

Protocols for producing Indigenous Australian media arts

Media arts

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ISBN 978-1-920784-36-2

Design Bright Red Oranges

Print e2e managment pty ltd

Cover Christian Bumbarra Thompson, *Emotional Striptease* 2003. Image courtesy of the artist and Gallery Gabrielle Pizzi.

Indigenous design element:
joorroo, Darrell Sibosado 2002

The Australia Council respects Indigenous communities and culture. Readers should be aware that this protocol guide may contain references to members of the Indigenous community who have passed away.

IMPORTANT NOTICE

The information included in this guide is current as at September 2007. This document was first published under the title 'New Media Cultures' in 2002. This guide provides general advice only. 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.

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Introduction

Australia's unique Indigenous artistic and cultural expression is rooted in thousands of years of heritage and continuing practice.

When the Musée du Quai Branly opened in Paris in 2006, visitors were spellbound by the immense power of the vast collection of Australian Indigenous artworks, including special landmark commissions on the ceilings and façade by eight of Australia's best known Indigenous contemporary artists. In May 2007, Emily Kngwarreye's *Earth's Creation* was sold at auction for more than \$1 million, the highest price ever for a painting by a female artist in Australia.

While works by individual artists such as these are protected by copyright, there are often no legal rights around the broader reproduction and use of Indigenous cultural heritage material. Australia does not yet have a law that prevents alteration, distortion or misuse of traditional symbols, songs, dances, performances or rituals that may be part of the heritage of particular Indigenous language groups.

That is where the Australia Council for the Arts' protocol guides come in. The five guides in the suite spell out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material. They can help people to do the right thing.

These guides recognise that in Indigenous Australian communities the artist is a custodian of culture, with obligations as well as privileges.

The five guides in the suite are:

- Media arts
- Music
- Performing arts
- Visual arts
- Writing.

They are relevant to anyone working in or with the Indigenous arts sector, including:

- Indigenous and non-Indigenous artists
- people working within related fields of Indigenous artform practice
- Australian and state/territory government agencies
- industry agencies and peak organisations
- galleries, museums and arts centres
- educational and training institutions
- Indigenous and targeted mainstream media.

The protocol guides endorse Indigenous cultural and intellectual property rights – the rights of Indigenous people to own and control their cultural heritage. These rights are confirmed in the 2006 *United Nations Declaration of the Rights of Indigenous Peoples*¹, which says Indigenous people have the right to practice and revitalise their cultural traditions and customs. 'This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.'

In *Our culture: our future*², Terri Janke recommended significant changes to laws, policy and procedures to protect Indigenous cultural knowledge and expression. The Australian Government has yet to make a determination on this matter.

In Australia, Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people have a living heritage. Their connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, music, the visual arts, and media arts are the mediums for transmitting Indigenous cultural heritage.

As primary guardians and interpreters of their cultures, Indigenous people have well-established protocols for interacting with their cultural material. New situations also require cultural protocols.

Although each guide in the suite addresses cultural protocols specific to an artform, the same underlying principles are common to each.

We hope Indigenous people, and those working with them, will be inspired and encouraged to use the principles as a framework for developing protocols appropriate to their specific projects, language groups, regions and communities.

We also hope the guides will spark debate and that additional protocols will be developed across artforms.

Send any comments about this guide or any suggestions for improvement to the Australia Council for the Arts:

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Using this guide

This guide is designed to be an initial point of reference in planning a work of media art with Indigenous media art practitioners, or using Indigenous cultural material in such a work. When you need specific advice on the cultural issues of a particular group, we recommend you speak to people in authority or engage an Indigenous cultural consultant with relevant knowledge and experience.

Reading this guide from cover to cover is an important and highly recommended first step.

The introduction defines protocols as used in this guide, and looks at the special characteristics of Indigenous media art.

The Indigenous heritage section gives an overview of the issues that inform the development of Indigenous protocols. It explores the complexity of Indigenous Australia and charts international initiatives for the protection of Indigenous cultural and intellectual property rights.

The principles and protocols section examines the nine principles that support the protection of Indigenous cultural heritage. It includes valuable information on protocols specific to the use of cultural heritage material in media arts practice. A number of case studies and commentaries from Indigenous media artists identify pitfalls and offer readers valuable advice.

