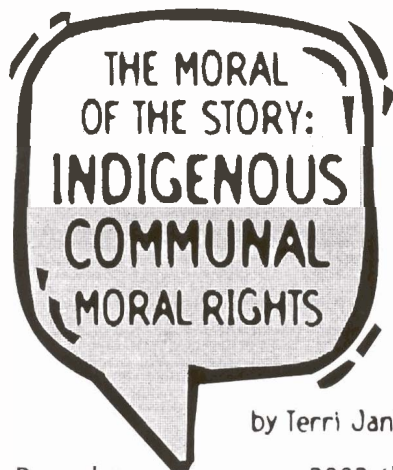


# BULLETIN

ARTS LAW CENTRE OF QUEENSLAND INC BULLETIN # 3/05 · ISSN # 1440-477

HELPING QUEENSLAND ARTISTS PROTECT THEIR LEGAL RIGHTS AND FINANCIAL INTERESTS



by Terri Janke

December 2003 the Federal Attorney-General released an Exposure Draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*, which proposes changes to the *Copyright Act 1968 (Cth)* to introduce Indigenous Communal Moral Rights. The draft Bill is said to give effect to the Government's 2001 election policy commitment and to a commitment made to Senator Aden Ridgeway in Parliament during the passing of the *Moral Rights Bill* in December 2000<sup>1</sup>.

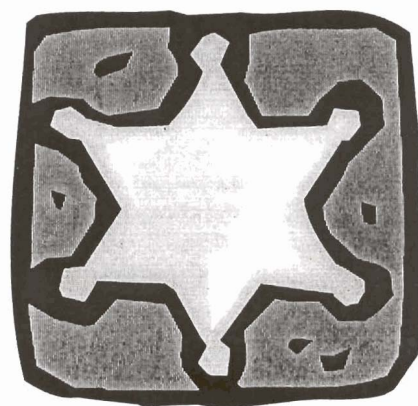
For almost forty years, Indigenous artists have been pointing out that copyright laws do not adequately protect Indigenous arts. The limited duration, the requirement on material form and the focus on economic rights have been the cause of their concern. Appropriation of Indigenous cultural material has in many instances distorted and debased the original cultural work. This has been the main reason Indigenous people have called for greater protection. In the 1970s, Aboriginal artist, and then Chair of the Aboriginal Arts Board, Wandjuk Marika called for copyright laws to protect Indigenous artists' works. In the 1980s, there was an investigation which took the approach of 'protection of folklore'. An Aboriginal Folklore Model was proposed, which created an Aboriginal Folklore Commissioner who could take action against such derogatory uses of cultural material. This model was viewed as paternalistic by Indigenous people. There was no implementation of the report's recommendation.

In the 1990s when Aboriginal art was enjoying great success, copyright was used by Indigenous artists to stop the rip-off copying of Aboriginal art. The Aboriginal copyright cases included *Yumbulul v Reserve Bank of Australia* and *Others 21 IPR 481*, *Bulun Bulun v Nejlam Investments (unreported) T-Shirt Case*, *Milpururru and Others v Indofurn Pty Ltd and Others [1994] 130 ALR 659* (The Carpets Case) and *Bulun Bulun v R & T Textiles [1998] AILR 39*. By bringing these actions, Indigenous artists showed infringers that they were prepared to use copyright laws to protect their cultural rights.

In 1996, an inquiry called 'Stopping the Ripoffs' initiated by the Keating government looked at whether there should be legislative amendments to protect the special nature of Indigenous cultural expression. This inquiry never completed as the Howard government at the end of 1996 changed the focus of reform in this area.

In 1997, the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) called together an Indigenous Reference Group and commissioned the writing of the report, *Our Culture: Our Future*. The report, which was released in 1999, recommended a range of strategies for protecting Indigenous cultural and intellectual property. *Sui generis* (stand alone) laws were favoured, however, a range of short and long term strategies which cover legal, non-legal, administrative and ethical measures were put forward.

Moral rights were introduced to the Copyright Act in 2000. When deliberations in the Senate took place over this Bill, Senator Aden Ridgeway raised the concern that the Moral Rights Bill did not include Indigenous communal moral rights. The government said that they would follow this up.



## Law AND Accounting Volunteers FOR Arts

ARTS LAW CENTRE OF QUEENSLAND INC  
109 EDWARD STREET BRISBANE 4000  
TEL 3211 3628 [alcq@artslawqld.org.au](mailto:alcq@artslawqld.org.au)  
[www.artslawqld.org.au](http://www.artslawqld.org.au) FAX 3211 3758

The Draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* was sent to a select number of Indigenous organisations and arts organisations for comment. Submissions to the Bill have closed.

