



MORE THAN WORDS -  
WRITING, INDIGENOUS  
CULTURE & COPYRIGHT IN  
AUSTRALIA

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

It provides general advice not intended legal advice. If you have a particular legal issue, we recommend that you seek advice from a qualified legal practitioner.

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## **Introduction**

Indigenous cultures have survived generations and continue against seemingly impossible odds, through colonisation, assimilation and intervention. This cultural continuum owes its existence in part to the power of the story, told by Indigenous people orally and recently in writing. The Indigenous story has encoded messages of law, land, place, knowledge, experience and survival. It is the underlying script for Indigenous cultural identity. Indigenous stories are more than words. They are a cultural code, a passport, an inheritance and treasures for people who have faced near devastation.

It is from here that the proponents for the protection of Indigenous cultural and intellectual property against theft and distortion take their reference. European intellectual property laws do not protect oral based cultures, but allow the taking of them. Copyright allows authors to own their stories, and control how they can be reproduced, used or adapted. The foundations of copyright are built on the invention of the printing press. The written word is the currency of copyright. Writing down Indigenous stories takes us into a culturally risky space where authors can write and own stories to which they have no claim, no connection and no responsibility.

This paper seeks to inform writers about Indigenous intellectual and cultural property and copyright and identify issues for the writers and publishers.

## **Culture and copyright**

### **Indigenous cultural and intellectual property and heritage**

Heritage includes knowledge systems, resources and cultural practices created by Indigenous people through inter-generational transfer, particularly:

- literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- languages
- knowledge including spiritual knowledge and ecological knowledge
- Indigenous ancestral remains
- Cultural property (including objects held in museums)
- Documentation of Indigenous people in records and film.

The *Declaration on the Rights of Indigenous people* uses ‘traditional knowledge’ and ‘traditional cultural expression’ instead of ‘Indigenous cultural and intellectual property’ (ICIP). In this paper, I use ‘Indigenous cultural and intellectual property’. Please be aware, that you may hear the other terms used in discussion about Indigenous intellectual property.

Heritage or ICIP differs from European notions of intellectual property in these ways:

1. Indigenous heritage defines a group, and is collective in nature. It links people to place. For instance, traditional stories about a place might be told by all Indigenous people with claims to that region. Depending on the nature of the story, there may be cultural laws about who can tell a story, publish or adapt it. Under Indigenous laws, stories may be held by one person, a family or community, and the right to tell or disseminate that story is subject to a complex system of consents.
2. Along with heritage or ICIP rights there are also responsibilities including the obligation to pass on knowledge or cultural expression, and in doing this you must acknowledge its source and origin and also guard its cultural integrity.
3. Cultural rights can’t expire or be taken away. This is different from intellectual property rights, which only exist for defined periods and can be assigned.

### **The complex web of copyright**

The *Copyright Act 1968* provides creators of literary works with the rights to own and control their written stories. Although you don’t have to register your work for it to be protected by copyright, it must be written down or otherwise put in material form. Oral stories, the main form of many Indigenous stories, are not protected by copyright. Not till an Indigenous story is written down does copyright come into play, but it belongs to the person who is reducing the story to the written form.

This anecdote highlights the issues:

Debbie, a non-Indigenous author, hears Mara, a Wuthathi elder, telling a traditional story. Debbie then writes the story in her own words. Debbie will own copyright in that expression of the story. She then licences it to a journal for publication and receives payment. Debbie does not tell Mara that the story will be published, and does not acknowledge Mara or the Wuthathi people. Wuthathi elders see their story published in the journal. They are angry that there is no reference to the cultural source. It is an old story – about 100 years old, passed on through over four generations. Of great concern was that Debbie got some of the story details wrong. The changes made the story seem like a joke, they thought, and not true to the original spirit of ancestors.