The guide also contains general information and advice on the main laws in Australia governing the use and reproduction of arts and cultural expression. For this second edition, we have integrated copyright, licensing and royalty information into the principles and protocols section. So one section deals with attribution and copyright and another with proper returns and royalties.

The implementation section summarises some of the key points and provides a checklist for applying protocols to a media arts project.

We have also included a list of contacts and references to access relevant people and information.

What are protocols?

In 1997, when media art was an emerging field, many Indigenous commentators noted the potential for that artform to reproduce and deal with Indigenous cultural content in unprecedented ways. Indigenous artists and communities were keen to participate, however, media art allowed Indigenous cultural material to be copied, digitised and altered in ways that were not previously possible. Hence, as Wal Saunders has noted, 'this enthusiasm is tempered by concerns about process and protocol'.³

Protocols define appropriate ways of using Indigenous cultural material, and interacting with Indigenous people and their communities. They encourage ethical conduct and promote interaction based on good faith and mutual respect.

Indigenous protocols arise from value systems and cultural principles developed within and across communities over time.

Responsible use of Indigenous cultural knowledge and expression will ensure that Indigenous cultures are maintained and protected so they can be passed on to future generations.

It is important to recognise the diversity and complexity of the many different Indigenous cultures in Australia. Ways of dealing with issues and cultural material may differ from community to community. There are also many different protocols across diverse urban, rural and remote communities.

While it is not possible to prescribe universal rules for engaging with Indigenous people and their communities, there are some fundamental principles within which to conduct respectful work. The protocols outlined in this guide are shaped by nine fundamental principles. The protocols are, by definition, ways of applying these principles. For example, a cultural protocol to action the underlying principle of respect is to acknowledge the Indigenous custodians of country at the site of each performance or installation, or in the introductory on-screen text in a screen-based project.

The guide also aims to formally identify issues arising from the interaction between Indigenous cultural concerns and the law protecting the rights of artists. The Australian legal system incorporates some but not all of these concerns.

Protocols differ from legal obligations, so the guide outlines the current copyright law framework. The process of following the protocols supports the recognition of Indigenous heritage rights. It encourages culturally appropriate working practices and promotes communication between all Australians with an interest in Indigenous media art.

What is media art?

*As with all things experimental, there is confusion around the area of media arts; the edges are blurry and definition bleeds across forms.*⁴ Jenny Fraser

Media art is generally a collaborative practice where artists engage digital technologies and cross-disciplinary artforms to produce a range of performance, installation and screen-based artworks. It can also explore the creative synthesis of art and emerging science and technology fields.

Media art is sometimes referred to as cross-disciplinary art, hybrid art or art fusion.

As Samara Mitchell describes it:

*Media artists often employ existing mediums such as photography, painting, filmmaking and performance, and combine these mediums in new ways, or forge them with emerging technologies (such as digital video, electroplating), or in methodology, such as an artist working alongside geneticists to sculpt with stem cells. The results aim to generate a new medium for conducting ideas and experiences that are invoked by being on the threshold of cultural discovery.*⁵

The subject matter of media is diverse and resists categorising. Some examples of media art include:

- creative web-based projects
- new applications of film or video
- installations incorporating mixed forms of art, such as sculpture, sound and visual technologies
- hybrid performance practice
- digital manipulation of images such as photographs or video (enhanced, adapted, and/or mixed)
- computer-generated art such as DVDs and CD-ROMs, including games and databases.

There are two fundamental aspects of media art that suggest the 'newness'.

- How the work is created – often through cross-disciplinary or hybrid practices where artists collaborate across artform, culture and/or fields of practice.
- How the work is transmitted and made accessible to the audience – often involving integration of text, pictures, video, sound and the use of technologies as a mode of delivery. The integration determines the interactivity and/or how the audience engages with the work, either through a public event or via screen-based technologies such as a CD-ROM, DVD, video or film.

