



**Writing up Indigenous research:
authorship, copyright and
Indigenous knowledge systems**

Terri Janke



Terri Janke and Company

Writing up Indigenous Research: authorship, copyright and Indigenous knowledge systems

Terri Janke, Terri Janke and Company Pty Ltd, Sydney, 2009

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Publication date: 10 August 2009

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WARNING

The document contains names of deceased Aboriginal and Torres Strait Islander people.

Important legal notice

This paper provides general advice only in an effort to encourage constructive debate on the topic. It is not intended to be legal advice. If you have a particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner.

Acknowledgments

The research and writing of this paper was financially assisted by a grant from the Institute of Koorie Education, Deakin University.

Terri Janke, the author would like to acknowledge and thank Veronica Arbon for her encouragement to research issues relating to copyright, attribution and traditional knowledge.

The author also acknowledges the support of Jeremy Morse, Solicitor at Terri Janke and Company with research and writing; and Lan Pham, Professional Assistant, for assistance with coordination of the publication.

Design: John Paul Janke, **jankemedia**.

ISBN

978-0-9757044-3-1

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Introduction

In the past, research on Indigenous people was undertaken by non-Indigenous people, whom imposed their worldviews on Indigenous subject and themes. As noted by Professor Linda Smith, Maori academic and author of *Decolonising Methodologies*, “research is linked to colonialism and oppression and must be decolonized”.¹ It is the role of the Indigenous researcher to decolonise research. The Indigenous researcher decolonises research by shifting their colonising lens of scientific rationality to an Indigenous perspective that considers traditional knowledge.

Today, there are many Indigenous researchers and academics with higher education qualifications. These Indigenous research professionals challenge past academic thinking, and in conducting their own Indigenous research bring different philosophies and writing imperatives. Working within the western academic framework raises issues for the recording of traditional knowledge systems, authorship and copyright. What if the researcher wants to publish their research after completion? Should they seek consent of the Indigenous knowledge holders?

Indigenous knowledge systems are orally based and developed over time through inter-generational refinement. They are constantly evolving and subject to complex kinship relationships about who may hold and disclose knowledge. Writing up Indigenous research such as a thesis or dissertation involves the transfer of Indigenous knowledge to a material form. For that skill, labour and effort the individual undertaking the research writing task is recognised under copyright laws as the author of the paper they produce. Copyright owners have the exclusive rights to control who can use, reproduce and adapt the written work, and the author holds the moral rights of attribution and integrity.

When Indigenous knowledge is the subject of research, in many cases, the research paper may be the first time this information is recorded. Hence, the author and copyright owner has a large amount of discretion about where that underlying knowledge ends up, and how it might be adapted in the future. There are a growing number of Indigenous research protocols which guide the relationship between the researcher and the researched, however they lack sufficient details about authorship, copyright, and the future use of research materials. Once Indigenous knowledge is captured and made public, copyright becomes the main tool for controlling how that information is used. There are no laws that recognise Indigenous knowledge rights.

This paper attempts to raise awareness and invigorate discussion about copyright and research of Indigenous knowledge systems. I will focus on Indigenous rights to traditional knowledge; copyright and Indigenous research, including the role of university intellectual property policies; attribution of Indigenous knowledge holders and integrity.

1. Indigenous rights to traditional knowledge

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.

-Article 31.1

United Nations *Declaration on the Rights of Indigenous Peoples*²

Historically, Indigenous knowledge systems and cultural practices were created by Indigenous people through inter-generational transfer of knowledge, working within their territories, closely interacting with each other, the land, seas, animals, plants and the natural environment. Today, these systems have suffered losses due to colonisation, removal from territories and the destruction of Indigenous societies.

The United Nations *Declaration on the Rights of Indigenous Peoples* was adopted in 2007 by the UN General Assembly and supported by the Rudd government as of 2009. Amongst the 46 articles included in the Declaration, there is an article which espouses Indigenous rights to traditional knowledge. Article 31 states that Indigenous peoples have a right to control their traditional knowledge (TK) and traditional cultural expressions (TCEs) and that Indigenous peoples have the right to have their knowledge and cultural expressions protected and recognised as intellectual property.

Whilst the Declaration is not a legally binding international treaty, it is a standard setting document which can be used to influence future law and policy developments. Intellectual property laws are based on international treaties which

member countries must enforce within their domestic laws. The interface between intellectual property and traditional knowledge has been the subject of many reports and studies. Intellectual property laws are limited in their ability to protect Indigenous knowledge systems. In 1999, I wrote a report *Our culture: our future* which detailed these shortfalls with respect to Australian intellectual property laws.³ International work conducted by the World Intellectual Property Organisation (WIPO) also identifies the gaps in intellectual property protection.⁴ By way of a very general overview the shortfalls in copyright protection are stated in the following paragraphs.