The limitations with copyright that this points to:

1. **Authorship is about who puts pen to paper:** Copyright does not protect underlying ideas. Under the general provisions of copyright law, Debbie is recognised as the author of the written expression. Mara has no copyright in her story because she told it orally. She has no right under copyright law to be acknowledged. If she had written it down, could Debbie still write a story based on her idea, drawing on a central theme? Possibly, so long as Debbie did not reproduce a significant part of Mara's words.<sup>1</sup> Also, Debbie would be legally required to acknowledge Mara as the author of the story.
2. **Copyright doesn't protect old stories:** Even if the first Indigenous storyteller had put it in material form, the length of copyright protection is 70 years after the death of the author. This old story would be out of copyright which means anyone can reproduce it without consent or payment to the first Indigenous storyteller.
3. **Copyright laws focus on individual rights not communal rights:** The Wuthathi do not own copyright in the story. Under Indigenous protocols, this story belongs to the Wuthathi. Its continuing link to Wuthathi people may have bearing on its people's rights to land and their cultural identity. Copyright, however, provides no protection.
4. **Moral rights are individual rights belonging to authors:** The *Copyright Act 1968* provides moral rights which give authors the right to be attributed, the right against false attribution and the right of integrity. In the example above, these rights belong to Debbie. Therefore, there is no right for the Indigenous group to be attributed, or to take action against Debbie for false attribution. Although the cultural integrity of the story is important to the Wuthathi elders, under the current moral rights regime, they have no claim for infringement of integrity.
5. **Copyright can be transferred and licensed:** Copyright, like other property, can be sold, licensed and assigned. The copyright owner is free to deal with the copyright in a story. This includes giving consent for others to reproduce the story, adapt it, translate it, and make a film out of it. The author is not bound by cultural obligations, like Indigenous custodians, who must consider at each stage whether a new use, or medium changes the spirit of the work.

## Australian Indigenous copyright developments

The non-Indigenous bias of copyright laws was first challenged in the early 1970s by Aboriginal artist and the then Chair of the Aboriginal Arts Board, Wandjuk Marika. He called for copyright

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<sup>1</sup> See Australian Copyright Council, 'Writers and Copyright', Information Sheet, Australian Copyright Council, Sydney, 2006 available at [www.copyright.org.au](http://www.copyright.org.au).

laws to protect Indigenous arts in the same way they protected other artist's work.<sup>2</sup> The 1970s ethnographic view of Indigenous cultural production considered Indigenous art and stories as 'folklore' and not the result of individual creativity. It took over 20 years for an Australian court to consider the issue in detail. In 1994, a group of Indigenous artists took a case to the Federal Court over imported carpets that copied their art.<sup>3</sup> The court found that the artists owned copyright in their artworks because even though they followed pre-existing clan designs, the works showed independent skill and interpretation.

### Fiduciary obligations of copyright owners

A case in 1998 discussed copyright and communal ownership. In *Bulun Bulun v R & T Textiles* an Aboriginal artist created an artwork which incorporated traditional ritual knowledge of his people, the Ganalbingu clan. John Bulun Bulun had permission from his clan to do this, so long as he used the image in accordance with customary laws. The artwork was altered and reproduced without his consent on fabric by textile importers. John Bulun Bulun and George Milpurruru, a senior clan elder took action in the Federal Court. The fabric importer agreed to stop importation and pay damages. The court 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.<sup>4</sup> Whilst John Bulun Bulun could sell the artwork for his own benefit, he was culturally required to look after the encoded knowledge with the clan's interests at heart. If John Bulun Bulun had been unwilling or unable to take action for infringement, then Mr Milpurruru, as representative of the Ganalbingu people, could take action against the infringer.

### International rights update

The United Nations' *Declaration on the Rights of Indigenous People* 2007 states that Indigenous people have a right to control their traditional knowledge (TK) and traditional cultural expressions (TCEs).<sup>5</sup> Australia has yet to endorse this standard-setter.