It is not necessary for all media artists to employ emerging technologies in the creation of their work. Hybrid performance and installations can be produced using traditional artforms that are fused into something new.⁶

Among key organisations with a media art focus are the following:

Australian Network for Art and Technology (ANAT)

ANAT is the peak network and advocacy body for media artists working in screen, sound, installation, performance, literary and networked arenas. ANAT creates opportunities for connection, collaboration, innovation, research and development, both nationally and internationally. It represents the concerns of art and technology practitioners all over the world. ANAT offers a range of national professional development initiatives for emerging and established artists and curators. It provides opportunities for professional and skills development of Indigenous artists in areas of emerging and media arts practice.

For more information visit its website at <www.anat.org.au>.

Australian Centre for the Moving Image (ACMI)

ACMI at Federation Square in Melbourne is a state-of-the-art centre for the exhibition, collection, preservation and appreciation of Australian screen-based arts. The centre showcases the moving image in all its forms – film, television, multimedia, games, video, internet and digital media. ACMI features the world's largest digital media gallery, a unique exhibition space for innovative Australian and international screen-based art, including interactive installations, large-scale projections and immersive environments. It offers production facilities and a diverse range of educational programs.

For more information visit its website at <www.acmi.net.au>.

The special nature of Indigenous media art

Indigenous media artist, Jason Davidson, sees the power of media art to deliver in many ways. He says:

*It seems as though the non-Aboriginal community has moulded us into what they accept to be Aboriginal. Many non-Aboriginal people seem to believe that the only way Aboriginal people can tell a story is through a painting. By including new media or multimedia as a way of artistically telling a story we are also expanding our boundaries of artistic expression. Young people should be encouraged to not only paint but to also incorporate and combine new skills of new media technology so we have a future.*⁷

Media is a steadily developing field of Indigenous arts practice. In this century Indigenous cultural expression spans all artforms and can include digital technologies and hybrid art practices.

According to a report by ANAT, access to media technologies is an issue for Indigenous artists.

Indigenous artists with an interest in media technologies often feel locked out of this developing area. This is in part due to the difficulties (both perceived and real) of either accessing or obtaining the equipment required to learn these new skills.⁸

The growing number of Indigenous artists practising media art include Brook Andrew, Tina Baum, Gordon Bennett, Brenda L Croft, Jason Davidson, Destiny Deacon, Jason De Santolo, Jenny Fraser, Cam Goold, Dianne Jones, Jonathon Jones, Christian Thompson, Karen Casey, Gary Lee and Rea.

The different forms of work are diverse and range from digital manipulation of photographs and CD-ROM to performance and installation art.

The artists in this field give various reasons for the special nature of this medium as a form of Indigenous cultural expression. These include:

- facilitating ongoing transmission of information
- recording community knowledge
- recording oral histories/life stories
- community ownership of stories
- cultural reclamation and maintenance
- entertainment
- personal and community healing (e.g. stories of the Stolen Generation)
- educating the broader community about Indigenous issues
- educating Indigenous communities about local and national Indigenous issues.

Indigenous media artists continue to draw from the wealth of Indigenous cultural heritage, using cultural expression and knowledge to create media works that tell Indigenous stories and reflect on Indigenous experience.

Media art is an incorporation process. This raises issues for Indigenous media artists in the use of cultural heritage and appropriate representation and production of this material.

Indigenous artists may need to incorporate cultural respect protocols when dealing with their cultural heritage material. This is particularly important because technology makes it easier to combine, copy and manipulate materials without permission from Indigenous custodians. It is traditional for Indigenous artists to incorporate cultural respect within their art practice.

When the digital form became available it was scrutinised very carefully by Indigenous communities. Now a growing number of Indigenous artists and communities use new technology in their projects. When working with the digital form, these communities seek to guard the integrity of important cultural material. For this reason, respect for cultural protocols is an important step in the process of creating Indigenous media works, or using Indigenous cultural material.

Some of the issues to be considered include:

- Who has the right to use Indigenous cultural material? Is it communally owned?
- Can a particular item of Indigenous cultural material be adapted or altered?
- What is the proper treatment of Indigenous cultural material, including creation stories and language group images?
- How should the artist properly attribute the Indigenous community when using Indigenous cultural information?

Indigenous heritage

Media is an important means of expressing Indigenous heritage – past, present and future. Indigenous heritage, enshrined in Indigenous cultural and intellectual rights, is discussed at length in *Our culture: our future*⁹. Under

copyright laws these rights are not always protected, and this is why we encourage the use of Indigenous protocols.

