



INFORMATION SHEET

STORY TELLING - LEGAL ISSUES

What is story telling?

This information sheet considers the art of oral story telling in which the form or words used to express a story can change with each telling. It is a fluid art form and includes both traditional and folk tales handed down through generations as well as new stories.

What legal issues can arise?

The main legal issues are:

- Copyright;
- Moral Rights;
- Performer's Rights;
- Indigenous Cultural Intellectual Property

Copyright

Copyright protects particular forms of creative expression. It protects the expression of information, ideas, concepts, styles and methods rather than the information, ideas, concepts, styles and methods themselves. In Australia, the *Copyright Act 1968* (Cth) can protect stories which are expressed in literary works (e.g. written works such as novels, poems, song lyrics, the content on your blog, computer programs, and compilations,) or dramatic works (e.g. choreography, screenplays, plays).

“Literary work” is not defined in the *Copyright Act* but has traditionally been interpreted by the courts to refer to the expression of ideas and information in language (words) which have ‘material form’ because they are recorded in print or writing. This means that copyright would not protect stories told orally and handed down through the generations because they are not in “material form”.

Technological developments mean that words can now be stored or given material form not just in writing or print but by other methods such as audio or video recording. In 2009, the High Court held that information about television programming was ‘fixed’ in material form when entered into a database, and was therefore protected as a literary work regardless of whether it was visible.¹ Similarly modern songwriters often don’t write their music down in traditional notation but simply record it as a digital file thus ‘fixing’ it in a material form. This means that there could be copyright protection for stories told by story tellers, which have not been written down but have been recorded or filmed because the act of capturing the story on film or in an audio recording gives the story ‘material form’. However, copyright would only apply in that situation to the particular words and language used in the expression of the story as recorded and not to the plot or theme of the story or versions expressed in different language.

¹ [IceTV Pty Limited v Nine Network Australia Pty Limited \[2009\] HCA 14 \(22 April 2009\)](#).

Another issue for traditional stories or folk tales is that Copyright Act only protects original works. In other words, the literary work in question must *originate* with the author and cannot be merely copied from another work. It might be argued that a story handed down through generations of oral story telling is not 'original' because it was not created or authored by the current story teller and is expressed in the same way as stories before it. However, as copyright protects the particular language used to express a story and not the plot or theme of the story, it can also be argued that every story teller uses their own unique means of expression and that thus each oral story is original. This can be compared to a story teller who tells stories which are expressed in words which are not the product of their own imagination but have been learned and are recited.

Usually the 'creator' or author' of a literary or dramatic work owns the copyright. One difficulty is that the person who writes the story down or who films or records the story is often not the story teller. That person might argue that as they have given the story its 'material form', they are in fact the owner of any copyright in the story not the story teller. An answer to this would be that the person listening to the story and either writing it down or recording it does not contribute any authorship to the expression or telling of the story and is not the source of its originality to the story thus cannot claim ownership in the copyright in the resulting literary work.

Another problem is that a film or sound recording has its own separate copyright which is generally owned by the 'maker' of the film or sound recording or the person who pays to have the film or sound recording made – this is not necessarily the person whose performance in telling the story is captured. There are three scenarios;

- The person who pays a cameraman or film crew or artswoker to record people telling stories (it could be a university or corporation) will generally own the copyright in that film or sound recording - even if the story teller owned the copyright in the story as a literary work. That person (the person who commissioned the film or sound recording to be made) would argue that the story teller had given them a licence of the copyright in the story by consenting to be filmed or recorded.
- If the film is not commissioned then the 'maker' of the film would usually be the film producer. The producer would own the copyright in the film and would argue that the story teller had given them a licence of the copyright in the story by consenting to be filmed.
- If the sound recording is not commissioned, the position is even more complex but possibly more advantageous to the story teller. In such cases, the story teller would be likely to be regarded as a performer who engaged in a live performance of an improvised literary work which contributed to the sounds of the sound recording. The legal consequence is that the performer and the person making the sound recording share the copyright in the sound recording (with some exceptions discussed below in the section on Performer's rights).

All of these scenarios will be different if there is a contract which contains an agreement for the copyright to be owned in a different way.

Assuming an original story told by a story teller and recorded on film or in an audio recording can be said to be an original literary work which has 'material form' then the owner of the copyright in that literary work has a number of exclusive rights, including the rights to reproduce that work, to publish it and to communicate the work to the public.

Clearly, the question as to whether copyright exists in a story and if so, who owns it, is a difficult one

Moral rights

The author of an original literary or dramatic work has moral rights which recognise the creator's ongoing connection with the work.