1.1 Copyright focuses on material form

Copyright protects works in a material form and does not protect oral or performance forms. As a result, Indigenous knowledge systems may not be protected by copyright, meaning consent to use this knowledge is not necessary under copyright law.

1.2 Copyright protects the expression not the underlying content

Copyright protects the form of expression and not the knowledge content, which means that the knowhow and substantive content could be taken and used by third parties.⁵ In publishing Indigenous knowledge, regardless of whom the copyright owner is, the actual knowledge is made widely known and this may have implications for future protection and the customary beliefs of the relevant knowledge holding group. For example, a research paper with traditional knowledge about the healing properties of a plant is made freely available. Other people can read that knowledge and use it to develop new medicines. Copyright laws do not provide special protection for the sacred or secret component of Indigenous knowledge. Sacred or secret knowledge does not receive special attention even though under Aboriginal customary laws, there may be sanctions imposed for the wider dissemination of ceremonial and ritual knowledge.

1.3 Moral rights for individuals only

Moral rights are the rights of the author to be attributed as the author of the work, not to have the work falsely attributed to somebody else, and the right of integrity. Attribution is about acknowledging the source of a work or information. The moral rights provisions of the *Copyright Act 1968* recognise the right of attribution for individual creators only. What processes should be adopted for acknowledging and attributing Indigenous knowledge holders collectively as a group?

Integrity is about protecting damage and derogatory treatment of a work so that it doesn't harm the author's reputation. These rights are important given that cultural integrity is fundamental for Indigenous transfer of knowledge.

Whilst moral rights are part of the copyright law, these rights are given to individual creators, not communal groups. Currently there are no cultural integrity rights for Indigenous knowledge holders and no attribution right of knowledge holders if they are not recognised as 'authors'.

In 2003, the Howard Government put forward a proposal to amend the *Copyright Act* to introduce Indigenous communal moral rights however, no changes have been made to reflect this Indigenous Communal Moral Rights Bill, and the Rudd Government is yet to set directions for Indigenous cultural and intellectual property.⁶

1.4 Limited term for copyright protection

Copyright only lasts for a limited time. For literary works like a thesis, this is 70 years after the death of the author.⁷ After this time expires, a work will be in the public domain and freely available for anyone to copy, whereas in Indigenous societies cultural rights never expire.

1.5 No special protection of sacred knowledge

In Indigenous knowledge systems, there is information that is referred to as 'secret and sacred' under customary laws. It may be made available only to the initiated, used at a particular time or for a specific purpose. It may be information that can only be seen and heard by particular clan members (such as men or women or people with certain knowledge).

In 1977, as a result of the *Foster v Mountford*⁸ case, a book containing secret sacred information to the Pitjantjatjara men was withdrawn from sale in the Northern Territory.⁹ The information had been given to the author in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should it come into the hands of the uninitiated, women or children. The court issued an injunction to stop the sale of the book in the Northern Territory. The case illustrates that the publication of research should be discussed up front. Most Indigenous people would argue that sacred and secret material should not be published in books.

Despite these shortfalls in protecting traditional knowledge, copyright may be able to provide indirect protection by controlling access and use to the recorded form such as the written document, sound recording or film. This paper will discuss the four identified gap areas between copyright and the recording of Indigenous knowledge and the issues that will arise for the research sector.

2. Copyright and Indigenous research

2.1 Indigenous knowledge systems

Indigenous knowledge systems form part of a living heritage. Indigenous knowledge systems contain a wealth of information including traditional knowledge of arts, craft, dance and cultural expressions, belief systems, customary laws, environmental knowledge of plants and animals and kinship systems. As mentioned above, these systems have been handed down through the generations, mostly in oral form. They are not protected by copyright and consent to write or research on a knowledge system is not required. However, under Indigenous laws, knowledge may be held by one person, a family or community, and the right to share or disseminate that knowledge is subject to a complex system of consents. There is also a cultural obligation to pass on knowledge, and to guard its cultural integrity.¹⁰

2.2 Copyright and authorship

The *Copyright Act 1968* provides creators of literary works with the rights to own and control their literary works. This protection is granted by law automatically to authors and there is no need for registration. The work must be written down or recorded in material form. The author is the person who undertakes the skill, labour and effort to produce the work into a material form. In this way, it is the academic who writes a thesis incorporating Indigenous knowledge who will be recognised as the author of the copyright work.

In the past and even today, Indigenous people have been used as informants for research, evaluations and theses. As in many cases they might not be writing up the research project so they will not meet the author requirements. This may be a different story if the writing up of the information is verbatim, or recorded on tapes and film. In these cases, Indigenous informants will have a greater contribution to the copyright form.

Deakin University's intellectual property policy is under review at the time of writing. However, as a guide to researchers, the university's website says that when writing a paper with colleagues and supervisors, 'all those who have made a substantial contribution to the research leading to a publication must be offered the opportunity of inclusion as an author.'¹¹

In this same way there should be scope for Indigenous co-authorship of papers where an Indigenous individual who is not the author has made a substantial contribution to the research being published.