To examine the need for greater protection of Indigenous cultural rights within intellectual property laws, the World Intellectual Property Organisation (WIPO) has convened an Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression/Folklore since 2001. After 13 sessions, the IGC is divided about whether there should be an international treaty. Their work has focussed on

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<sup>2</sup> Dr Vivien Johnson, *Copyrites, Exhibition Catalogue*, National Indigenous Arts Advocacy Association, Sydney, 1997, p 11.

<sup>3</sup> *Milpurruru v Indofurn Pty Ltd* (1995) 30 IPR 209

<sup>4</sup> *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 530

<sup>5</sup> United Nations, *Declaration on the rights of Indigenous peoples* 2007, <http://www.un.org/esa/socdev/unpfii/en/declaration.html>, viewed 12 January 2009.

developing *Draft Provisions for the Protection of Traditional Cultural Expressions* and *Draft Provisions for the Protection of Traditional Knowledge* which outline an optional framework for countries to consider.<sup>6</sup> Whilst not binding, these documents feature the principles of ‘prior informed consent’ and ‘benefit sharing’, under which Indigenous people must be consulted, properly informed and compensated by anyone wishing to use communally owned cultural expressions. The *Pacific Model Law for the Protection of Cultural Expressions*<sup>7</sup> is another model which recognises the right of traditional owners to control their culture. Five Pacific nations including Palau, Cook Islands and Papua New Guinea are considering laws based on this model.

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<sup>6</sup> World Intellectual Property Organisation, *Draft Provisions for the Protection of Traditional Cultural Expression*, [http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html), viewed 12 January 2009.

<sup>7</sup> Secretariat of the Pacific Community, *Pacific Model Law for the Protection of Cultural Expressions 2002*, New Caledonia, available at [http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc\\_framework.pdf](http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc_framework.pdf).

## Protocols for writing

In Australia the focus has been on protocols. Protocols are ethical in nature, although sometimes made enforceable under contract. The Australia Council for the Arts has published protocols for Indigenous cultural and intellectual property in all areas of the Arts. This includes a protocols booklet specifically for writing.<sup>8</sup> Grant recipients must agree to follow the protocols. The protocols do not establish strict legal requirements but promote an ethical framework of principles. This allows the writer flexibility to tailor the protocols for a particular project, or for working with a specific Indigenous community.

## Including traditional material/stories in your notes

Writing about Indigenous culture will often involve representation of Indigenous traditional stories. By tradition, I refer to a knowledge system, so ‘traditional stories’ are a means of passing on that knowledge system. Using, adapting and incorporating these stories into plots within novels, or even writing versions of these traditional stories, requires authors to think beyond conventional copyright laws. The main question to consider is: Does the work incorporate traditional stories, oral stories or information handed down from generation to generation and belonging to a group? If it does, Indigenous cultural obligations require an Indigenous author to consult the clan and acknowledge the source. Pat Mamanyjun Torres explains how the process of gaining consent for her book, *The Story of Crow*<sup>9</sup>, was a continual dialogue with custodians of the story. She got approval in the research stage to make the story into a children’s book for the purposes of educating all children about her culture. She continued to consult as the material for the book developed, seeking approval of working drafts, and finally the manuscript.<sup>10</sup>

## What about non-Indigenous authors who incorporate Indigenous material into their novels?

The *Guidelines for the Protection of Indigenous Heritage* recommend that ‘artists, writers and performers should refrain from incorporating elements of Indigenous heritage, particularly those of a sacred character, into their works without the prior, free and informed consent of the traditional owners.’<sup>11</sup>

## But should non-Indigenous writers write traditional stories?

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<sup>8</sup> Available at [www.australiacouncil.gov.au](http://www.australiacouncil.gov.au).

<sup>9</sup> Pat Torres, *The story of crow*, Magabala Books, Broome Australia, 1987.

<sup>10</sup> Pat Mamanyjun Torres as cited in Terri Janke, *Writing: Protocols for producing Indigenous Australian writing*, Australia Council for the Arts, Sydney, 2007, p 15.

