

# SOLID ARTS

# THE SOLID ARTS PROJECT

Arts Law Centre of Australia

- BACKGROUND
- INDIGENOUS CULTURAL  
INTELLECTUAL PROPERTY
- COPYRIGHT
- MORAL RIGHTS
- CONTRACTS



# SOLID ARTS



**BACKGROUND**



# Background to Solid Arts

Solid Arts – the Indigenous Intellectual Property (IP) Toolkit Project

Project of Cultural Ministers Council of Australia

- Arts/Law has been assisting artists and cultural organisations develop contracts as a means to better protect Indigenous IP
- Government agencies have been taking steps to put better systems and practices in place. However, they are stopping short of providing better legislative protections
- Examples:
  - The Indigenous Art Code
  - Indigenous IP Toolkit.



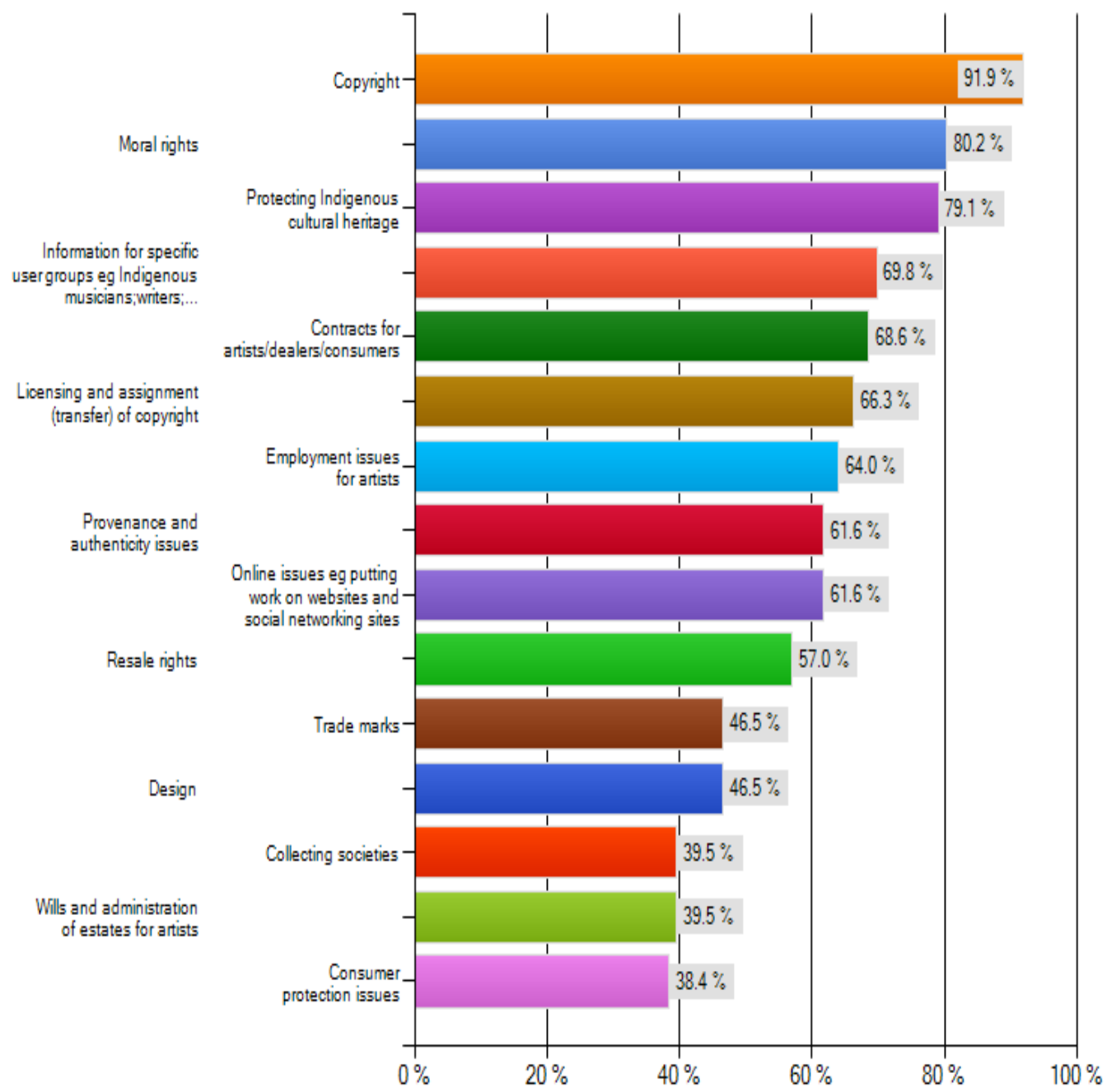
# Objectives of project

- Promote links between businesses and Indigenous communities
- Raise awareness of Indigenous communities, consumers and commercial operators about Indigenous IP issues
- Enhance coordination of existing networks, Indigenous and non-Indigenous, operating in the Indigenous IP area



# Consultation and planning

- What are the main Indigenous Intellectual Property issues affecting artists and arts organisations
- Current gaps in information about Indigenous IP issues
- What useful resources already existed
- Most effective methods for communicating Indigenous IP information to Indigenous artists, consumers and commercial dealers
- Letters, emails, survey & meetings