The media arts sector can adopt a best practice approach by encouraging respect for the cultures of Indigenous Australians. It can do this by acknowledging their innate value and their difference from other cultures, and by respecting ownership and control of Indigenous heritage.

All Indigenous artists are responsible for safeguarding cultural knowledge. They need to ensure that Indigenous cultures, both in the past and today, are protected and maintained in their works. In this way these cultures can be passed on to future generations.

There are many Aboriginal and Torres Strait Islander cultures, which have developed over thousands of years and have been passed down from generation to generation. Despite the enormous impact of the invasion in 1788, Indigenous cultures have continued to develop.

The connection to heritage is expressed in contemporary life by an individual's relationship with land, waterways, animals and plants, and through relationships with other people.

Aboriginal and Torres Strait Islander people have a well-developed and complex web of relationships based on family ties, language group affiliations and community, organisational and government structures. A range of authority structures exists across urban, regional and remote communities. It is important to acknowledge the complexity of Indigenous Australia when negotiating the use of Indigenous heritage for a media art project.

Indigenous Australians are concerned that there is no respect for their cultural knowledge, stories and other cultural expression in the wider Australian cultural landscape. Concerns include the current legal framework that does not promote or protect the rights of Indigenous

people – particularly to own and control representation and dissemination of their stories, knowledge and other cultural expression.¹⁰

The process of following the protocols not only supports Indigenous heritage rights, but also promotes diversity and new initiatives in media, and culturally appropriate outcomes.

Our culture: our future

Indigenous cultural and intellectual property rights refer to Indigenous people's cultural heritage.

Heritage comprises all objects, sites and knowledge – the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory.

Indigenous people's heritage is a living heritage that includes objects, knowledge, artistic, literary, musical and performance works which may be created now or in the future.

Indigenous cultural and intellectual property rights include the right to:

- own and control Indigenous cultural and intellectual property
- ensure that any means of protecting Indigenous cultural and intellectual property is based on the principle of self-determination
- be recognised as the primary guardians and interpreters of their cultures
- authorise or refuse to authorise the commercial use of Indigenous cultural and intellectual property, according to Indigenous customary law

- maintain the secrecy of Indigenous knowledge and other cultural practices
- full and proper attribution
- control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

For a full list of rights see *Our culture: our future – report on Australian Indigenous cultural and intellectual property rights*.¹¹

Current protection of heritage

Australia's current legal framework provides limited recognition and protection of Indigenous heritage rights. *Our culture: our future* recommended significant changes to legislation, policy and procedures. As yet there has been no formal response to these recommendations from the Australian Government. However, there are proposals to amend the *Copyright Act 1968* (Cth) to recognise Indigenous communal moral rights. In the absence of laws that protect Indigenous cultural and intellectual property, much of the rights recognition has been done at an industry and practitioner level, through the development of protocols and use of contracts to support the cultural rights of Indigenous people.

Across the world, Indigenous people continue to call for rights at a national and international level. Indigenous people are developing statements and declarations that assert their ownership and associated rights to their cultural heritage. These statements and declarations are a means of giving the world notice of the rights of Indigenous people. They also set standards and develop an Indigenous discourse that will, over time, ensure that Indigenous people's cultural heritage is respected and protected.

These rights are given international recognition in the *United Nations Declaration of the Rights of Indigenous Peoples*.¹² Article 31 states:

1. *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.*

2. *In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*¹³

The *Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights* urges Indigenous people to 'develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge'.¹⁴

The *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People* (1993)¹⁵, which were adopted by the former Aboriginal and Torres Strait Islander Commission's Indigenous Reference Group in 1997, state:

Artists, writers and performers should refrain from incorporating elements derived from Indigenous heritage into their works without the informed consent of the Indigenous owners.