<sup>11</sup> Madam. Erica-Irene Daes, Special Rapporteur, *Study on the Protection of the Cultural and Intellectual Property [Heritage] of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, 1993.

According to Jackie Huggins, an Aboriginal writer and academic, they shouldn't write children's literature based on them. Quoted in 1997, Huggins said most traditional stories written by non-Indigenous writers, pitched at children, were 'patronising, misconstrued, preconceived and abused.'<sup>12</sup> Given the cultural importance of these stories and the lack of Indigenous voices in Australian literature, shouldn't Indigenous authors be given the opportunity to write these books?

Indigenous storytellers who write books that incorporate Indigenous knowledge often do not want to claim 'ownership' of a traditional story, knowing that it is the cultural asset of their clan. Some do not even want to be named as author. No copyright in the story is claimed at all which means that the story is open to theft. Just as Indigenous visual artists own the copyright in their art that incorporates traditional ritual knowledge, Indigenous authors should be recognised as the copyright owners of their expressed cultural stories, and attribution should be given the clan authors. A copyright statement could deal with it, for example:

Traditional story from Torres Strait Islands.

This version ©Terri Janke, 2008 is made with the permission of the Elders group. It may not be reproduced or adapted in any form without the permission of the author and the Elders group.

Copyright lasts for 70 years after the death of the author. Indigenous authors often do not have wills. Magabala Books includes an heir letter with their publishing contract which allows the author to identify who should control copyright and receive royalties after the author dies.

## Writing about Indigenous people

Some Indigenous people question whether non-Indigenous people should write about Indigenous people at all, be it Indigenous history or the portrayal of an Indigenous character. Copyright does not protect themes or ideas, so it does not stop non-Indigenous people from writing on Indigenous history or topics. Dr Anita Heiss states that the strong view against non-Indigenous people writing about Indigenous people is based on the history of negative representations of Aboriginal and Torres Strait Islanders that has proliferated in the writing world.<sup>13</sup> Yet, if Australian writers are to depict a representative Australian society, they must write about Indigenous characters from diverse backgrounds, with good and bad attributes. When referring to Indigenous culture, they must consult and seek permission when a song, story or cultural fact is used.

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<sup>12</sup> Willa McDonald, 'Tricky Business: White on Black Territory', *Australian Author*, vol 29, no.1, Autumn, 1997, p 13.

<sup>13</sup> Heiss, Anita, 'Writing about Indigenous Australia — Some issues to consider and protocols to follow- A discussion paper,' Australian Society of Authors, Sydney, 2002 available at [www.asauthors.org](http://www.asauthors.org).

In the last ten years, growing awareness of protocols has informed many writers of the need to challenge their own stereotypes and to ask the questions about interpretation and perspective. The Australia Council's Aboriginal and Torres Strait Islander Arts Board, *Writing Protocols* suggest four questions to consider before writing about Indigenous people:

- How will your writing affect the Indigenous group it is based on?
- Does it empower them?
- Does it expose confidential or personal and sensitive material?
- Does it reinforce negative stereotypes?<sup>14</sup>

Kate Grenville consulted Indigenous elders when she wrote *The Secret River*<sup>15</sup> and had an Indigenous writer review her drafts. She said that the process actually made the book better and enhanced her understanding of cultural issues. Her first drafts had a didgeridoo playing in the Aboriginal camps around Sydney Cove, but after consultation she learned there would have been no didgeridoos there at the time.<sup>16</sup>

Phillip Gwynne, the non-Indigenous author of *Deadly Unna*<sup>17</sup> faced a storm of Indigenous anger when his book was made into the film, *Australian Rules*. His book was reported to have detailed the violent death of an Aboriginal boy in a South Australian community. The Aboriginal community called for consultation. The filmmaker considered it censorship. The author was quoted in the media as having said he would never write about Indigenous people again.<sup>18</sup>

Should writers adopt an Indigenous persona for the sake of their craft? When non-Indigenous author Leon Carmen wrote his book *My Own Sweet Time*<sup>19</sup> under the pen name, Wanda Koolmatrie, he submitted it to Magabala Books. His manuscript mimicked the genre of Indigenous life writing that had been published through the 1970s to the 1990s, then Indigenous authors began to get their stories published. There were a handful of Indigenous publishers to promote the authentic Indigenous voice. Using an Indigenous name to sell and market your story may be misleading and deceptive practice<sup>20</sup>, particularly if you submit it for publication to an Indigenous publishing house.