# Best communication methods

## Indigenous artists

1. Face to face – seminars etc
2. Aboriginal radio
3. TV

## Consumers

1. Websites/email
2. Printed material
3. TV

## Commercial operators

1. Websites
2. Printed material
3. Email
4. Face to face workshops

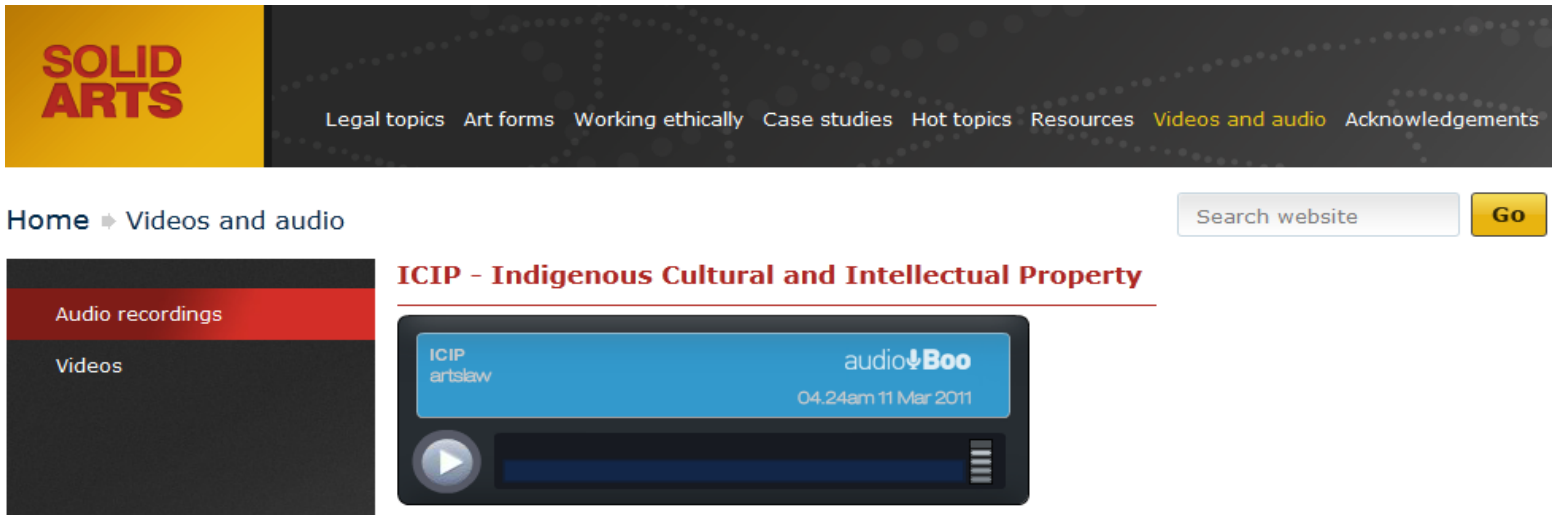


# Radio Programs in English and Indigenous languages

**In English – 5 topics**

**Play** ICIP – Indigenous Cultural and Intellectual Property

**In 7 Indigenous languages:** TSI Kriol, West Kriol, Tiwi, Yolngu Matha, Pitjantjatjara, Warlpiri, Arrernte



**SOLID ARTS**

Legal topics Art forms Working ethically Case studies Hot topics Resources **Videos and audio** Acknowledgements

Home ▶ Videos and audio

Search website **Go**

**ICIP - Indigenous Cultural and Intellectual Property**

Audio recordings  
Videos

ICIP artslaw audio↓Boo  
04.24am 11 Mar 2011



# Posters – key messages?

- 14 posters are distributed to Indigenous Art Centres and other Indigenous organisations nationally

## Back drop of Indigenous Art Code:

- Don't copy others
- Respect for culture - ICIP
- Ownership of arts and copyright
- Wills
- Protecting your work online
- Working with the mob (collaborative works)
- Moral rights
- Employment



# Information Sheets

## Solid Arts

**Copying without permission is wrong**

**If someone copied your work without your permission you can do something about it. Get advice about the best way to deal with copyright infringement. This might be a letter of demand, negotiation or you might have to go to court.**

**For more information about ownership of art and copyright visit:**  
**THE ARTS LAW CENTRE OF AUSTRALIA**  
[www.artslaw.com.au](http://www.artslaw.com.au)  
**ARTISTS IN THE BLACK**  
[www.aitb.com.au](http://www.aitb.com.au)  
**SOLID ARTS**  
[www.solidarts.com.au](http://www.solidarts.com.au)  
**AUSTRALIAN COPYRIGHT COUNCIL**  
[www.copyright.org.au](http://www.copyright.org.au)

If you think you have a problem or are not sure about an arts issue contact **Artists in the Black** (a service of the Arts Law Centre of Australia) on **1800 221 457** and speak with an Aboriginal Liaison Officer or lodge an online legal query form at [www.aitb.com.au](http://www.aitb.com.au).