Internationally, the World Intellectual Property Organisation (WIPO) has established an intergovernmental committee on intellectual property and genetic resources, traditional

knowledge and folklore to discuss intellectual property issues that arise in the context of:

- access to genetic resources and benefit-sharing
- protection of traditional knowledge, innovations and creativity
- protection of expressions of folklore.¹⁶

Based on its extensive international, regional and national experience and on input from different countries, the WIPO intergovernmental committee developed two important documents, which outline policy options and legal options for traditional cultural expression and knowledge. These are:

- The protection of traditional cultural expressions/expressions of folklore; Draft objectives and principles¹⁷
- The protection of traditional knowledge; Draft objectives and principles.¹⁸

The latest WIPO provisions for the protection of traditional cultural expressions (TCEs) suggest three layers of protection tailored to different forms of cultural expression. It says TCEs of particular religious and cultural significance should be noted in a public register so there is certainty as to which are protected and for whose benefit. The items in the register would be afforded a form of protection similar to that given by intellectual property rights legislation.

It recommends in Article 3, that when TCEs have been registered or notified, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent certain acts taking place without its free, prior and informed consent.

With TCEs other than words, signs and names, these acts include:

- the reproduction, publication, adaptation and communication to the public and adaptation of its traditional cultural expressions

- any use of traditional cultural expression which does not acknowledge in an appropriate way the community as the source
- any distortions, mutilations or other modification of or inappropriate action in relation to the traditional cultural expression
- the acquisition or exercise of intellectual property rights over the traditional cultural expression adaptations of them.¹⁹

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.²⁰ The prior, informed consent of traditional owners is required to:

- reproduce or publish the traditional knowledge or expressions of culture
- perform or display the traditional knowledge or expressions of culture in public
- 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
- use the traditional knowledge or expression of culture in any other form.

Principles and protocols

A framework for respecting Indigenous heritage includes the following principles:

1. Respect
2. Indigenous control
3. Communication, consultation and consent
4. Interpretation, integrity and authenticity
5. Secrecy and confidentiality
6. Copyright and attribution
7. Proper returns and royalties
8. Continuing cultures
9. Recognition and protection.

In the following pages, under each of these principles, we have suggested protocols for using Indigenous cultural material, and interacting with Indigenous artists and Indigenous communities.

1. Respect

Respectful use of Indigenous cultural material and information about life experience is a basic principle.

Acknowledgment of country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia. As such they have a strong link to country, meaning the totality of life and the spirit of the particular area of land they and their ancestors inhabited.

In *Nourishing Terrains*, Deborah Bird Rose says:

Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place,

such as one might indicate with terms like 'spending a day in the country' or 'going up the country'. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart's ease.²¹

When organising an installation, performance or event of local, state or national significance, it is respectful to invite a representative of the traditional owners to attend and give a welcome to country address. An Indigenous custodian of the land gives such an address during the official openings of events. As a matter of cultural protocol, large cultural events should invite an Indigenous custodian or representative of the traditional landowner group to provide a 'welcome to country'. Alternatively, a prominent Indigenous person or an elder who has lived in the area and contributed to the Indigenous community may also be asked to acknowledge country if they are not in a position to welcome.

It is respectful for others who are speaking officially to also acknowledge country and custodians at the site of the event. This could be done by the master of ceremonies making an introductory acknowledgment to the traditional owners of the land.²²

Seek advice from the Indigenous community on the preferred manner of acknowledgment, and the relevant groups to be acknowledged.

It is important to acknowledge country and custodians at the site of each performance, installation and event, or in the introductory on-screen text in a screen-based project.

Seek advice from the Indigenous community on the preferred manner of acknowledgment.²³

Museums and Galleries of NSW has published a written 'welcome to country' protocol available from their website at <www.mgns.org.au>. This is a useful guide

for artists and galleries to prepare for launches and events.

Accepting diversity

Indigenous culture is diverse. Culture varies depending on the Indigenous country (area of land within Australia) and particular language groups. Indigenous artists come from many different backgrounds, learn their art in many different ways, and develop their media works in many different styles.

Representation

Indigenous people and their cultures need to be represented in a manner preferred by those cultures. Inappropriate or outdated perspectives and terminology should be avoided. It is important to consult the relevant groups about this.

Living cultures

Indigenous cultures are living and evolving entities – not historical phenomena. Indigenous artists draw upon their pre-existing cultural base in many different ways.

It is important to respect the diversity of cultural expression in Indigenous media art, and acknowledge its ongoing development through different styles and forms.

2. Indigenous control

Indigenous people have the right to self-determination in their cultural affairs, and expression of their cultural material. There are many ways in which this right can be respected in the development of media works.

