updated - please check our website to ensure you are accessing the most current version. Should you wish to use this information sheet for any purpose other than your reference, please contact us for assistance.

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 Australian Government through the Australia Council, its arts funding and advisory body.

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