## Solid Arts

**Indigenous Cultural and Intellectual Property (ICIP): dancers**

**Respect for culture**

Performance is a special part of Aboriginal and Torres Strait Islander culture. Performers need to respect our culture. Some things performers need to think about:

1. Always try to learn from your old people.
2. Follow the cultural protocols from each community.
3. Don't perform other people's stories, dances etc unless you get permission.
4. Copyright may not protect the performance.
5. Be careful about allowing filming and recording.

**For more information visit:**  
**THE ARTS LAW CENTRE OF AUSTRALIA**  
[www.artslaw.com.au](http://www.artslaw.com.au)  
**ARTISTS IN THE BLACK**  
[www.aitb.com.au](http://www.aitb.com.au)  
**SOLID ARTS**  
[www.solidarts.com.au](http://www.solidarts.com.au)  
**AUSTRALIA COUNCIL FOR THE ARTS**  
[www.austriacouncil.gov.au](http://www.austriacouncil.gov.au)  
**AUSDANCE**  
[www.ausdance.org.au](http://www.ausdance.org.au)

If you think you have a problem or are not sure about an arts issue contact **Artists in the Black** (a service of the Arts Law Centre of Australia) on **1800 221 457** and speak with an Aboriginal Liaison Officer or lodge an online legal query form at [www.aitb.com.au](http://www.aitb.com.au).



# NOT MADE IN AUSTRALIA- Postcard

Check the label – don't buy a cheap substitute

Do you want to buy an authentic Indigenous artwork or souvenir? Check where it was made. There are many “Indigenous-style” souvenirs, such as boomerangs and other artifacts, which are not made by Indigenous people but are imported into Australia from overseas. Support Indigenous people and buy authentic Indigenous products.

For more information visit:

Solid Arts [www.solidarts.com.au](http://www.solidarts.com.au)

Indigenous Art Code [www.indigenousartcode.org](http://www.indigenousartcode.org)

ANKAAA [www.ankaaa.org.au](http://www.ankaaa.org.au)

DESART [www.desart.com.au](http://www.desart.com.au)

Ananguku Arts [www.anangukuarts.com.au](http://www.anangukuarts.com.au)

AACHWA [www.aachwa.com.au](http://www.aachwa.com.au)



# DVD

- 7 stories to date (3 more to come including WIPO IGC story)
- Embedded in Solid Arts website and YouTube
- Australian Aboriginal filmmaker, Pauline Clague – Core Films



# Solid Arts website

(<http://www.solidarts.com.au/>)

- an online Hub, with free legal information and practical tools for indigenous artists
- contains information for everyone who has an interest in Indigenous arts
- a portal to other sites relevant to Indigenous Cultural and Intellectual Property

**SOLID ARTS**

Legal topics Art forms Working ethically Case studies Hot topics Resources Videos and audio Acknowledgements

**Respecting and protecting Indigenous intellectual property**  
*Find out legal information about these topics:*

Search website  **Go**

- Contracts
- Copyright
- Employment issues
- Indigenous cultural & intellectual property
- Licensing
- Moral rights
- Provenance & authenticity issues
- Resale rights
- Wills

**SOLID ARTS CASE STUDY:**  
**Ilbjerri Theatre Company**  
– copyright ownership and contract

Ilbjerri Theatre Company in Victoria is the longest running Indigenous theatre company in Australia creating innovative contemporary works by Aboriginal. [Find out more here.](#)

**WHAT IS SOLID ARTS?**  
Solid Arts is an online resource with free legal tools, practical advice and links to other sites.

**WHERE DO I START?**

- Indigenous artists
- Art centres and commercial operators
- Creators who work with Indigenous communities
- People who purchase Indigenous artworks
- Anyone interested in Indigenous issues

