Legal Issues For Language Centres

The number of Indigenous languages in Australia has significantly declined over time. There are now less than 150 Indigenous languages spoken in Australia and the majority are still at risk of being lost. As the preservation of language is crucial to culture, there are currently more than 20 Language Centres and organisations across Australia working to preserve and share Indigenous languages.

Legal issues around copyright and moral rights may arise in the creation of resources and publications by Language Centres. Copyright and moral rights are forms of protection that automatically arise upon creation of literary or artistic work. A copyright owner holds economic rights in their original work and has exclusive rights to do certain things, such as reproduce the work protected. Moral rights give the author or artist the right to be credited as the creator of the work, not to have the work falsely attributed to someone else and not to have the work adapted in such a way as to impact on the author's integrity or reputation. For further information see the Arts Law Information Sheets on Copyright and on Moral Rights.

Indigenous Language Centres often will have many employees contributing to resources. As an employer, the Language Centre generally owns the copyright to all materials produced by their employees where the works were created as part of the employees' normal duties. Where a third party or non-employee is preparing works, additional steps may be needed to clarify copyright ownership.

This Information Sheet seeks to advise Indigenous Language Centres on the following topics regarding some of the issues they need to deal with:

1. Joint Authorship
2. Dictionaries
3. Storyteller's Rights and ICIP
4. What happens when a Language Centre closes down?
5. Orphan Works
6. Libraries and archives
7. Education

Joint Authorship

Joint authorship occurs when copyright is owned by more than one person or entity. There are two ways in which joint ownership might form: through **collaborative authorship**, or through **contract**.

For example, where a Language Centre collaborates with an individual (who is not an employee) to produce a language resource, the Language Centre and the contributor can jointly own the copyright in the work. Each copyright owner will have all the rights that a single owner would have.

In a collaboration, all contributors will be considered joint authors if each individual contribution to the work is inseparable from the contribution of other authors. The contributions must be significant and original (but not necessarily equal) with the intention that they will be merged into the one work. This generally does not apply to illustrators because the illustrator usually owns the copyright in their illustrations only and aren't seen as joint authors with the writers.

Joint authorship through contract arises where all authors have agreed, in writing or verbally, that the copyright shall be owned in a particular way, e.g. divided as a percentage share between them.

How to navigate joint ownership?

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To minimise uncertainty, the best practice is for co-authors to enter into a written contract which outlines the percentage share of copyright of each contributor to the resource and deals with any other rights between the parties. If the joint authors don't agree on the proportion of rights, the default position is that they own the rights equally.

If authors jointly own copyright, each owner must get the consent of the other(s) before exercising any copyright rights in the resource (e.g. licensing (giving permission to) someone else to use the jointly owned material).

Case study: Career Step, LLC v TalentMed Pty Ltd (No 2) **[2018] FCA 132**

Career Step claimed that TalentMed had infringed its copyright under the *Copyright Act 1968* (Cth) (*Copyright Act*) by copying its materials from a medical transcriptionist training course to develop a similar and competing course. The course consisted of 23 separate modules authored by different contributors, with no single person having contributed to each module, and some modules only having one contributor. Career Step's submission was that despite this, its course was a single, original literary work because it was a work of joint ownership.

The Court agreed with Career Step, finding that it was unnecessary for each author to contribute to each module to establish joint authorship. It was also unnecessary for collaboration to be established through the entirety of the work in the sense that there needed to be one author as a common link between every module. The evidence demonstrated a detailed creative process requiring drafting and editing by many people as a whole. The authors were a group coming together for a common purpose to write the material, and the detailed creative process was sufficient to demonstrate that each contribution was inseparable.

Dictionaries

Language Centres may wish to produce Indigenous language dictionaries. Depending on the content of the dictionary, the dictionary will only receive copyright protection if the following conditions are met:

- the work must be original, meaning it has not been copied from somewhere else; and
- there has been sufficient labour, skill and judgment used in the expression of the work and how the different pieces are brought together.