Many of the organisations who responded to the Exposure Draft have been critical of the proposals in that they fail to adequately address the shortfalls in protection of Indigenous arts under the intellectual property law regime. The government made some minor amendments and the Bill is listed for introduction before parliament in 2005.

### WHAT ICMRS ARE GIVEN TO INDIGENOUS COMMUNITIES?

The *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* proposes to introduce the following Indigenous communal moral rights:

The right of attribution:

An Indigenous community's right to be identified as having a cultural association with the work or film.

The right of false attribution:

An Indigenous community's right not to have any association with a work or film falsely attributed.

• The right of integrity:

An Indigenous community's right to not have the work or film subject to derogatory treatment.

1. Intellectual Property Branch, Department of Communications, Information Technology and the Arts and the Copyright Law Branch, Attorney-General's Department, *Indigenous Communal Rights Paper*, December 2003

## CASE STUDY: Djanda and the Sacred Waterhole

The moral rights which currently exist under the Copyright Act 1968 are given to creators and are individual rights only. For example, the work 'Djanda and the Sacred Waterhole' is created by Banduk Marika. The work is a communally owned design and contains references to cultural knowledge belonging to the Rirratingu clan. If the work was derogatorily treated, Banduk would have a remedy under moral rights. However, the Rirratingu clan do not have any moral rights under the Copyright Act even though under their customary laws, the clan, or a person on behalf of the clan may have responsibility for the cultural integrity of a work. This does not necessarily have to be the artist.

This requirement excludes Indigenous persons with authority other than the author (creator) from legally exercising moral rights over works embodying traditional ritual knowledge<sup>2</sup>.

An 'Indigenous community' means a community of 2 or more Indigenous persons who hold in common a particular body of traditions, observances, customs or beliefs; or if there is only one surviving member, that surviving member.

Similar moral rights already exist for individuals but the amendments propose that an Indigenous community will have coexisting rights as well as individual creators where the requirements listed below are met.

### WHEN DO ICMRS ARISE?

For there to be Indigenous communal moral rights in a copyright work the following requirements must be met before the first dealing<sup>3</sup> of the work:

#### Work Must Be Made

There must be a copyright work or a film for the rights to exist. This means that there must be a work as defined under the Copyright Act. This means that the particular cultural item must be:

- an artistic, musical, dramatic or literary work that meets the requirement of the Copyright Act.
- or a film as defined under the Copyright Act.

To be protected under Indigenous communal moral rights, a cultural work item must be one that is:

- in material form and is original
- created by a living artist, or one that has only been deceased for less than seventy years.<sup>4</sup>

For instance, many cultural works of cultural significance will not meet this requirement because they will be oral in form, or older than seventy years after the death of the artist.

### Drawn from Traditional Base

The work must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'. A community is defined loosely and can include an individual, family, clan or community group.

### Voluntary Agreement that Communal Moral Rights Exist

A voluntary agreement must be entered into between the creator of the work and the Indigenous 'community'. A voluntary agreement may be oral or by way of contract or deed. The communal moral right would exist for the duration of the copyright period in the work, i.e. seventy years after the death of the artist.

The requirement of a voluntary agreement puts the onus on the Indigenous community. Most Indigenous artists and creators who live and work in their communities would obligingly meet this requirement. Many Indigenous artists practice cultural protocols, or observe customary laws and seek consent and permission to use culturally owned material. Outsiders who are not Indigenous or third party users perform the majority of abuses of communal moral rights. For example, in the *Carpets Case* the altered designs were copied images from text books. These types of abuses will not be protected against at all by the

proposed amendments. The community would not be able to make third parties non-Indigenous users subject to a voluntary agreement, and in many cases may not even know about them until they have occurred.

### Notice of Association Must Be Given to Third Parties

There must be acknowledgement of the Indigenous community's association with the work.<sup>5</sup> This requires notice of association to be given by Indigenous communities and the author. This can be done by the community in respect of works and films it has been consulted on, however, it will not be able to give 'notice' on works and films that it has not. These are likely to be the works and films that are infringing communal moral rights. Protocols for consultation should be encouraged.

### Consent from Interest Holders

Interest holders in the work need to have consented to the Indigenous communal rights in the work. In this respect an Indigenous community has no rights if an interest holder refuses or fails to consent to the Indigenous communal moral rights arising.

### HOW ARE ICMRS EXERCISED?

An Indigenous community that has Indigenous communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative in respect of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to decision making processes.

Consent can be revoked by the Indigenous community and the authorised person removed, but if rights and consents are already granted to third parties, these will remain in tact.