One significant way is to discuss how Indigenous control over a project will be exercised. This raises the issue of who can represent language groups and give permission to use traditionally and collectively owned material.

To consult effectively and gain consent for use of Indigenous cultural material in a particular project, the Indigenous people with authority for specific geographic locations, stories, rhythms, song cycles and images need to be identified.

Speaking to the right people is very important. Indigenous communities, whether regional, urban or remote, have an infrastructure of organisations and individuals who can advise on a range of issues – including guidance about locating Indigenous people with authority to speak for specific Indigenous cultural material.

For initial inquiries and contacts, consult the following websites and directories:

- Department of the Environment, Water, Heritage and the Arts, *Indigenous Visual Arts and Crafts Resources Directory 2006*. Available from the Indigenous Visual Arts section, on (02) 6171 1000.
- Association of Northern and Kimberley Aboriginal Artists of Australia (ANKAAA) at <www.ankaaa.org.au>, the peak advocacy and support agency for Aboriginal artists and arts centres located in the regions of Arnhem Land, Darwin/Katherine, Kimberley and Tiwi Islands. Information and contact details of arts centres in these regions are available at <www.aboriginalart.org>.
- Desart. For contact details of Central Australian Aboriginal arts centres, at <www.desart.com.au>.
- UMI Arts represents Queensland Cape York Art producing communities. Tel: 07 4041 6152; Fax: 07 4041 6542; Email: umiarts@bigpond.net.au
- Ananguku Arts and Culture Aboriginal Corporation. The lead agency for visual and performing arts development in Anangu Pitjantjatjara Yankunytjatjara Lands, South Australia, at <www.ananguku.com.au>.
- Torres Strait Regional Authority. For contact information regarding the Torres Strait, at <www.tsra.gov.au>.
- *The Black Book Directory 2005*, Indigenous Arts & Media Directory. Published by Blackfella Films and Australian Film Commission, available online at <www.blackbook.afc.gov.au>.

- Black Pages Directory is Australia's first and only national online Indigenous Business and Community Enterprise Directory, at <www.blackpages.com.au>.
- Australian Institute of Aboriginal and Torres Strait Islander Studies has links to a list of Aboriginal and Torres Strait Islander organisations, at < www.aiatsis.gov.au/library/links/atsti_links >.
- Information on Indigenous media artists can be found at Blackout Collective, at <www.fineartforum.org/Gallery/cybertribe/blackout> and CyberTribe Indigenous Art Online, at <www.fineartforum.org/Gallery/cybertribe>.
- Aboriginal arts and crafts centres. For a contact list see the Indigenous Visual Arts and Craft Resource Directory, in the first point above.

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, permission must be obtained from the local land council or trust, or the community council concerned. For information, consult the land council in the region you intend to visit or, for the Torres Strait, contact the Torres Strait Regional Authority.

Some other useful starting points for inquiries include:

- Aboriginal land councils
- Office of Indigenous Policy Coordination (Indigenous Coordination Centres)
- Torres Strait Regional Authority
- Island Coordinating Council
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- Indigenous unit of the Australian Film Commission
- relevant individuals or family members
- elders and custodians of relevant Indigenous language groups
- Indigenous arts centres

- Indigenous media organisations
- Indigenous language centres
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries
- state and territory government arts departments in New South Wales, Western Australia, Queensland, South Australia, Tasmania and Northern Territory, which have staff dedicated to Indigenous arts programs.

Media artist Vynette Wright offers some advice on locating relevant Indigenous custodians:

Sometimes the lines of custodianship over traditional cultural material are like a tangled web. Different language groups, clans and families may share common songs, stories, dances and designs. Cultural disruption has led to confusion and conflict over who controls the right to use and exploit this lore. If there is such conflict the media artist can decide not to use the material or to seek out the senior custodians of each group. Most custodians and community desire our cultural heritage to be revived and restored and strongly emphasise the need for cultural transmission to younger generations. These custodians tend to consider traditional law first and their duties to transmit knowledge to youth as a priority. So a media project can be unifying, if senior elders consent to material being used. If the elders give their consent (a consent form is suggested), the majority of people in their respective mobs will relax and show strong support.²⁴

Engaging Indigenous contributors

When engaging Indigenous contributors in a project, most organisations use the Australian Government's definition of Aboriginal and Torres Strait Islander identity as a guide. The Australia Council's Aboriginal and Torres Strait Islander arts board requires a confirmation of Aboriginal/

Torres Strait Islander identity to be signed. Applicants must provide:

- confirmation of identity from an organisation registered under the *Aboriginal Councils and Associations Act 1976* or since July 2007, registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, or other relevant legislation, plus
- a declaration that they are of Aboriginal or Torres Strait Islander descent, identify as such and are accepted as such in the community in which they live.