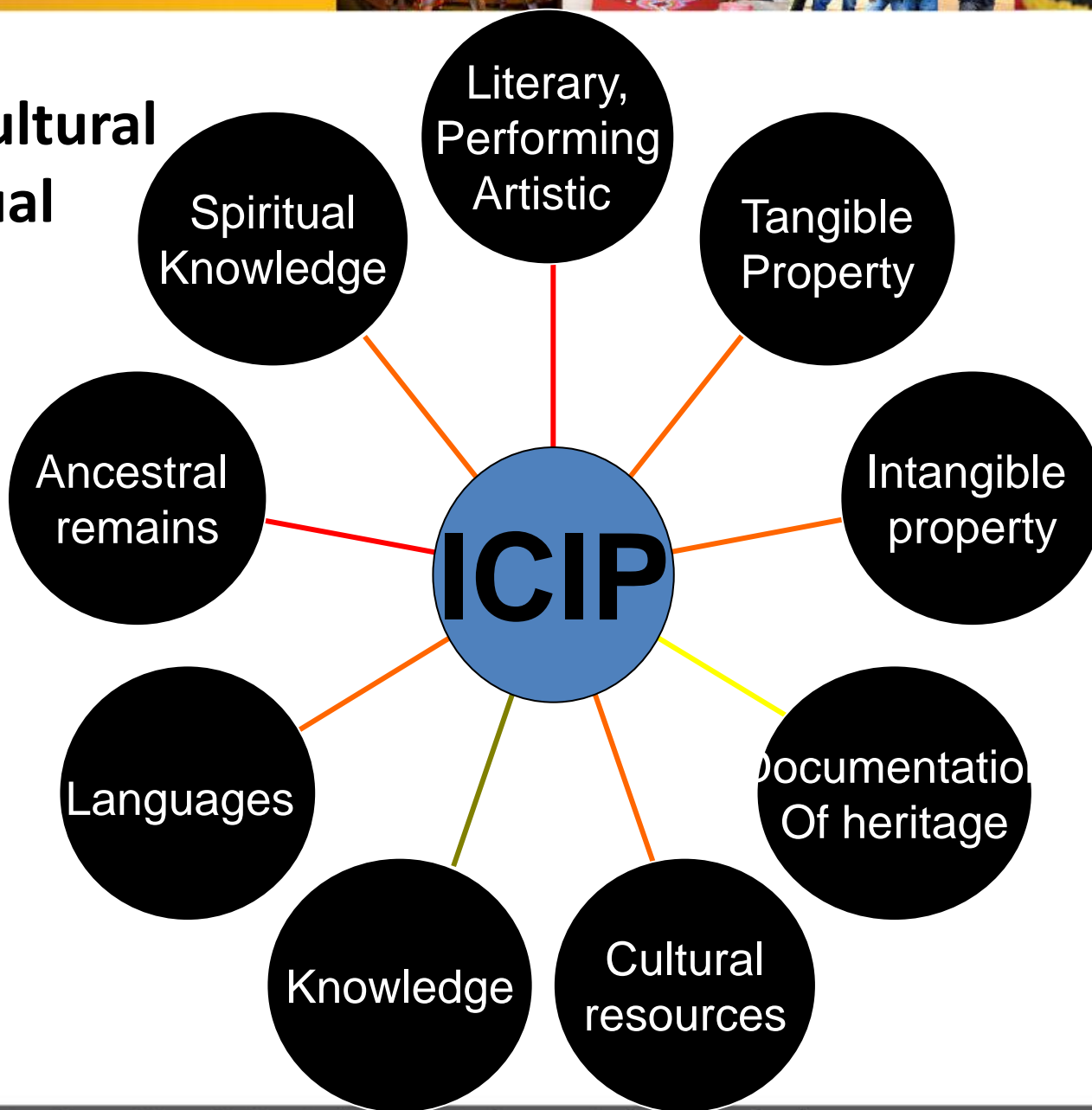
# SOLID ARTS



## Indigenous Cultural and Intellectual Property (ICIP)



# Indigenous Cultural and Intellectual Property





# Indigenous Cultural and Intellectual Property-

Differences in Anglo-Australian Law and Aboriginal Culture

## Anglo-Australian law

- Areas of law: Copyright, Native title, World heritage
- Statute: *Aboriginal and Torres Strait Islander Heritage Protection Act 1999*, Trade practices
- Material form
- Individual rights
- Not copied
- Specific categories of material;
- Limited time eg life of artist + 70 years

## Aboriginal law and culture:

- Oral/customary
- Communal rights
- Shared knowledge/ culture passed on
- All aspects of cultural heritage
- Time ongoing



# Indigenous Cultural and Intellectual Property- Important to remember

- The right to create artworks and to use pre-existing designs/totems of the clan, resides in the *traditional owners* as custodians of the images.
- Traditional owners- possess collective authority to determine the use of the works
- Extent to which an artwork can be reproduced- depends on the subject matter of the work.
  - Eg. An artwork that is associated with a public story or ceremony might have fewer restrictions than an artwork that embodies, a dreaming or creation story.
- Aboriginal artwork often depicts secret parts of a dreaming that will only be recognised and understood by a few- i.e. those who have a close knowledge of the cultural significance of the story.
- Important that any reproduction is accurate and done with full, proper permission of the artist and community



# The UN Declaration on the Rights of Indigenous Peoples

## **Article 31**

*1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*



# UNDRIP Article 31 continued

*2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

- The Australian Government is committed to these Articles, which should be reflected in your approach
- Also, internationally, the World Intellectual Property Organization (WIPO) is working towards protecting forms of ICIP.



# World Intellectual Property Organisation (WIPO)

## Inter Governmental Committee meetings

- Formal meetings in Geneva, Switzerland
- Commenced over 10 years ago
- Consists of Member states, intergovernmental organisations, non government organisations and Indigenous representatives and organisations
- Limited voice for Indigenous peoples at meetings
- 3 draft international instruments developed to protect traditional knowledge, traditional cultural expressions and genetic resources
- WIPO General Assembly decided on 12 months further work to develop instruments.



## International developments- National Legislation protecting ICIP

- Pacific Model laws- *The Protection of Traditional Knowledge and expressions of Culture Act 2001*
- Cambodia- *Protection of Cultural Heritage Act 1996*
- Taiwan- recently developed sui generis legislation called *Indigenous Peoples Intellectual Property Act*



# Other laws

A range of laws may be used creatively to protect aspects of Aboriginal culture from misuse.

These include: copyright; native title, heritage protection (Aboriginal and Torres Strait Islander Heritage Protection Act 1999); consumer protection (s 18 ACL); and criminal law (ie fraud).