### Defences, Notices and Consents

There is no Indigenous communal moral rights infringement if:

2. Terri Janke, *A Moral Issue: Moral rights and Indigenous people's cultural rights*, NIAAA Newsletter, Autumn 2001, page 2 – 3
3. Section 38 of the Copyright Act 1968 Infringement by sale and other dealings: (a) sells, lets for hire, or by way of trade offers or exposes for sale or hire, an article; or (b) by way of trade exhibits an article in public
4. The rules on duration of copyright owned by governments and for broadcasts and published editions have not changed. Generally, copyright in these cases has not been changed and, depending on the type of material, continues to last until 50 years from the end of the year in which it was made, or from the end of the year of first publication. Sourced from the Australian Copyright Council Information Sheet G23 Duration
5. Clauses 195AZZL and 195AZZM, Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003



- the actions were reasonable;
- if the authorised user consented.

#### Reasonableness Defence

Matters to be taken into account when **considering** whether an action is derogatory treatment are listed in the proposed legislation and include:

The nature of the relationship between the author of the work and the Indigenous community at the time of any contact, or attempted contact, by the person for the purposes of:

Determining whether the community has a right of integrity in respect of the work

Seeking consent to an act or omission that would infringe the right

The nature of the Indigenous community at the time of any contact or **attempted contact** for the purposes of:

– determining whether the community has a right of integrity

– seeking consent to an act or omission

- The nature of the work
- The purpose for which the work is used
- The context in which the work is used
- Any practice, in the industry in which the work is used, that is relevant to the work or the use of the work

Any practice contained in a voluntary code of practice, in the **industry** in which the work is used, that is relevant to the work or the use of the work

Whether the treatment was required by law or was otherwise necessary to avoid a breach of **any law**.

#### Consent

It is not an infringement of an Indigenous communal moral right of an Indigenous community in respect of a work to do, or omit to do, something if the act or omission is within the scope of a written consent given by the community's authorised representative in respect of the work.

There is provision which makes consent from undue pressure invalid. It is important to note that there is considerable inflexibility in some industries already with individual moral rights. Many authors are faced with wide consent clauses in funding and commission agreements.

## CASE STUDY: Olympic Museum Website

From 10 July to 15 October 2000, the Olympic Museum Foundation presented, at the Olympic Museum in Lausanne, an exhibition entitled 'Aboriginal Art: An Immemorial Fountain of Youth'. This exhibition contained works by Australian Aboriginal artists, including Mary Kemarre, Tjampitjin<sup>6</sup> and Richard Tax Tjupurulla. The exhibition posters, the invitations to its preview, the promotional flyers and the exhibition catalogue featured a reproduction of a work entitled 'Kulkun near Lake Mackay in the Great Sandy Desert' by Tjampitjin, without indicating the name of the artist or the title of the work.

During the exhibition, and for several weeks afterwards, the Olympic Museum website (<http://www.museum.olympic.org>) featured images of three of the works shown at the Museum, viz. 'Bush Flowers', by Mary Kemarre; 'Tiddal in the Great Sandy Desert', by Richard Tax Tjupurulla; and 'Kulkun near Lake Mackay in the Great Sandy Desert', by Tjampitjin.

These works were reproduced on the Museum website without the authorisation of the authors. During a certain period of time, people consulting this page were able to download the images to use them as wallpaper on their computer screens. From 10 July to 15 October 2000, the Olympic Museum Foundation presented, at the Olympic Museum in Lausanne, an exhibition entitled 'Aboriginal Art: An Immemorial Fountain of Youth'.

The artists pursued the matter arguing under the Swiss Copyright Law, the Olympic Museum has infringed their copyright and rights of paternity (moral rights). The matter was settled, the works being taken from the website, damages paid, and a written letter of apology given to the artist signed by Juan Antonio Samaranch, President of the Olympic Museum Foundation<sup>7</sup>.

A similar situation could occur with Indigenous communal moral rights if there is a consent regime in the model.

#### Remedies

If a successful action of infringement is brought by the authorised representative, the following remedies are available:

- Injunction
- Damages for resulting loss
- Declaration that an ICMR has been infringed
- An order that the defendant make a public apology for the infringement
- That any false attribution or derogatory treatment be removed or reversed.

The apology is often a remedy that Indigenous artists and communities consider culturally appropriate and it is sought as 'retribution'.

#### CONCLUSION

The Indigenous Communal Moral Rights Bill Exposure Draft has been criticised as not meeting its objective 'to provide Indigenous communities with a means to prevent unauthorised and derogatory treatment of works and films which draw on their traditions, observances, customs and beliefs.'