2.2.1 Copyright and anonymous works

Who is the creator of traditional knowledge or cultural stories? Indigenous people often acknowledge stories and information as being sourced from the ancestors or creation beings even though it is written and retold by a living author. This might result in Indigenous writers not claiming copyright in the written form. The work is therefore anonymous. Under Article 7.3 of the Berne Convention for the Protection of Literary and Artistic Works, there is protection for unpublished works of anonymous authors. The *Copyright Act 1968* provides that, once the work is "lawfully made available to the public", the period of protection will subsist until 70 years after first publication.¹² This in practice may mean a shorter period of copyright protection if the work is published in the author's lifetime. By not claiming 'expression' or 'version' authorship of a published work could mean that the work is more exposed to copying and theft. An alternative position is to assert copyright authorship in the 'expression' or 'version' and to recognise traditional knowledge rights by stating the names of the clans where the knowledge or stories are sourced and using notices. In this way, the 'expression' author acts as a custodian of the work, and can use his or her copyright to guard an Indigenous community's right of attribution or integrity.

2.2.2 Authorship where sound recordings are source

The non-Indigenous author and academic Kerry McCallum worked with the late Hazel McKellar to write the book *Woman from Nowhere*.¹³ Hazel approached Kerry and gave her tapes where she had dictated stories about her life. Kerry listened to the tapes and put the book together, meeting with Hazel to glean more details and to set the structure of the manuscript. Kerry describes the process, 'I converted her oral story into a readable format. This involved taking out repetition, putting things in order and placing information in chapters to focus the story.'¹⁴ After Kerry finished writing, she read the book out loud to Hazel so Hazel could make corrections. This process took over two days. The book was published by Magabala Books. Hazel (and now her heir) owns the copyright in the book. Kerry is credited on the cover of the book - 'as told to Kerry McCallum'.

2.2.3 Authorship where Indigenous knowledge holder substantial contributor

The writing of *Ngurra-kurlu: a way of working with Warlpiri people* illustrates an innovative approach to managing copyright and authorship of an academic paper.¹⁵ Miles Holmes is a PhD candidate from Queensland University. He wrote the paper in collaboration with Wantu Jampijinpa Pawu-Kurlpurlurnu (Warlpiri) who mostly talked to Miles and Lance (the co-authors) who wrote the document. According to the authors, the 'paper is a cross-cultural work, a combined attempt to find English counterparts to Warlpiri philosophy.'¹⁶ Given that the paper involved Wantu's interpretation of his people, the Warlpiri's belief systems, he is credited as the lead author. Copyright is owned jointly between the three authors. This approach recognised that Wantu is an author alongside the academic 'researcher' who put pen to paper. However the issue of communal ownership remains.

2.2.4 International Society for Ethnobiology Code of ethics

The International Society for Ethnobiology (ISE) is the leading promoter of ethical research into the relationships between plants, animals, the environment and Indigenous people. The ISE Code of Ethics promotes the following 'Principle of Acknowledgement and Due Credit':

*This principle recognises that Indigenous peoples, traditional societies and local communities must be acknowledged in accordance with their preference and given due credit in all agreed publications and other forms of dissemination for their tangible and intangible contributions to research activities. Co-authorship should be considered when appropriate. Acknowledgement and due credit to Indigenous peoples, traditional societies and local communities extend equally to secondary or downstream uses and applications and researchers will act in good faith to ensure the connections to original sources of knowledge and resources are maintained in the public record.*¹⁷

In line with this international standard, the Indigenous research sector should develop guidelines for attribution and acknowledgement of Indigenous knowledge holders and Indigenous communities. A policy outlining the criteria for co-authorship to guide research projects would help researchers determine whether an Aboriginal person should be attributed as author, or contributor only. Acknowledgement and credits should appear in publications (including databases) so that connections to the original IEK source are maintained. With respect to Indigenous communal moral rights of integrity, the protocols for respecting the cultural integrity of Indigenous knowledge should take account of appropriate context and interpretation.

2.3 Factors influencing copyright ownership

A research document is considered a literary work under copyright laws. The ownership of the copyright in a literary work will be dependent on the situation in which the work was produced.

2.3.1 Employer owns copyright

If a literary work is produced by an academic in the course of their employment, copyright may belong to the university or research entity which employs that academic unless there is a clear copyright policy or employment agreement which states otherwise.

2.3.2 University IP policies govern copyright

Most universities have policies about intellectual property ownership of research results that are produced by staff and students. Usually, they override the general copyright law ‘author is copyright owner’ principle. In many Australian universities, the IP policy recognises that staff and students own the copyright in their research works, however, the university has an unlimited licence to use the copyright content. But what are the rights and responsibilities in respect of copyright works that incorporate Indigenous knowledge?