## Writing with Indigenous people

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<sup>14</sup> Terri Janke commissioned by the Aboriginal and Torres Strait Islander Arts Board, *Writing protocols for producing Indigenous Australian writing* (2<sup>nd</sup> ed), Australia Council for the Arts, Sydney, 2007, p 17.

<sup>15</sup> Kate Grenville, *The Secret River*, Text Publishing, Melbourne Australia, 2005

<sup>16</sup> Kate Grenville, Speaking at the Melbourne Writers Festival, 2005.

<sup>17</sup> Phillip Gwynne, *Deadly Unna*, Penguin, Victoria Australia, 1998.

<sup>18</sup> Peter Ellingsen, 'Australian rules', *The Age* (Melbourne), 12 August 2002 as cited in Stephen Gray, 'Imagination, Fraud and the Cultural Protocols Debate: A question of free speech or pornography?' (2004) 9 *Media & Arts Law Review* 23

<sup>19</sup> Wanda Koolmatrie, *My Own Sweet Time*, Magabala Books, Broome Australia, 1994.

<sup>20</sup> Section 52, *Trade Practices Act 1974* (Cwlth)

Some non-Indigenous writers collaborate with Indigenous people to write biographies on the Indigenous person. In many past cases, the Indigenous person did all the telling, and the non-Indigenous person ended up with their name on the book, and the royalty cheque. Copyright laws supported this.

This approach has been challenged as Indigenous people become more aware of their rights. A growing number of non-Indigenous authors are aware of the issues of cultural ownership of stories. The general laws of copyright can be changed by agreement. Copyright can be jointly owned or even assigned to the Indigenous person. To be legally binding, the assignment and vesting of copyright should be in writing.

The non-Indigenous author and academic Dr Kerry McCallum worked with the late Hazel McKellar to write the book *Woman from Nowhere*.<sup>21</sup> 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.’<sup>22</sup> 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 ‘as told to Kerry McCallum’.

At the beginning of an Indigenous biography, the writer could enter into a written agreement with the Indigenous person, with terms that address the collaborative nature of the project by sharing the copyright and benefits:

The Writer and the Subject 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 Subject (including monies received from Public Lending Rights and Copyright Agency Limited).

Publishers would then enter into agreements not just with the Writer, but also the Subject as they both are the copyright owners of the work.

## Attribution

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<sup>21</sup> Hazel McKellar (as told to Kerry McCallum), *Woman from nowhere: Hazel McKellar's story*, Magabala Books, Broome Australia, 2000

<sup>22</sup> Dr Kerry McCallum as cited in Terri Janke, *Writing: Protocols for producing Indigenous Australian writing*, Australia Council for the Arts, Sydney, 2007, p 17.

Attribution is about acknowledging where a story originates. Under the moral rights provisions of the *Copyright Act 1968* the right of attribution is recognised for individual creators only. In 2003, a draft Indigenous Communal Moral Rights Bill proposed amendments which would give moral rights to Indigenous groups. The Bill has not been tabled in parliament and it is uncertain if it will proceed until the Rudd Government sets its direction for Indigenous cultural and intellectual property rights.

In the past and even today, Indigenous people have been used as informants for research, evaluations and theses. Today, Indigenous people are seeking greater acknowledgment than being recognised as mere informants. They seek the right to be acknowledged as owners of their knowledge and stories.

It is also important to attribute the cultural source of a story. For example, a story from a particular clan group should be attributed in each and every publication.