# Case study

- The Wandjina is the supreme creation spirit of the Worrora, Wunumbal and Ngarinyin peoples of the Kimberley
- A sculpture depicting Wandjina figures appeared on the verge of a wellness and art business in the Blue Mountains
- The sculpture was done by a non-Aboriginal artist, commissioned by the owner of the centre, also not Indigenous. Associated art exhibition, book and website also depicting Wandjina
- Indigenous communities in the Blue Mountains and the Kimberley were very upset. Considerable community disquiet among non-Indigenous residents as well.
- No copyright infringement . Consumer laws found to be inapplicable . The sculpture fell within the scope of the development application lodged by the business owner with the council.
- Arts Law made submissions and represented the Indigenous groups.
- Development approval for the sculpture was refused
- Highlights gaps in existing laws.



# What Solid Arts and Arts Law do to assist

Provide:

- Website resources
- Telephone advice and document reviews
- Sample contracts (and ICIP clauses)
- Wills
- Mediation
- Casework
- Advocacy and education



# ICIP – what you need to remember

*Respect for heritage, culture,  
knowledge, stories, language, cultural  
expressions, songs, dances, images,  
medicinal and biological knowledge*



# Best practice

Several best practice sources:

- Arts Law websites;
- protocols on the Australia Council website;
- Indigenous Art Code





# Best practice

- Don't presume
- Be respectful
- Become informed
- Source protocols and other best practice models appropriate to your situation
- Consider including a term in an agreement recognising ICIP (Arts Law has samples)
- Always ask permission!



# How does ICIP come into what you do?

- Festivals
- Performances
- Photographs
- Access to country
- Sacred sites
- Research



# In summary

## Protocols:

- Not legally binding, based on good faith (show your desire to do the right thing);
- Encourage understanding and engagement with Indigenous people through consultation and consent.



# In summary

## Contracts:

- Consider including a term in any agreements you enter into that touch on ICIP to show your respect for the rights of Indigenous communities (and for Aboriginal people, to show you're aware of your rights!)
- Think about clauses that require parties to comply with a particular protocol.



# In summary

## Notices

- When publishing or communicating content that contains ICIP, notices can be used stating that the content contains ICIP and cannot be reproduced or altered without the community's permission.
- Exhibitions, performances, websites



# Sample contract clause

- The parties recognise and agree to respect all ICIP in relation to any Design or Product, and to comply with any restrictions on using and dealing with ICIP. Without limiting the generality of the foregoing, the parties agree to use all reasonable endeavours to adhere to protocols for producing Indigenous Australian visual arts issued by the Australia Council from time to time.



# Sample clause continued

- Each party agrees to include any caption set out in the Schedule (ICIP) and give full and proper attribution to any relevant Indigenous community in relation to any ICIP in any Design or Product or Art Work.



# Sample clause continued

- The Organisation acknowledges that in the event of the Artist's death the subsequent display of the Artist's likeness may be culturally inappropriate and that, upon notification of the Artist's death and receipt of a request to do so from the Artist's family or an arts centre involved in the Artist's community, the Organisation agrees use its best efforts to remove any likenesses or images of the Artist from any display or publication under the management or control of the Organisation.



# Resources

Use the Solid Arts material available on the website [www.solidarts.com.au](http://www.solidarts.com.au) and also in your packs.



# From the Solid Arts site

Consider that Aboriginal and Torres Strait Islander people have been making art for thousands of years. Artists (and performers) have special responsibilities to respect culture. Help them to meet their cultural obligations by respecting their culture when they choose to share it with you.



# Finally....

*“...we are only asking that we be granted the same recognition, that our works be respected and that we be acknowledged as the rightful owners of our own works of art...”*

– Wandjuk Marika, 1975



# Copyright: visual arts



# Where to find Information about Copyright

- The Arts Law Centre of Australia:  
[www.artslaw.com.au](http://www.artslaw.com.au)
- Artists in the Black: [www.aitb.com.au](http://www.aitb.com.au)
- Australian Copyright Council:  
[www.copyright.org.au](http://www.copyright.org.au)
- Copyright Agency: [www.copyright.com.au](http://www.copyright.com.au)



## Solid Arts

**Basic Principle: Don't use the creative works of others without permission.**

- Australian copyright law gives artists the legal right to decide how their work is used. So don't reproduce an artists' work without permission.
- This is separate to the ICIP issues. It can also be disrespectful to Aboriginal culture to copy other people's work.



# Outline

- *What copyright is (1)*
- *What it protects (2)*
- *What it doesn't protect (3)*
- *Who owns copyright (4)*
- *Where you might go to try and find a copyright owner (5)*
- *Best practice approaches for art centres and institutions with respect to copyright (6)*



# *What is copyright?*

From the Solid Arts site:

*Copyright is a bundle of rights that artists may own in relation to their work.*

- Copyright is about providing an incentive to creators to keep producing the wonderful things we all benefit from





# Purpose and Use of copyright law

- Incentive
- Creativity
- Benefit to society as a whole
- Provides creators/copyright owners with monopoly over copyright works for duration period generally of life of the artist + 70 years.
- Arises automatically
- No registration system or fee to be paid
- Circumstances where creator isn't owner:
  - Employment, commission for eg – will talk about in a bit)
- Best practice is to assume, unless you know that some other agreement is in place, that visual artist is the copyright owner