If the dictionary only brings together a range of words and meanings in alphabetical order, it is less likely to meet those requirements and copyright may not subsist in the dictionary.

If the dictionary also includes historical information or background about the words, it is more likely the above requirements will be met and copyright protection in the dictionary will arise.

Any copyright protection in the dictionary will last for the life of the author plus 70 years. Separately, the publisher will own copyright in the published edition for 25 years from the year of first publication. After 25 years, the published edition passes into the public domain, but the underlying copyright remains with the author.

Reproduction of Words and Definitions

Copyright is infringed when the work, or a substantial part of it, is reproduced. This means that users are able to copy words and meanings from a dictionary without breaching copyright provided the reproduction is not a substantial part of the dictionary. The test of whether the copied part is substantial is not about how much is copied, instead, it is a question of whether the copying was of a distinctive or essential part of the original work.

Illustrations in Dictionaries

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If illustrations are included in a dictionary, the illustrations themselves will attract copyright protection of their own by being an ‘artistic work’. The original creator of the illustration will automatically own this copyright unless it was created as part of their employment duties (in which case the employer owns the copyright), or unless there is a contract which specifies who owns the illustration. The artist also has moral rights in their work.

Storyteller’s Rights and ICIP

Copyright protects particular forms of creative expression. It protects the expression of ideas, concepts, styles and methods but not the ideas, concepts, styles and methods themselves. For example, copyright will not protect an idea for a film or a book, but it will protect a script for the film and the manuscript for a book.

Stories are generally expressed as **literary works** such as novels or poems, and **dramatic works,** such as choreography and plays. In these forms, they are protected by copyright. Oral stories, however, do not fit neatly into the protection offered by the law.

1. To attract copyright protection generally, a story must satisfy **two** requirements: A story must be expressed in a **material form**, e.g. written down or recorded.
2. The story must be **original**. That is, the work in question must *originate* with the author and cannot be merely copied from another work.

Who owns the copyright in a story?

The legal question of who owns the copyright in a story passed down through generations of oral storytelling has not yet been definitively resolved in law. This is because a story must be recorded in a material form in order to receive protection. In most cases, the general rule is that the ‘creator’ or ‘author’ of a literary or dramatic work owns the copyright. However there are various exceptions:

a. subject to any rights of the Crown;
b. assignment of copyright;
c. where created as part of employment duties, the employer owns the copyright;
d. certain works done under commission; and
e. subject to any contract which stipulates who owns the copyright.

We recommend Language Centres adopt the Arts Law Centre’s Cultural and Intellectual Policy for Indigenous Stories to aid in ensuring culturally appropriate ownership of stories. The Protocol starts from the basic premise that the storyteller should be entitled to hold copyright in the story or medium even when it is recorded for the first time by another person. Where the *Copyright Act* might place ownership on another person, the Protocol requires the person recording the story to assign copyright to the storyteller.

Indigenous Cultural Intellectual Property (ICIP)

If a Language Centre intends to create, or deal with, a work that incorporates, is sourced from or refers to Indigenous objects, knowledge or works, the ICIP should be acknowledged and respected. The term ICIP refer to the interests of Aboriginal and Torres Strait Islander peoples in their cultural heritage, which includes songs, music, dances, stories, ceremonies, symbols, languages and designs.

Permission should be obtained from the traditional owners of ICIP before using cultural objects, knowledge or works. The traditional owners should be consulted on how the community should be attributed and given the opportunity to approve the way in which the material is used. In some circumstances it may be appropriate to use a notice of custodial interest, which

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could read as follows:

Notice of Custodial Interest of the [NAME] Community

The artwork and text in this resource embodies traditional knowledge of the [NAME] community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the [NAME] community and may also breach the *Copyright Act 1968* (Cth). For enquiries regarding permitted reproduction of these images, contact [NAME/COMMUNITY].

For more information see Arts Law's Information Sheet on ICIP.

What happens when a Language Centre closes down?