Larissa Behrendt incorporates stories from her clan, the Eualeyai, in her novel *Home*. To acknowledge their source she makes the following acknowledgment in the book: ‘The stories of the Eualeyai that appear here belong, as they always have, to the Eualeyai people. I heard these stories from my father.’<sup>23</sup>

## Editing Indigenous books

Given the small number of Indigenous editors working in the publishing industry, it is most likely that an Indigenous author’s work will be edited by a non-Indigenous author. In the editorial process, the editor will suggest changes and which may affect cultural integrity. The editorial process can have a large impact on how the final document is presented and interpreted. The editing process can diminish writers. There are concerns that non-Indigenous editors often misunderstand the content of their manuscripts, and often alter language and style to cater for a mainstream non-Indigenous audience.

Margaret McDonnell describes her experience as a non-Indigenous editor working on an Indigenous writer’s manuscript as ‘an exercise in cross-cultural communication and negotiation.’<sup>24</sup> McDonnell edited Ruth Hergarty’s work, *Is that you, Ruthie?* McDonnell says ‘There are two separate aspects to the issue of community that need to be considered: the first is the notion of one’s self as part of a community, the second is the notion of the right or responsibility of an individual to tell a particular story, which entails responsibilities to the community.’

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<sup>23</sup>Larissa Behrendt, *Home*, University of Queensland Press, St Lucia QLD, 2004, p. 319.

<sup>24</sup> McDonnell, Margaret, 2004, ‘Protocols, political correctness and discomfort zones: Indigenous life writing and non-Indigenous editing’, [online]. *Hecate*, v.30, no.1, 2004: 83-95. Availability: <<http://search.informit.com.au.ezproxy.scu.edu.au/fullText;dn=200408085;res=APAFT>> ISSN: 0311-4198. [viewed 28 Nov 08].[http://findarticles.com/p/articles/mi\\_hb6655/is\\_/ai\\_n29107530/McDonnell.pdf](http://findarticles.com/p/articles/mi_hb6655/is_/ai_n29107530/McDonnell.pdf)

## Indigenous cultural mourning practices

The practice of restricting the use of images and names of deceased Aboriginal people also raises issues for writers, editors and publishers. Michael Jacklin, Associate Research Fellow from the University of Wollongong notes:

Difficulties... stem from the fact that Indigenous mourning practices vary from community to community, or even between families, but also from the changes being experienced in customary practice, in reaction to both technology and the increasing likelihood of non-Indigenous interest in or impact on sorry business.<sup>25</sup>

Wandjuk Marika and Jennifer Isaacs began writing Wandjuk's life story together. The process involved careful consideration of text and photographs being careful not to disclose any sacred or secret material in. Before publication Wandjuk passed away and the publication of the book *Wandjuk Marika: Life story* was suspended for eight years due to name and image restrictions relating to cultural mourning practices. The names of other family members who had passed away were omitted from the text.<sup>26</sup>

At the Residential Editorial Program in 2006, Marg Bowman, then senior editor of IAD Press, spoke of her experience of working on a biography of Mr Rubuntja, a senior Indigenous artist and law man. As he was an old man, they had to ask the question: should his photograph go on the cover? The artist was clear that he wanted his image on the cover. He also asked for the book to remain in circulation after he died.<sup>27</sup> A developing practice is to discuss this with the relevant Indigenous people at the time the book is being put together. It could also be a term covered in the publishing agreement in the same way that filmmakers are now including such terms in performer's releases.<sup>28</sup>

Warnings about deceased references in books are becoming common in Australian publishing. The following example comes from *The little red yellow black book: an introduction to Indigenous Australia*, 2008, published by Aboriginal Studies Press:

Aboriginal and Torres Strait Islander peoples are respectfully advised that this publication contains the names and images of deceased people. The Australian Institute of Aboriginal

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<sup>25</sup> Michael Jacklin, 'Collaboration and closure: Negotiating Indigenous Mourning Protocols in Australian Writing', *Antipodes*, Vol. 19 no. 2 (December 2005), pp 184-191, at p 185.