# Copyright is also a bundle of economic rights

- Reproduce
- Adapt
- Communicate
- Publish
  
- This is separate from ownership of the visual artwork



# *What does it protect?*

- Generally, copyright protects things like visual art, craft, music, literature, film – cultural goods or creative expressions of imagination
- It protects the particular expression of an idea
- The wonderful arts-related, cultural and educational things that make up a vibrant and thriving cultural life





# *How long does copyright last?*

**Life of the author (visual artist) + 70 years**

- Once the period life of the creator + 70 years has passed or expired, copyright works are said to be in the public domain (ie free to use without a copyright owner's permission)
- Note that may be more complicated than first appears if you're talking about using someone else's art work (ie photograph, sketch etc) of that public domain work!





# ***What it doesn't protect***

## *Copyright doesn't protect*

- Artwork without material form
- Art work in the public domain – eg. rock art
- Ideas for art
- Artistic styles & techniques
- Information that may be used in art
  
- Culture communicated through art



# ***Who protects Copyright and How?***

- There are in-built exceptions that fit with the overall purpose of the copyright scheme being designed to benefit society as a whole
  - ‘Fair Dealing’ exceptions or defences
  - Statutory licensing schemes
  - Special provisions for collecting institutions, ie museums and galleries



# Ideas- Example

Dan Brown/ Random House:

- Able to use 'The Holy Blood and the Holy Grail' as inspiration/information.
- Authors of earlier publication sued Dan Brown and Random House for © infringement.
- Judge said a novelist must be free to "draw appropriately" from historical works without facing a court and having his integrity called into question.





# Artistic styles and techniques

- Use of Aboriginal artistic styles and elements
- Consider best practice protocols and other laws that may come into play (such as passing off and misleading and deceptive conduct) in relation to art marketed as Aboriginal art but created by non-Aboriginal artists.



# Who owns the copyright?

- The creator – in most cases
- Selling the artwork doesn't affect ownership of the copyright
- Unless you know there's an agreement to the contrary, safest and most ethical to approach copyright with the assumption that the artist is the owner.



# ***When is the creator NOT the owner?***

- Contract
- Employment (print journalists retain some rights)
- Some commissions – weddings and babies!
- The Crown
- Remember: Copyright arises automatically- as soon as a visual art work is created



# What a copyright owner can do

- A copyright owner can deal with their copyright in the same way that they use any tangible asset: they can sell (or buy), license, bequeath/include it in a will (inherit) *etc*
- The Copyright Act assumes the copyright owner will seek to obtain value in return for granting the right to reproduce





# ***When is reproduction okay - exceptions***

- Exceptions for fair dealing:
  - research & study
  - reporting the news
  - criticism & review
  - parody & satire
- Sculptures in public places



# Less than a substantial part

- ‘Substantial part’ not defined in the Copyright Act, but courts refer to “important”, “essential”, “distinctive” and sometimes “vital” parts to indicate.
- About quality, not quantity (ie the *Kookaburra Sits in the Old Gum Tree* flute riff or a portion of an Aboriginal visual art work reproduced in another form...)
- Example: Magpie Geese and Water lilies; carpets case



# Case Study- Albert Namitjira

- In 1957 Albert Namatjira entered into a legal agreement with publishing company Legend Press (owned by John Brackenber).
- The agreement stated that Legend Press would pay royalties to Namatjira in exchange for having the sole right to reproduce all of his paintings.
- Namatjira still owned copyright and theoretically at the conclusion of the licence was entitled to negotiate a different agreement or seek increased fees.



## Continued...

- The agreement concerned copyright- the right to put reproductions of Namatjira's artwork on items such as books, tea towels and greeting cards.
- In return, Namatjira received an ongoing economic benefit via royalties or licence fees.
- As the value of his works increased along with his reputation, better terms about his copyright licence would have made sense



# *Who owns copyright*

- In 1959, Namatjira passed away. In his will, his estate – including copyright – was to pass to his family.
- Legend Press still owned the right to reproduce Namatjira’s work at this time (and each year they paid 12% royalty to his family).
- NT Public Trustee administered the will and the Namatjira Estate and in 1983 sold the copyright to Brackenber for \$8,500.
- The 46 years remaining of the copyright duration period may have earned Namatjira’s family far in excess of the amount Brackenber paid for copyright (\$8500).
- **Moral of the story:**
  - Importance of artists and their families understanding that their copyright, in their work, is a valuable asset that may increase significantly over time.
  - Administrators of wills and estates need to understand the potential value of this asset



## *How to find a copyright owner (5)*

- **No excuse that you tried and failed**
- **NO central copyright registry (remember, arises automatically, no fees, no need to post anything to yourself in an envelope etc), so investigate as thoroughly as you can!**
- Google!
- Any publishing details?
- Relevant collecting society (Viscopy/Copyright Agency)



# ***Best practice approaches (6)***

- © © ©- Use the © symbol, though it's not necessary as far as establishing copyright is concerned. It's best to use the copyright symbol and include details of ownership so that others can locate a copyright owner in future (and know that you're aware of your rights!)
- Get everything in writing (an assignment and exclusive licence have to be in writing and signed to be valid, though other dealings may technically be oral);
- Unless you know otherwise, assume the artist is the copyright owner;
- Remunerate fairly for use of copyright.