If a Language Centre is a company, when it is deregistered or goes into liquidation, the intellectual property (**IP**) will be treated in the same way as any other asset of the organisation. Where a Language Centre has creditors, the IP assets of the Language Centre are pooled with other assets and sold or distributed among the creditors in accordance with the law's rules regarding priority for payment of creditors on liquidation.

What happens on deregistration?

On deregistration, the company ceases to exist and all property, including IP, vests with the Australian Securities and Investments Commission (**ASIC**).

Where the company is deregistered and the IP is transferred to ASIC, there are three options to obtain the copyright in the IP:

1. an application can be made to ASIC to transfer IP to a different entity;
2. a claim can be made by a shareholder or former director of the company to ASIC for unclaimed money or assets. This is a difficult process; or
3. a shareholder or former director can also apply to ASIC for the company to be reinstated (for example if funding is resumed).

Due to the complexity and difficulty of retrieving ownership of assets after deregistration from ASIC, it is important that directors take steps to transfer the copyright out of the company well before deregistration. For example, this would involve the Language Centre transferring (assigning) the ownership of the copyright to another entity before deregistration. This transfer requires the following:

a. It needs to be **in writing** and **signed** by or on behalf of the copyright owner. As long as it's clear, no particular form of words is required for the assignment to be effective.
b. The Language Centre should also make sure that the assignment agreement complies with any requirements set by its constitution to be a legally binding document.
c. It is important to ensure the sale of the copyright is legitimate so that there can be no argument that it was done to defraud the Language Centre or its creditors out of the value of the asset if the Language Centre has gone broke and owes debts. When a company becomes insolvent its assets must be sold to repay the creditors. If the copyright is sold or assigned, the buyer (the assignee) would need to pay a fair market price for the IP. Company directors owe various duties to the company including the duty not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the company.
d. When the company receives the assignment fee the money should be paid into the company's financial accounts, to be pooled with the company's other money, and then paid to the creditors in accordance with the law regarding priorities for creditors.

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It would be prudent to establish a separate limited liability company to own the Language Centre's IP so that the IP is protected if the Language Centre ceases to operate. However, given the costs and time involved with setting up and managing a separate company this may not be practical for a Language Centre.

Orphan Works

Where the author of a work cannot be identified, the work is described as an 'orphan work'. An orphan work is still protected by copyright (unless copyright has expired and the work is now in the public domain) despite the owner not being identifiable. If you decide to use an orphan work, there is the risk of copyright infringement and legal action against you.

There is no general exception that allows for the use of orphan works without permission. Language Centres ought to proceed with caution when using orphan works in any resources and to minimise the risks, they should make every effort to locate the copyright holder and keep a detailed record of what steps were taken to try and find them.

Good Faith Statement

If a Language Centre wishes to use an orphan work, it is good practice to use a good faith statement. A good faith statement should explain that you have conducted a diligent search to find the copyright owner and welcome the copyright owner to contact you regarding your use of the work. A good faith statement is not a defence to copyright infringement, though it is a useful tool to welcome communication between you and the copyright owner to try and minimise the risk of legal action for copyright infringement.

Preventing Language Centre Works from being "orphaned"

Language Centres should ensure that any work they wish to protect is recorded and easily identified as belonging to the centre or a contributor. This may be done by including information accompanying any resources created by the Language Centre, listing both the copyright owner of the work as well as how to contact the centre or the contributor/creator of the work and the date the work was created. Crediting the author/artist is also required to respect their moral right to be credited.

Language Centres are encouraged to use a copyright notice. Although not legally required in Australia, the copyright symbol is a well-known symbol to put people on notice that a work is protected by copyright. Accompanying the copyright symbol © you should include the name of the copyright owner and the year of publication. For example, the notice '© Arts Law Centre 2020' placed at the end of a document is a sufficient copyright notice for publications authored by the Arts Law Centre.