The *National Principles of Intellectual Property Management for Publicly Funded Research* set out best practice IP management principles for universities and public funded entities when dealing with ownership of intellectual property created out of employment, training, study and research. Principle 4 on ownership of IP includes a reference to Indigenous people, noting that:

*Particular attention should be given to cases where IP impinges or potentially impinges on the cultural, spiritual or other aspects of indigenous peoples.*¹⁸

There are no specific details about prior informed consent or cultural attribution and integrity. As a result, a range of approaches are taken by university IP policies to Indigenous peoples’ knowledge:

- The Australian National University’s IP policy notes that ‘the University respects the rights and benefits of its collaborators and partners, including those of Aboriginal and Torres Strait Islanders in Australia...’¹⁹
- Charles Darwin University’s Intellectual Property Policy follows the National Principles approach by stating that its IP policy will be implemented in a way that ensures ‘there are processes in place to handle cases where the Intellectual Property rights of the University impinge or potentially impinge on the cultural, spiritual or other aspects of indigenous peoples...’²⁰ The CDU further recognises Australian Indigenous people as key stakeholders in the university’s activities within its Indigenous Peoples Policy. The IP policy also says it ‘recognises the culture, history, uniqueness and diversity of the Indigenous community. Charles Darwin University is committed to forging mutually beneficial relationships with the Indigenous community, built upon a foundation of trust and respect.’²¹
- Macquarie University IP policy requires all members of the university community to respect the rights of third parties and notes that this may involve...not impinging upon the cultural, spiritual or other interests of indigenous peoples.²²
- Queensland University’s Intellectual Property Policy for Staff, Students and Visitors includes a clause on ‘Indigenous Cultural and Intellectual Property Rights’. It follows *Our culture: our future* by recognising that ‘the heritage of Indigenous people is a living one and includes items that may be created in the future, based on that heritage.’ The policy further notes that ‘Indigenous Cultural and IP Rights are increasingly being recognised internationally through treaties and standard setting

developments by the United Nations and its agencies. The University recognises and will protect Indigenous Cultural and IP Rights to the fullest extent permitted by Australian law.²³

- Batchelor Institute’s Intellectual Property Policy aims to encourage an environment in which teaching, learning, research and scholarship and community service will flourish. The Institute adheres to the principle that knowledge and ideas should be made available within the public domain for the benefit of the whole community. However, this needs to be balanced against the principle that due recognition is given to any cultural property rights over specific knowledge and ideas when substantiated claims to this effect are made by particular Indigenous communities. Thus the Policy recognises there are inherent cultural and custodial rights which go beyond the creative process and beyond the rights covered by legislation, but which may require negotiation of ownership.²⁴ The Batchelor Institute Research Policy states that researchers must adhere to and safeguard the ownership of the intellectual and cultural property rights of participants including the ownership and use of cultural materials; ceremonial and “secret” issues; use of/reference to deceased people or their names; intrusion into ceremonial funeral sites; and respect of cultural values.

2.3.3 Agreements can change copyright general rules of ownership

Written agreements such as funding agreements, research agreements, and partnership agreements may also state who owns, or has some controlling interest, in the copyright of a literary work. It is important to note that copyright can only be assigned in writing.

If produced under a research agreement which expressly states that the copyright in the work belongs to the commissioning agency, or any other party, then copyright will belong to the agency or that party. For example, it is possible for research results to vest in an Aboriginal organisation, which funds the research being conducted.

2.4 Exclusive rights to copyright and traditional knowledge

Under the *Copyright Act*, the copyright owner will have the exclusive right to reproduce, publish, and communicate it to the public and to adapt it. However, the author would hold the moral rights of attribution and integrity over the work.

The copyright owner is not bound by cultural obligations but many Indigenous researchers must consider their responsibilities to protect and respect culture when undertaking research and writing up Indigenous knowledge for publication. When copyright does not belong to the Indigenous researcher but is owned by a university or third party, it raises a number of cultural issues that require consideration.

For instance, let’s say I wrote a research paper on the spiritual beliefs of the Wuthathi people, after researching archives, tapes and films and talking to elders. I would be recognised as the author of the document. I am employed by a university as a researcher. The copyright in that document belongs to them.

As copyright owner, the university is free to deal with the copyright in the written document. This includes giving consent for other people to reproduce, adapt, translate or make a film out of it. I have moral rights in the written work. This gives me the right to be named as the author and to stop other people from using my work in a derogatory way that harms my reputation. All of what I have outlined in this scenario would be the legal rights framework under copyright law.

You will notice that there is no recognition of the rights of the Wuthathi clan or community as the owners of the knowledge. Should I or the university consider these rights in our future publication and use of the research?