# Copyright: visual arts quiz

- How long does copyright in a visual art work last?
- If I make 5 changes to a visual artwork may I use it?
- If I find something on the internet that I can easily copy, may I use it?
- Do I have to get permission to photograph a mural in a public place?



# Moral rights

Arts Law Centre of Australia



**Moral rights**

**Attribution**

**Against  
false attribution**

**Integrity**



# Applies to

- People not companies
- Creators not employers
- Artists and Performers



# Moral rights ownership in more detail

- Creators of works
- Producer, director and the screenwriter of films
- Live performers – (of dramatic works, musical works, literary works, dance, circus acts, expressions of folklore) who contribute to the sounds of the performance (including the conductor)
- Performers contributing to the sound of a performance embodied in a sound recording (but not the producer)



# Separate to Copyright

- Moral rights are different to copyright: while copyright may be regarded as protecting the economic or financial asset aspect of a copyright owner's portfolio, moral rights are about the reputation of the creator and the integrity of the creative work.
- The copyright owner and the holder of the moral rights may be different!
- Irrespective of who owns copyright, moral rights reside with the creator/performer and can't be bought or sold.
- Moral rights last as long as copyright



# In detail...

- Right of attribution
  - Right to be named, identified as the author of the work
- Right against false attribution
  - Ensure that a third party is not named as the author of the work
- Right of integrity
  - Ensure that the work is not the work is not subjected to derogatory treatment (mutilation, alteration, act which is prejudicial to the author's/creator's honour or reputation)



# Especially important because

- Moral rights recognise ongoing personal connection between creator of work and the way in which use of work can affect his or her reputation or honour
- Moral rights protect work so that it is presented to the public in the way in which its author intended



# Case Study- Sarongs story

A Sarong copied from an artwork by Clifford Possum Tjapaltjarri ‘Honey Ant Dreaming Story’.

- This case involved 6 different artworks that were reproduced onto sarongs.
- All of the art works were copied from a book called ‘Australian Aboriginal Art’ and were made in India and imported into Australia to be marketed to tourists. None of the artists had provided permission for their works to be copied.
- In 1993, Macquarie University ran an exhibition entitled “ The Case of the Stolen Designs” and showed 6 sarongs purchased at a Darling Harbour souvenir shop each reproducing an original Indigenous artwork. All of the sarongs were direct copies with minor colour variations.



# Infringement

- Any act which is contrary to the artist's moral right (action or omission), unless:
  - the artist consented to other person's actions in writing (genuinely given in relation to specific acts or omissions); or
  - the other person acted reasonably (defence of reasonableness)



# DEFENCE OF REASONABLENESS

- Purpose, manner, context in which the work is used
- Difficulty and expense of identifying the author
- Conditions under which the work was made



# The kinds of activities that might constitute an infringement of the moral right of integrity

- Cropping someone's image without their permission
- Changing the colours or the lyrics
- Dealing with their work in any derogatory or offensive way



# What about if...

- Your film is taken from Youtube and used in an ad with a voiceover
- Your artwork is made into carpets and a border is added
- Your song is played on the radio but they announce it as someone else's



## Case study from Solid Arts site

Bede Tungutalum and “Owl Man”

**In 2004, Senior Tiwi artist Bede Tungatulum saw prints of his limited edition linocut, “Owl Man” for sale online and via galleries in Australia. The unauthorised print copies were altered in a way that was prejudicial to the artist’s honour and reputation (even if done in good faith): they had nostrils and lips added.**



## Continued...

**Because the artist sought legal advice early (he approached Artists in the Black after seeing the prints), together with lawyers from a large law firm working pro bono, AITB was able to achieve a resolution that was satisfactory to the artist. It included the payment of compensation, the removal from sale and return to the artist of a number of the altered copies of Owl Man (including from online gallery websites in the US and Switzerland).**



# Other examples

Can you think of examples where you may have unwittingly infringed someone's moral rights ?

Case example: *Meskenas*

- After Vladas Meskenas' son made over 90 phone calls for a period of a year and then ACP (Women's Weekly) flipping the image with their attempt to rectify, court awarded damages in range of \$9000.

*The moral: if you've accidentally infringed someone's moral rights, apologising and rectifying asap is the best approach.*



# Best practice

- Deal with it contractually
- Have a policy of attribution
- Think about integrity
- Respect moral rights wherever commercially practicable



# Contracts



# Why do you need to know about contracts?

- If you're dealing with copyright, you need a contract with the copyright owner.
- How can you ensure that the ATSI artists and organisations you are dealing with understand what's happening?
- Pointers for a fair process
- What contracts with ATSI artists do you deal with?



A contract can be written

It can also be made during a  
conversation



# Why get it in writing?

1. Clarity.
2. Avoids disputes - he says/she says
3. Clear statement of obligations.
4. Evidence of a deal
5. Avoids misunderstanding – every one's on the same page
6. Makes you stop and think about the what ifs!
7. When things don't go as planned



# How is a contract made?

- Offer
- Acceptance
- Consideration
- Intention to be bound legally





# Formation

## Offer

“If you do a painting for our Indigenous healthy eating program, I’ll pay you \$1000.”