Exceptions to Copyright Infringement

The *Copyright Act* has more than 90 exceptions that permit certain organisations to copy or communicate material without permission if they meet various requirements. Here we will briefly discuss the following exceptions:

- libraries and archives;
- fair dealing; and
- statutory licences.

Libraries and archives

The libraries or archives exception allows a library or archive to use copyright material in certain ways without permission from the copyright owner. This exception applies only where no other exceptions under the *Copyright Act* apply.

Under the *Copyright Act*, "library" is defined as an organisation where all or part of its collection is accessible to members of the public directly or through interlibrary loans. A Language Centre seeking to rely on this exception should demonstrate that

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it is willing to share its collection, for example, by membership of a library network or by a listing in the Australian Interlibrary Resource Sharing Directory. An “archive” is defined as a collection of material of historical significance or public interest, being maintained for the purpose of conserving and preserving the material without seeking to generate a profit.

Some of the permissions available to libraries and archives under this exception are:

- **copy for research or study:** a library or archive may copy written, artistic and musical works for individuals who have requested the material for research or study;
- **copy in electronic form:** a library or archive may make a copy of content (including audio-visual material) available in electronic form on the library or archive’s premises. However, reasonable steps must be taken to prevent people who access the electronic research copy from infringing copyright, e.g. not allowing them to make a further copy;
- **preservation**: a library or archive may use copyright material for preservation, so long as the library or archive possesses the original material in its original form, and/or an officer of the library is satisfied that a copy cannot be obtained in line with preservation best practice; and
- **interlibrary collection**: a library may copy a published written, artistic and musical works for another library which has requested it for inclusion in its collection. The material may be supplied by email but cannot exceed 10% of the pages or a single chapter of the work.

Fair dealing

The fair dealing exceptions can be used when copyright material is used for research or study, criticism or review, parody or satire, reporting news and giving profession advice. The amount used must be ‘fair’. For written material, the *Copyright Act* prescribes an amount under 10% of the number of pages or a single chapter in the book as fair, but also allows for amounts exceeding these limits by including factors that one can take into account in considering whether the use is fair.

The fair dealing exception also requires libraries, archives and education institutions seeking to rely on this exception to comply with the following limitations on use (set out in s 200AB of the *Copyright Act*):

a. the use must be completely non-commercial (the organisation may collect fees to cover their costs but not to make a profit);
b. the use must not conflict with the copyright owner’s normal exploitation of the work (for example, the library should not allow the material to be freely copied by those accessing it); and
c. the use must not unreasonably prejudice the legitimate interests of the copyright owner.

Statutory licences – Education Licences

Section 113P(1) of the *Copyright Act* permits educational institutions to reproduce and communicate works if those institutions hold a Statutory Text and Artistic Works Licence (also known as Education Licence B or a Remuneration Licence).

To obtain this licence, the organisation must be an educational institution that has an agreement with the collecting society such as Copyright Agency Ltd or, if relevant, Screenrights Australia, and makes a yearly payment based on the number of students enrolled at the institution. Education institutions that generally qualify to obtain this licence are schools, TAFE institutes and universities. The licence allows copies or communications to be made of literary, dramatic, musical and artistic works for education purposes. There are no rules about how much of a text can be copied, as long as the amount copied or communicated does not unreasonably prejudice the legitimate interests of the copyright owner.

There is no legal requirement to include a notice stating that copyright material has been copied under the education licence. However, it is best practice to include a notice where reasonably practical, in order to limit the potential liability of the Language Centre in the event that a person receiving the content further uses the content in a way that may infringe

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copyright. For example, we suggest including the following notice:

[WARNING]

This material has been copied [and communicated to you] in accordance with the statutory licence in section 113P of the Copyright Act. Any further reproduction or communication of this material by you may be the subject of copyright protection under the Act. Do not remove this notice

USEFUL RESOURCES

- Australia Council – Protocols for Using First Nations Cultural and Intellectual Property in the Arts
- Terri Janke and Company – First Languages, Law & Governance Guide

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.