<sup>26</sup> *Ibid*, p 188.

<sup>27</sup> W Rubuntja, *The Town Grew Up Dancing: the life and art of W Rubuntja*, with Jenny Green, Jukurpa Books, 2002.

<sup>28</sup> Terri Janke, *A guide to protocols for filmmakers working with Indigenous content and Indigenous communities*, Screen Australia, 2008, available from [www.screenaustralia.gov.au](http://www.screenaustralia.gov.au).

and Torres Strait Islander Studies (AIATSIS) apologises for any distress this may inadvertently cause.<sup>29</sup>

## Sacred and secret material

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). Indigenous people are of the view that books should not publish sacred and secret material.

In 1977, as a result of the *Foster v Mountford*<sup>30</sup> case, a book containing secret sacred information to the Pitjantjatjara men was withdrawn from sale in the Northern Territory.<sup>31</sup> 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 publisher HarperCollins apologised for offending Indigenous Australians in September 2008, after Indigenous groups complained that a pending edition of *The Daring Book for Girls*<sup>32</sup> included girls playing the didgeridoo. For many Indigenous groups, the playing of the didgeridoo is culturally restricted for men only. The publisher showed cultural respect by removing the content from the edition.

## Traditional custodian’s notice

As discussed above, the court in *Bulun Bulun v R & T Textiles* found that copyright owners may have a duty to ensure their copyright material is not used in ways that conflict with cultural obligations. As a result, the Arts Law Centre of Australia drafted a traditional custodian’s notice to be displayed alongside artworks with 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).

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<sup>29</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *The little red yellow black book: an introduction to Indigenous Australia*, Aboriginal Studies Press, Canberra, 2008.

<sup>30</sup> *Foster v Mountford* 14 ALR 71, 1997.

<sup>31</sup> Charles Mountford, *Nomads of the Australian Desert*, Rigby, 1976.

<sup>32</sup> Andrea Buchanan, *The Daring book for girls*, HarperCollins Publishers, Pymble, Australia, 2008.

Similar notices could be used for published knowledge and stories. Notices included in published documents and websites will put the users of this content 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 could be used in a book on Indigenous plant knowledge:

The language and information contained in this book includes traditional knowledge and traditional cultural expressions of the (name of Indigenous group). The information is published with the consent of the traditional owners.

This information should not be used without observing the Indigenous cultural protocols of prior informed consent, attribution to traditional Indigenous communities, cultural integrity, and the sharing of benefits. Contact the traditional owners at (contact details.)

## Publishing agreements

Publishing agreements can also give effect to Indigenous cultural and intellectual property rights. Magabala Books has had extensive experience dealing with cultural interests in their publishing contracts and practices. Some of the culturally flexible approaches Magabala Books has developed include:

1. Including an heir letter as an appendix to a contract so that the author or copyright owner can state who they want to look after the copyright and receive royalties after their death.
2. If a cultural story of history is mostly collectively owned and culturally significant, an Aboriginal organisation holds the copyright, and the publishing contract is entered with that organisation.
3. Where a book project has involved the writing and recording of an Indigenous person's story by a non-Indigenous writer, Magabala Books has used a commission agreement to recognise joint ownership of copyright. They have also negotiated staged withdrawal by non-Indigenous recorders from royalty schemes and subsidiary licences.
4. Indigenous community organisations are used heavily for approval of proposed material for publication. Organisations such as the Kimberley Aboriginal Law and Culture Centre are asked to review materials to consider whether they are culturally appropriate for wide dissemination.<sup>33</sup>

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<sup>33</sup> Magabala Books, Submission to *Our Culture, Our Future*, as cited in Terri Janke, *Our Culture, Our Future*, p 221.