As an Indigenous researcher, I may have gained that knowledge because I am Wuthathi and because my family and community agreed that I could undertake the research, knowing that I would be responsible for it. There are Indigenous cultural protocols that I would have to recognise and respect because I have become a custodian of the knowledge by virtue of undertaking the research project. This relationship is arguably a fiduciary relationship which may have some implications regarding my ability to deal with the copyright in the work. But, as for the university, what is their obligation to consider these cultural protocols? Should universities have policies which consider cultural attribution and integrity?

2.4.1 WIPO Draft Provisions promote free, prior and informed consent

In recognising the shortfalls in the legal framework, WIPO (the World Intellectual Property Organisation) has drafted Provisions on Traditional Knowledge and Traditional Cultural Expressions.²⁵ The WIPO provisions advocate compliance with the 'free, prior and informed consent' principle and the recognition of customary laws and practices. Under the WIPO Provisions the prior consent of the traditional owners of cultural expressions would be required before recording, publishing and communication to the public. The draft provisions also provide for moral rights for communities. It is not mandatory for countries to adopt the draft provisions but they serve as a guide for dealing with the interface between intellectual property and traditional knowledge. These provisions will be useful to the Indigenous research sector in developing frameworks for Indigenous knowledge rights recognition and protection.

2.5 Copyright and fiduciary obligations to protect ritual knowledge

An important Aboriginal copyright case entitled *Bulun Bulun v R & T Textiles* may have some implications for copyright owners of Indigenous research. The 1998 case examined the artistic work of John Bulun Bulun, an Aboriginal artist, which incorporated traditional ritual knowledge of his people, the Ganalbingu clan. John Bulun Bulun had permission from his clan to depict the cultural imagery, on the condition that he complied with customary laws about respecting the underlying cultural knowledge. The artwork was altered and reproduced without his consent on fabric by textile importers. John Bulun Bulun and George Milpurrurru, a senior clan elder took action in the Federal Court. The fabric importer agreed to stop importing the fabric and pay damages. The judge did not think that the clan owned copyright in the work, but did find that Bulun Bulun owed a fiduciary duty to the clan to protect the integrity of his copyright work in accordance with his cultural obligations to protect traditional knowledge.²⁶ Whilst John Bulun Bulun could sell the artwork for his own benefit, he was culturally required to look after the encoded ritual knowledge with the clan's interests at heart. If John Bulun Bulun had been unwilling or unable to take action for infringement, then Mr Milpurrurru, as representative of the Ganalbingu people, could take action against the infringer. This case has implications for copyright owners of works that embody Indigenous knowledge. If a person recording cultural ritual knowledge has conditions placed on them about how that knowledge can be disseminated and used then there is an argument that the fiduciary duty is placed on them. Accordingly, they must ensure that their copyright material is not used in ways that conflict with their cultural obligations.

2.5.1 Traditional custodians' notice

Following the *Bulun Bulun Case*, the Arts Law Centre of Australia drafted a traditional custodian's notice to be displayed alongside artworks containing traditional knowledge.

The images in this artwork 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 the images for any purpose that has not been authorised by the custodians is a serious breach of the customary law of the (name) community, and may also breach the Copyright Act 1968 (Cth).

For enquiries about permitted reproduction of these images contact (community name).

Similar notices could be used for published knowledge in research projects. Notices included in published documents and websites will put the readers of research results on notice that any traditional knowledge should not be used, adapted or commercialised without the prior informed consent of the relevant traditional custodians. Here is an example of a notice that was used in a book on Indigenous plant knowledge produced by Wangka Maya Language Centre (WA):

The language and information contained in this book includes traditional knowledge, traditional cultural expression and references to genetic resources (plants and animals) of the Manyjilyjarra and Warnman people. The information is published with the consent of Manyjilyjarra and Warnman traditional custodians, for the purposes of general education and language maintenance purposes.

Use and reference is allowed for the purposes of research or study provided that full and proper attribution is given to the author, knowledge holder and traditional custodial group. No commercial use by educational institutions is authorised without prior consent and negotiation of rights.

This information should not be used commercially in any way including in tourism, food technology including bush tucker applications, medicines, pharmaceutical products, health and beauty products, storytelling or as trade marks, patents and designs, without observing the Indigenous cultural protocols of prior informed consent, attribution to traditional Indigenous communities, cultural integrity, and the sharing of benefits.²⁷

2.5.2 Using copyright notices

Copyright notices are commonly found on the title page of books, reports, websites, films and other copyright materials. Although copyright notices do not affect the position of the law or legal contracts, they are used internationally to put people on notice who the copyright owners are and how the material can or cannot be used. These notices can also be expanded to make people aware of Indigenous intellectual and cultural property rights relating to the content. There is a growing of using notices in this way.