3. Communication, consultation and consent

It is only natural for works to reflect the Australian experience, but the intention to include Indigenous experiences needs to go through a consultative process of collaboration and acknowledgment.

Jenny Fraser²⁵

Media artists may use material from any artform to create their works. For instance, a CD-ROM might include artworks, old photographs and songs. The cultural content may range from sensitive to more openly available material.

By communicating and consulting with the relevant Indigenous people and groups you can be better informed about the issues in using this material before seeking their formal consent.

Communication, consultation and consent is an important first step when developing and planning media projects and when reproducing and including existing cultural material.

Case study: Consultation for a CD-ROM – *Walkabout Walkabout Bulurru*

Vynette Wright, a Yidinji artist, is working on a CD-ROM, *Walkabout Walkabout Bulurru*, that aims to record the song lines of a number of Indigenous groups. Wright emphasises the importance of close consultation with the elders, whom she is recording on film, telling stories and singing songs. Prior to filming, there was a lot of consultation, allowing elders to decide if they wanted to be involved, what they wanted to say, and how they wanted the material represented.

Wright says the elders often like the idea that the old stories are told in 'a new media' that will engage the younger people. She says:

There's been too much taking and not enough giving. You have to go to the elders. They have had life experience and if you go there with the intention to exploit them, they will pick it up.

The elders won't cooperate with people that are not genuine. When talking to the elders it has to be face-to-face in a meeting with you telling them all about the project, basically asking for their support and seeking their agreement to be involved.²⁶

The artist's responsibility to effectively communicate with the elders reaffirms her role in the continuing practice of culture.

Doreen Mellor outlines the importance of early consultation:

Consultation with a community or group of people is not simply a formality... Consultation is required as a precursor to consent for it to proceed. It is not appropriate to have decided that the activity is to proceed, or that its structure or format is established before consulting the Indigenous group or person involved.

The idea may be a good one from an external point of view. Consultation establishes the internal, cultural perspective and it is important to accept that it is this perspective which should determine the appropriate course of action.

With regard to the process of obtaining consent:

- *allow time (perhaps more than one meeting) for communication of a proposal, allow time for a decision to be made*
- *remember that the decision will be made on other bases than the ones brought from outside the community – different types of knowledge operating in Indigenous communities may conflict with the requirements of a project*
- *be prepared to take ‘no’ for an answer (but do not take it personally)*
- *respect the views of all factions within a community, and ensure that consent comes from the appropriate quarter for a particular activity or project.*²⁷

Collaborating with other artists

There are many situations where an Indigenous media artist may be approached to collaborate on a project with a group of artists. It is important that communication and consultation with the Indigenous artists and their communities takes place in the initial development phase of the project.

When more than one person works on a project such as a database or CD-ROM, the copyright ownership may belong to several people, unless employed by the creating entity (see the copyright section of this guide for details). It is important to discuss ownership of rights at the outset and where possible, allow Indigenous people to retain rights to their cultural material. Proper attribution should also be given to the owners of the story.

Where possible, licences should be sought rather than an assignment of rights. However, in some commercial design commissions, such as

development of logos, the assignment of copyright is often negotiated, and appropriate rates should be paid to the artist.

Commissioning Indigenous artists

There have been many situations where an artist has commenced with and continues making a work only to find out later that they did not get the commission. If there was clear and direct communication between the artist and the commissioning body, this would save artists time and money (and maybe disappointment).

Jenny Fraser²⁸

When commissioning the work of Indigenous artists, it is important to provide briefs and to engage the artists in writing, for any design work before they commence. We recommend that written engagement contracts be used so that the commissioner and the artist are clear on the work to be provided and the terms of use, as well as the payment of fees.