To help Indigenous authors understand the publishing process, Aboriginal Studies Press has produced an *Information Kit for Indigenous Authors*.<sup>34</sup> It not only explains the process but outlines the terms and conditions in a publishing contract. Understanding the cultural responsibilities Indigenous authors have to their communities, ASP has inserted a dispute resolution clause which allows for good faith negotiations if the publishing process conflicts with any cultural obligations. The clause promotes mediation of any disputes before commencing legal action.

Indigenous writers identified copyright protection as a ‘serious and unresolved problem’, according to the 2000 study, *To tell my Story*.<sup>35</sup> Many felt unaware of copyright law and ill-equipped to deal with intellectual property issues. Understanding the terms and conditions of a publishing deal are to a large extent industry issues that are shared with all writers. The Australian Society of Authors’ publications - *Australian Book Contracts* and *Between the Lines: A Legal Guide for Writers and Illustrators* - are useful references.<sup>36</sup>

The Arts Law Centre of Australia recommends that a writer seek legal advice before entering a publishing contract.<sup>37</sup> The Centre also established Artists in the Black in 2004 to provide copyright advice to Indigenous creators, including writers.<sup>38</sup>

### **Benefit sharing**

Another principle of ICIP rights is benefits sharing. The value of the Indigenous people’s contribution must be not only acknowledged but remunerated. Some ways that this can be done include paying Indigenous contributors fees at appropriate industry rates, assisting with training and skills development or by paying a royalty fee. Even if copyright in the book is owned by the writer, it is possible to make payments to Indigenous people for including Indigenous cultural and intellectual property in the book in the same way a poem or song might be remunerated for inclusion in another author’s work.

Writers should also consider the cultural legacy that they will leave to future generations. How will future Indigenous generations get access to these stories? Making books available to communities or depositing copies at the Australian Institute of Aboriginal and Torres Strait Islander Studies are some ways to promote cultural maintenance. A problem for some Indigenous people who reclaim archival records of deceased ancestors is copying or adapting content in new

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<sup>34</sup> Aboriginal Studies Press, *Information Kit for Indigenous Authors*, Aboriginal Studies Press, Canberra, 2006 – available from [http://www.aiatsis.gov.au/aboriginal\\_studies\\_press](http://www.aiatsis.gov.au/aboriginal_studies_press).

<sup>35</sup> Cooper, Judi with Dr Helen Molnar, Christine Morris and Mark Colbert, MC Media & Associates *To Tell My Story: A study of practising professional Indigenous writers of Australia*, Research Report, Australia Council for the Arts, 2001, p 43.

<sup>36</sup> *Australian Book Contracts* (3rd ed, 2001), Barbara Jefferies et al, Keesing Press and *Between the Lines: A Legal Guide for Writers and Illustrators* (2004) by Lynne Spender.

<sup>37</sup> Isolde Lueckenhausen, ‘Legal Resources for Writers and Online Publishing Tips’, *ART + Law*, December 2008, pp 8-10.

<sup>38</sup> Arts Law Centre of Australia, [www.artslaw.com.au](http://www.artslaw.com.au).

publications. The archives are bound by copyright and require permission of the ‘author’ prior to publication.

## Conclusion

Indigenous cultural and intellectual property rights are about respecting the right of Indigenous people to maintain their cultures. Like other copyright material, consent is required to use and adapt it in your own works. Stories and knowledge are connected with place. It is fundamental to acknowledge the origin or source. Stories link Indigenous people, place, the past and the future. Guarding cultural integrity is a responsibility of Indigenous custodians.

Indigenous people call for greater recognition of their Indigenous cultural and intellectual property rights. There are some important international developments like the work of WIPO and the Declaration on the rights of Indigenous people that set standards for legal frameworks for protection. In Australia, there are no proposals for specific laws but the 2008 Apology to Indigenous Australians offers an opportunity for a new beginning.

In the absence of specific Indigenous intellectual property laws, copyright is an important tool for the protection of Indigenous cultural and intellectual property. With knowledge of Indigenous cultural and intellectual property rights and copyright, writers, publishers and Indigenous people can work together to keep Indigenous cultures strong.