For example, Batchelor Press use the following notice directly under the copyright notice:

The stories and images in this publication contain traditional knowledge from different communities/people and have been published with the consent of the custodians of the stories. Dealing with any part of the stories/knowledge for any purpose that has not been authorised by the custodians may breach customary laws and may also breach copyright and moral rights under the Copyright Act 1968 (Cth). For enquiries regarding permitted reproduction of any part of these publications, contact Batchelor Press.²⁸

While copyright in the story and publication are owned by the author and Batchelor Press respectively, this notice informs readers that there are also customary laws governing the use of the content.

Arabana author and academic, Veronica Arbon uses a similar, albeit more specific notice in addition to a standard copyright notice in her book *Arlathirnda Ngurkarnda Being-Knowing-Doing*. It says:

This publication contains Indigenous knowledge of the Arabana people, in particular the Strangways, Hull, Hodgson and Arbon families, informed by Arabana language, stories and art. All rights reserved. Dealing with any part of this knowledge for any purpose that has not been authorised by the custodians may breach the Copyright Act 1968 (Cth) and amendments.

Arbon notes that she struggled with how to protect the broader Arabana cultural and language knowledge when she came to publish her book, based on her doctoral thesis. She said:

I was aware of how to protect stories and was careful of what I included under the guidance of my Elders but when it came to completion, submission and then publication I was very concerned. Therefore, when I published my book I claimed copyright, moral rights and sought to claim copyright for my people on the broader underpinning concepts in my writings. I have also included the following or similar words in a couple of articles I have published: *I would like to inform a number of words from my people's language and knowledge are used. Copyright and moral rights over such aspects always remain with Arabana people.*

In this notice, Arbon does not distinguish between the copyright and moral rights that an individual might have under copyright law, and the rights that Indigenous people or communities should have collectively. Her intention is to assert the collective cultural rights of her community, as expounded in the *Declaration on the Rights of Indigenous*

peoples. It is suggested that instead of copyright and moral rights, the last sentence could read: *The traditional knowledge/traditional cultural expression rights and the Indigenous communal moral rights over such aspects always remain with Arabana people.*

A similar effort has been made by Glenn Wightman, a non-Indigenous botanist who has been working in the Northern Territory for many years recording and publishing Indigenous plant knowledge in partnership with Indigenous people. In *Jaminjung and Nungali plants and animals: Aboriginal flora and fauna knowledge from Bradshaw, Gregory National Park and Timber Creek area*, the following notice appears:

The Jampinjung, Ngaliwurru and Nungali plant and animal names and uses in this book are the intellectual property of Jampinjung, Ngaliwurru and Nungali people. This knowledge should only be used with the written consent of the intellectual property owners. It is against the law to use this knowledge without permission.

According to the copyright notice on the same page, copyright is shared between the NT Government and the Diwurruwurru-jaru Aboriginal Corporation. A number of issues arise here that ought to be remembered when drafting such notices:

- Copyright cannot be held by communal groups. It can only be held individuals, incorporated organisations or governments. An effective way of managing this is by having an appropriate incorporated body hold copyright on behalf of a communal group.
- Copyright notices don't affect the legal ownership of copyright. They are merely administrative. Effective legal arrangements should be put in place to reflect the statements made.
- 'Knowledge' cannot be owned under Australian IP law, unless it is in material form. It would be more fitting to say 'It is against the laws of the (Indigenous group) to use this knowledge without permission.'

3. AIATSIS research guidelines

The leading Indigenous research guidelines are the *Guidelines for Ethical Research in Indigenous Studies* developed by the Australian Institute of Aboriginal and Torres Strait Islander Studies. Indigenous peoples' right to self-determination and to control and maintain their culture and heritage is the foundation of the AIATSIS Research Guidelines.²⁹ Drafted in 1999, the AIATSIS Guidelines note the importance of respecting intellectual and cultural property rights:

The intellectual and cultural property rights of Indigenous peoples must be respected and preserved.

Indigenous cultural and intellectual property rights are part of the heritage that exists in the cultural practices, resources and knowledge systems of Indigenous peoples, and that are passed on by them in expressing their cultural identity.

Indigenous intellectual property is not static and extends to things that may be created based on that heritage.

It is a fundamental principle of research to acknowledge the sources of information and those who have contributed to the research.

The AIATSIS Research Ethics are compulsory for recipients of AIATSIS grants. The AIATSIS grant processes asks for letters of consent from the Aboriginal community. The applications are reviewed by the AIATSIS Research Ethics Committee before approval. But what is the effect if they are not followed? How is non-compliance enforced? The Ethics do not state any recourse for non-compliance. The AIATSIS Guidelines are currently being updated. It is expected that there will be greater guidance on copyright and intellectual property. It is further suggested that the AIATSIS research ethics include guidance on attribution, copyright and enforcement issues including encouraging mediation for the handling of research disputes.