A story teller who is the author of a story which is an original literary work has:

- the right of attribution (to be named as the creator);
- the right against false attribution (not to have anyone else's name incorrectly associated with the story) ; and
- the right of integrity (against derogatory treatment of the story in a way that prejudices the reputation or honour of the author).

For example, a person who writes down or films or records a story told by the story teller may breach the story teller's moral rights in that story if they:

- do not acknowledge the story teller as the story's author;
- use the story in a way which amounts to derogatory treatment.

For more information see Arts Law's [Moral Rights](#) Information Sheet.

Performers' rights

Even if there is no copyright in a story (for example, if it has not been fixed in a material form or is not original), the story teller's oral recounting of that story is likely to be considered a live performance. With effect from October 1989, the *Copyright Act* was amended to give performers limited rights in their live performances and, from 1 January 2005, those rights were extended in response to the Australia United States Free Trade Agreement (AUSFTA).

Traditional oral story telling is likely to be considered a live performance of an improvised literary work, a dramatic work or an expression of folklore. This means that that the story teller would have performer's rights in that performance.

The story teller's rights as a performer will include:

- The right to prevent the unauthorized audio or video recording or the radio or television broadcast of their spoken performance. However permission is not required in relation to making "exempt" recordings. "Exempt" recordings include certain recordings for domestic use, scientific research, and educational purposes and for use by handicapped readers or institutions assisting them. Further, the performer's permission is not needed to make or use recordings for reporting the news or current affairs, criticism or review or for the purpose of judicial proceedings or legal advice.
- Where an authorised sound recording (not a sound-track or film) is made of their spoken performance, the story teller will share in the ownership of the copyright in that sound recording unless:
 - They gave the performance as an employee
 - Someone else commissioned the sound recording (paid the producer to make the sound recording)
 - They signed a contract that says otherwise.
- The moral right to be attributed as the performer (story teller) both in relation to the online communication or staging of the live performance and in respect of any sound recording (unless it is a sound track) of that performance.
- The moral right of integrity not to have their live or recorded spoken performance materially distorted or altered in a manner prejudicial to their reputation.

For more information see Arts Law's [Performers' rights](#) Information Sheet.

Indigenous Cultural Intellectual Property

If an artist, producer (or gallery, exhibitor, publisher etc.) intends to create, or deal with, a work that incorporates, is sourced from or refers to Indigenous objects, knowledge or works, ICIP should be considered. The term "ICIP" refer to Indigenous people's interests in their cultural heritage, which includes songs, music, dances, stories, ceremonies, symbols, languages and designs. ICIP is a communal rather than an individual interest. Traditional stories generally contain ICIP. The story teller of a traditional story may have duties and obligations to his or her community or tribal group in respect of the ICIP in that story and the way it is used. ICIP is not recognised under Australian law but Arts Law believes it is important that it is acknowledged and respected.

Permission should be obtained from the traditional owners of Indigenous heritage or traditional cultural knowledge before using a story containing ICIP. 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 could read as follows:

Notice of Custodial Interest of the *[NAME]* Community

"The stories recorded in this film embody traditional ritual knowledge of the *[NAME]* community. It was created with the consent of the custodians of the community. Dealing with any part of this film 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, contact *[COMMUNITY]*."

Protocols have been developed which provide guidelines for appropriate conduct when interacting with Indigenous people and their communities. Protocols are made in good faith and encourage mutual respect. They are not legally binding, unless inserted into a contract making the parties bound by the protocols. Arts Law strongly urges creators and all others dealing with creative projects that embody ICIP to act consistently with the relevant protocol.

The Australia Council for the Arts has produced a set of protocols including *Performing Arts: Protocols for Producing Indigenous Australian Performing Arts* and *Media Arts: Protocols for Producing Indigenous Australian Media Arts* that are available free. These protocols can be ordered through, or downloaded from, the Australia Council's website www.australiacouncil.gov.au or obtained from the Aboriginal and Torres Strait Islander Arts Board, Australia Council, Telephone: (02) 9215 9061 or email atsia@ozco.gov.au.

Screen Australia has developed *Pathways and Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Content* which is currently available on Screen Australia's website at www.screenaustralia.gov.au/filmmaking.

Additional information

Australian Copyright Council

www.copyright.org.au

Tel: (02) 8815 9799

The Australian Copyright Council provides legal advice on copyright and has a number of useful publications. Its information sheets may be accessed free on its website, or ordered.

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above.

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Artists in the Black website (www.aitb.com.au) for the latest news about the service.

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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Artists in the Black is a specialised Indigenous program run by the Arts Law Centre of Australia. Artists in the Black is a member of the Indigenous Art Code.

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