According to Jane Anderson, 'the draft Bill is highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their knowledge and its use.'<sup>8</sup> In this way, there is a big difference between the Government's stated objective and the current draft. I agree, as it is difficult to see where a remedy might arise for infringement.

Another concern is that there has been limited consultation by the government on the draft Bill with Indigenous peoples.

6. now deceased

7. Elizabeth Colman, *Olympic Apology to artists*, *The Australian*, Monday 17 February 2003

8. Jane Anderson, *Indigenous Communal Moral Rights, The Utility of an Ineffective Law*, *Indigenous Law Bulletin*, February 2004, Vol 5 Issue 30, pp 8 – 10, at 8

## THE MORAL OF THE STORY: INDIGENOUS COMMUNAL MORAL RIGHTS ... from page 7

The government has failed to engage Indigenous stakeholders in a meaningful debate on the contents of the Bill. This seems to be a major oversight if the main impetus for the introduction of the Bill was to benefit Indigenous communities.

Robynne Quiggin, Indigenous board member of the Arts Law Centre of Australia, criticises the Bill as based on the need to provide certainty to third parties in their dealing with Indigenous art, rather than being based on the nature or content of communal ownership.<sup>9</sup>

Is amending the *Copyright Act* 1968 (Cth) in this way the right approach given that the development of an international instrument for the protection of traditional knowledge and traditional cultural expression is currently being considered by the World Intellectual Property Organisation's (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore?

Should there be traditional cultural rights to traditional knowledge and cultural expression regardless of whether they meet the requirements of the Copyright Act; cultural expression that are not material form, and which exist in perpetuity?

The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002)<sup>10</sup> establishes:

### (a) Traditional cultural rights

The prior and informed consent of the traditional owners is required to, among other things:

- Reproduce or publish the traditional knowledge or expressions of culture;
- Perform or display the traditional knowledge or expressions of culture in public;
- To make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expression of culture; and
- To use the traditional knowledge or expression of culture in any other form.<sup>11</sup>

### (b) Communal moral rights

The moral rights created for traditional

owners are the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture. Material form is not required.

The moral rights exist independently of their traditional cultural rights. The model also proposes that communal moral rights continue in force in perpetuity and that they are inalienable, meaning they cannot be waived or transferred. ■

## IMPORTANT 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.

9. Robynne Quiggin, *The Contribution of Protocols and Moral Rights*, paper delivered at Snapshot 2 (AMAG), Melbourne, 5 August 2004

10. An original draft by Dr Kamal Puri and Clark Peteru for the South Pacific Community in New Caledonia was debated and revised by Legal Experts attending Workshops held from 2000–2002

11. Section 6, Model Law for the Protection of Traditional Knowledge and Expressions of Culture

© Terri Janke, Solicitor - TERRI JANKE & COMPANY

## WORKPLACE RELATIONS REFORM: how will it affect your organisation?

- Is your arts organisation:  
**Non-profit and Queensland-based**
- Does your arts organisation:  
**Employ staff ... then register now!**

The Arts Law Centre of Queensland INC is hosting a seminar for arts infrastructure organisations to:

- Review your rights and obligations as an employer
- Raise your awareness about impending IR reforms
- Improve your understanding of applicable awards, agreement-making and human resource practices.

The seminar is for representatives of Queensland incorporated associations and companies limited by guarantee including board/committee members and/or staff responsible for HR management.

**TUESDAY 6<sup>TH</sup> DECEMBER 2005 FROM 9 am – 12 noon**  
**LEVEL 2 METRO ARTS 109 EDWARD STREET BRISBANE**

This seminar will be presented by Ms Debra Coffey who is the Senior Human Resources Consultant at Commerce Queensland. Commerce Queensland is a non-government non-profit employer association that has extensive experience working across a diverse range of industry sectors.

The aim of the seminar is to raise awareness about the impact of Workplace reforms and the proactive steps arts employers can take to manage human resource issues. This 3-hour seminar will include:

- ✓ Overview of Current Employment Issues
- ✓ Legislation and Industrial Instruments
- ✓ Federal Industrial Relations Reforms
- ✓ "Getting your HR House in Order"
- ✓ Morning Tea and Networking

**PARTICIPATION IN THIS SEMINAR IS FREE FOR ALCQ MEMBER AND AFFILIATE MEMBER GROUPS AND ALCQ LAW AND ACCOUNTING VOLUNTEERS**

Register by 30/11/05 as seating is strictly limited:

- E-mail [alcq@artslawqld.org.au](mailto:alcq@artslawqld.org.au) ■ or Fax 3211 3758
- or Call 3211 3628 to request a registration form