4. Research consent forms

Using research consent forms is an important way of respecting the rights of Indigenous research participants. The use of consent forms should be used as a way of respecting the emerging right of prior informed consent as recognised in the *Declaration on the rights of Indigenous peoples*.

Contracts and consent forms should be drafted in simple language. They should introduce the researcher and explain to the participants the nature of the research and how the results will be used. They should also explain what the benefits will be to the Indigenous participants for participating in the research. These do not have to be financial benefits, but may include opportunities to be actively involved in the research, to receive copies of results, and to be recognised and attributed for their contributions.

The Australian Institute of Aboriginal and Torres Strait Islander Studies Human Research Ethics Committee has developed a template for a plain English Research Statement which outlines the requirements a researchers should discuss at the outset of an Indigenous research project. This includes discussing what the project involves, how the information will be collected and recorded, who will own copyright, and how it will be used in the future including where materials are to be deposited.³⁰

It is important to note that consent forms are legally required when recording people speaking on film or sound recording. Under the *Copyright Act*, performers and interviewees have certain rights:

- With sound recordings, the interviewee may share copyright in the sound recording if there is no payment for their performance.
- Interviewees and performers filmed for research projects have performers' rights which include the right to control how their performance is recorded. Consent is required for all uses of that performance or interview.

5. Benefit sharing

The Convention on Biological Diversity is an international treaty which the Australian government signed and ratified in 1993.³¹ As a signatory to the CBD, Australia is obliged to take measures aimed at protecting biodiversity and certain features of the natural environment. The CBD is designed to conserve biological diversity, ensure sustainable development of biological resources and encourage the sharing of benefits accruing from the use of genetic resources.

Since the CBD was adopted, benefit sharing has become recognised as a fundamental Indigenous knowledge right. The underlying principle is that Indigenous people should share in the benefits accruing from the use of traditional knowledge when accessing genetic resources. The benefit sharing right has now taken a wider focus to include all forms of traditional knowledge and traditional cultural expressions. It is now included in a range of national and international protocols which advocate that the value of the Indigenous peoples' contribution must be not only acknowledged but compensated. Other ways researchers may share benefits include providing copies of tapes, reports and other materials like film footage and photographs. Further, sharing of any commercial benefits should also be a major consideration. This paper has focussed on copyright, attribution and authorship issues, however, a share in copyright will entitle the Indigenous informant to a share in any royalties that come from the publication of books. It is advisable to have a written contract if the aim of a research project is to share royalties with an Indigenous organisation. The following clause is an example of a collaborative project between a writer and a knowledge holder that addresses sharing the copyright and benefits:

The Writer and the Indigenous Knowledge Holder agree that the copyright in the manuscript (including all drafts) will be owned by them in equal parts, upon creation. The proceeds, royalties and payment from the exploitation of the manuscript will be shared by the Writer and the Indigenous Knowledge Holder (including monies received from Public Lending Rights and Copyright Agency Limited).

6. Cultural maintenance

Researchers of Indigenous knowledge should consider the cultural legacy that they will leave to future Indigenous generations. How will future Indigenous generations get access to the research data, tapes and field notes? Making research available to communities or depositing copies at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) are some ways to promote cultural maintenance. The AIATSIS has deposit forms which allow for certain restrictions to be placed on materials.

The AIATSIS Audiovisual Archive Code of Ethics recognises the rights of Indigenous communities and individuals, as the owners of most of the knowledge contained in the collections. Copies of material will only be provided for publication purposes if the requestor has consulted with the relevant Indigenous community or individual and has received written permission to proceed, even in such cases where the copyright owner has approved publication.³²

The deposit of materials in archives also raises issues of whether these materials can be digitised and placed in databases, and made available to the general public. Professor Martin Nakata and others identify the growing need for documentation of Indigenous knowledge, saying that in light of the 'historical destruction of Indigenous knowledge, its current fragile existence, its threatened future, the preservation of Indigenous knowledge and protection of Indigenous intellectual property rights to ensure proper attribution and use of it now requires the documentation of such

knowledge.'³³ This knowledge is finding its way into areas the original research purposes may not have envisaged such as use in parks, wildlife, fisheries, tourism and environmental departments to assist management of resources, or commercial applications including the development of patents for new medicines. Martin Nakata and his writing team note that there is an increasing trend to document the knowledge of Indigenous people and to attribute knowledge as belonging to groups. This is not just a practice for remote areas where traditional structures are intact but it also includes 'linking traditional connections that have been severely disrupted by colonial intervention and government policies and what are now literally overlaid by the urban and regional sprawl of the modern nation.'³⁴ This may not altogether be a bad thing, but may allow for the reinvigoration of culture, and cultural connections. An issue however becomes, how these rights are managed and exercised in the future.

7. A National Indigenous Cultural Authority

The recognition of traditional knowledge rights will require a coordinated approach and a management system that allows knowledge holders, intellectual property owners, creators and users to find a balance between sharing knowledge and cultural rights management.