## 2. Acceptance

“Ok.”

## 3. Consideration

\$1000 ← → painting

## 4. Intention to create a legal relationship

Written? Oral? Implied?

*Parties can always make counter-offers and negotiate*



# A contract is

- A legally enforceable agreement between two or more parties.
- An exchange of promises with consequences if a promise is broken.
- A useful way to handle and manage business transactions and dealings with consumers and other businesses.



# Arts contracts come into play...

- When you buy artwork
- When you want to use an artist's artwork or music
- When you want an artist to create something for you
- When you arrange a festival or a competition
- When you provide arts funding through grant programmes
- When you want an artist to collaborate in program materials or delivery



# Remember:

There is no 'standard' agreement  
Every one is entitled to, and should, get  
independent legal advice before signing

Do consider looking at Arts Law sample  
agreements in particular contexts, though, and  
seeking our specialised legal advice!



# Contracts role play

You and an Aboriginal Cultural organisation....

Think of a hypothetical (or real) scenario in which you want to enter into a formal agreement about an arts-related matter...

Spend ten minutes discussing and negotiating the terms of your agreement.



# Contracts role play

- Mural for council building
- Illustrations for a book
- Music and dance for event
- Guide to Aboriginal artists in local area



# When negotiating

How did you find the pretend-negotiating experience? Cordial? Clear? Positive?

**It's always best to:**

\* Think about what you want before you enter into negotiations; be prepared; listen (and record) carefully; stay calm; think about the other parties' perspective; don't concede too quickly!



# Typical arts contracts

## \*image reproduction licence

Consider: *term, territory, exclusivity, scope, payment & accounting, termination provisions...*

Any ICIP?



# Licences

- For visual artists, this is separate from selling the physical work
- For all artists, there's a difference between giving up your copyright altogether and licensing it – Albert Namitjira
- Types of licenses:
  - Statutory licences
  - Government licences
  - Voluntary licences
  - Creative Commons
  - Exclusive, non-exclusive



# Arts contracts continued

- **Design and Commission**

Consider: *design and approval, payment, changes, obligations, risk & insurance, title & copyright, termination*

Does the design involve a traditional motif or design? ICIP?



# Arts contracts continued

- Collaboration agreement

Consider:

*Is it a 'one-off' or an ongoing partnership?*

*Is it a collaboration or licensing artwork?*

*obligations, payment, risk & insurance, title & copyright, termination*

Does the artwork or design involve a traditional motif or design? ICIP?



Yuta Badayala (In A New Light) is a collaborative project between Indigenous weavers from the Galiwin'ku Elcho Island community and Mapuru and Koskela, an Australian design company.



# Arts contracts continued

## Community Language Projects

Who's running the project, are the consultants and Indigenous participants being paid, who owns the output, are their educational outcomes, research outcomes.

## Fashion collaborations

## Design collaborations



# In the event of a breach

- What does the contract say? If there's no written contract, what evidence do you have for the agreement?
- Get legal advice.
- Negotiate with the other side.
- Mediation.
- Legal action.



# Breach of Contract

If a contract is breached by the other party you may be entitled to:

- Termination.
- Damages.
- Specific performance.
- Injunction.
- Restitution.

*And if you're the one who's in breach, the other party may seek those remedies against you*



# Drafting Tips

- Be precise
- Always clearly identify parties and the work/creation
- Include dates
- Assume this will be the only document recording your agreement (and therefore it has to be accurate and clear)
- Use plain English



# Top tips for successful contracts

- Get it in writing – this helps avoid disputes.
- Are the parties trustworthy?
- Is it good for you? You always have a choice.
- Don't give away more than you need to - try to keep control of your creative property.
- Only promise what you can deliver.
- You can use a 'formal' contract eg Arts Law's sample contracts or write your own or send a follow-up letter for them to check and sign if they agree. Always write in clear and simple language.
- Don't sign anything that you don't understand.
- Check whether GST or stamp duty is payable.
- Always keep a signed copy of the Agreement.
- If you are unsure – get independent legal advice.



# Top tips for contractual relations...

- Negotiate, negotiate, negotiate
- Get legal advice (call AITB/Arts Law!)
- Don't succumb to pressure to SIGN
- Know your rights
- Be respectful of others' rights
- Weigh up the pros and cons – if it doesn't feel like a good deal, it probably isn't and it may be best not to sign



# Top tips for contractual relations...

- Do your homework – know who you’re dealing with and ensure you’ve got the right (authoritative) person
- Don’t take more than is required (should you, for instance, licence rather than assign?)
- Think about copyright as an asset (proper compensation)
- Remember that an assignment or exclusive licence of copyright needs to be in writing and signed...



# Disclaimer

- This presentation is intended as a guide to the law only. It is not legal advice and should not be used as a substitute for legal advice. Although all care has been taken in preparing this presentation the Arts Law Centre of Australia does not guarantee the accuracy, adequacy or completeness of any information and is not responsible for any errors or damage suffered as a result of it being relied upon. Legal advice should be sought on the specific legal issues affecting you.
- The law as at September 2012