A National Indigenous Cultural Authority could develop national standards for attribution and acknowledgement and collect and develop systems for recording and tracking 'ownership' of traditional knowledge so that future users can locate relevant rights owners for negotiation and clearance of potential uses. A National Indigenous Cultural Authority could also undertake rights advocacy, set standards of practice to allow appropriate uses of cultural expression and oversee payment of royalties, in the same way the CAL collects author royalties.³⁵ A recent discussion paper entitled *Beyond guarding ground: a vision for a national Indigenous Cultural Authority* canvasses this option.³⁶

Conclusion

Indigenous research involves the recording and writing down of Indigenous knowledge and knowledge systems. These knowledge systems are part of the Indigenous cultural heritage of Indigenous people. The recognition of Indigenous knowledge rights within the higher education sector is mostly via protocols and ethics committees, but there is little guidance on copyright, intellectual property and how researchers should acknowledge knowledge holders, manage copyright in resulting papers, and share benefits with Indigenous knowledge holders or research subjects.

Using copyright in a cultural way

Indigenous knowledge is primarily orally transmitted and will not be protected by copyright. However, copyright issues arise because copyright doesn't protect old knowledge. It only protects works for 70 years after the death of the author. Some old works will not be protected, and no permission from the clan would be necessary, even where the material is sacred or secret.

Copyright only provides rights to those individuals who were involved in the creation of the work.

Copyright laws focus on individual rights not communal rights. There is scope for copyright to be used by the Indigenous higher education sector in ways that empower Indigenous people, and knowledge systems. For instance, copyright, like other property, can be shared and it can be licensed and assigned in writing. If a paper is being written which sources the words, ideas and knowledge of an Indigenous knowledge holder in a substantial way so that the words are verbatim, there is scope for this person to be recognised as an author or a co-author with the person who is conducting the research work.

Keeping the cultural tracks strong

In researching Indigenous knowledge, we must consider how our work will be used in the future by other academics, research institutions and commercial companies. Do we, as researchers have a duty to continue to link the Indigenous cultural sources to the work, over the life of the research project and beyond? If we are a link in the dissemination of cultural knowledge, we must ensure that we keep the cultural tracks strong, so that future generations can source that information, comment on it, and benefit from it.

The following is a checklist of preliminary questions when writing up research on Indigenous people. The following principles aim to help academic writers approach their research writing project in an appropriate and respectful manner, however, further research and inquiry on the subject is recommended.

Discussion points for writing up Indigenous knowledge

Free, prior informed consent

- Indigenous people should be encouraged and empowered in decision making processes about research projects that affect their cultural heritage.
- Recognise ownership of knowledge by seeking free, prior informed consent.
- Use consent forms and research agreements.
- Identify protocols and ethics to guide research and future uses.
- Advise participants in knowledge research projects that the law does not protect traditional knowledge effectively and although copyright protects the written form, other people can read the documents and use the content of the information for their ideas and future work.
- Discuss what happens if there are disputes, for instance, will the dispute be mediated and who by?

Indigenous rights to own and control knowledge future uses

- Advise Indigenous knowledge custodians about the proposed use of the knowledge and what systems will be put in place for them to discuss how the knowledge will be used in the future.
- Advise on shortfalls in the law and dangers of wide publication of knowledge.
- Seek consent for wider publication of knowledge, and where possible use consent forms and research agreements.
- Use a traditional knowledge custodian's notice and other forms of warnings to advise readers of traditional knowledge interests and where they should go to get clearances for traditional knowledge.
- Use copyright notices and identify communities whose knowledge has been sourced.
- Discuss deposit and use of data, field notes and other records.

Authorship, attribution and acknowledgment

- Should any contributing knowledge holders who have provided substantial information via tape or interview or who have assisted with writing be recognised as co-authors?
- Has the group been attributed in ways that are appropriate?
- How will this continue to be recognised in the future?
- Use traditional knowledge custodian's notices.
- Will copyright be jointly owned if a substantial part of the knowledge holder's contribution is written up into the document?

Integrity

- Discuss how the knowledge holder and community will be able to guard the integrity of the knowledge recorded in the document?
- What is the balance to be struck between researcher and informant – reach an understanding of the collaborative nature of the research projects.
- What measures of checking are required if any? For instance, submitting drafts for checking, and working with a traditional knowledge holder to ensure the written record has cultural integrity.
- If there is a dispute about how the research is presented and the conclusions reached, can the relationship be mediated?

Benefit sharing

- If research is published commercially as a book, what ways can benefits be shared with the Indigenous community?
 - o Copies of the book and other resources given to the community
 - o Sharing of royalties
- Would a National Indigenous Cultural Authority assist with the safeguarding of Indigenous knowledge by keeping records and managing ICIP rights, and assisting with the development of agreements and protocols?

Further Resources

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