Indigenous artists should be aware that they are at risk if they commence work without first establishing in writing whether they have been commissioned, what the scope of the project is, and what payment they will receive. Copyright issues should also be discussed. A written contract is recommended.

4. Interpretation, integrity and authenticity

Interpretation refers to how cultural material is interpreted and represented. In the past, Indigenous cultural material has been subjected to interpretation by non-Indigenous people. Today, as Indigenous people seek to reassert and claim control over their cultural heritage material, Indigenous interpretation of cultural heritage is a means of giving power to the cultural significance of the work.

Jenny Fraser says:

*Most people are happy to see their stories come to life if they are dealt with properly. This means respecting the integrity and also attributing the source of the story.*²⁹

Integrity refers to the treatment of the original work. Under the *Copyright Act* the moral right of integrity provides a right of protection for individual artists against inappropriate treatment of their works. For example, the alteration of the work by adapting, cutting, editing, and/or enhancing may materially alter the original intention of the work and infringe the artist's moral rights.

Maintaining the integrity of a work is important for Indigenous artists and for the Indigenous communities where a work originates. There is no legal remedy for a community as a whole if a communally owned work is subjected to inappropriate treatment, although individual Indigenous artists can exercise their legal rights. In 2004, the government announced its proposal to introduce Indigenous communal moral rights (ICMR) to the *Copyright Act*. However, at the time of writing, the ICMR proposals had not been implemented. (See the legal section of this guide for more discussion).

Authenticity refers to the cultural provenance of Indigenous heritage material. Giving proper consideration to authenticity means respecting any customary law or cultural obligation associated with the work such as gender, correct language and sensitivity to the context of the work's reproduction. It is important to consider the authenticity of a media work during its development phase.

Consider authenticity and context in the publication or performance of media works.

Words or phrases from particular Indigenous languages should only be used where their proper meaning is known and where they are

used in the proper context.³⁰ For information on Indigenous languages and usage, contact the relevant Aboriginal language centre or the Federation of Aboriginal and Torres Strait Islander Languages <www.fatsil.org.au>.

In the same way, cultural material should always be used in an appropriate context.

CD-ROM and database works

Media works in digital formats are often created by combining content from different sources. The current technology makes it easy to combine materials, such as film clips, photographs and songs, created by others.

Clearing copyright on the use of this material is necessary. If copyright material is included without permission, the owner of copyright can stop you distributing your work. They can also claim damages – that is, financial compensation for losses suffered.

For each element, it is also necessary to get permission for the use of cultural material and find out its context.

Adapting materials

Some Indigenous content may not be suitable for adapting, editing, mixing and altering. Under the moral rights law it is an infringement to materially alter a work without the specific consent of the copyright owner. Similar consideration should be given to the cultural owners of material, whether there is copyright protecting it or not.

Issues to consider include:

- Is it appropriate to alter and adapt the Indigenous cultural heritage material or to use and depict traditional ritual knowledge in the intended way?
- Who do I need to speak to, and get consent from, about my proposed alteration and adaptation?

Adaptation of works

The adaptation of works that embody cultural heritage is an important issue. When permission to adapt is given, the copyright created in new work may not always be clear and can raise the following issues:

- Are there any limitations on the use of the new work that incorporates the Indigenous heritage material?
- Who will I approach and request prior consent from for adapting communally owned Indigenous heritage material?

According to Vynette Wright:

Indigenous artists today are dreaming new stories, songs, dances and designs based on cultural lore, with the approval and guidance of their elders. Adaptations to traditional cultural material is often sanctioned so the younger generation have the right to publicly show this material without elders always needing to be on hand. For example, dancers may subtly change movements in a traditional dance or artists will change a clan design slightly so that it retains the majority of characteristics, yet still satisfies the law...

The community easily accepts the use of media technologies and contemporary art practices applied to traditional material as long as the original spirit embodied in the work is not harmed by the changes. I think this is the key to using cultural material validly and in a way that will almost guarantee sanctioned use, even when the work is radically altered. If the spirit embodied within the work is recognisably retained it is easily acceptable. A song may have contemporary music applied and mixed with the traditional sound but it retains its original integrity. A Rainbow Serpent may be drawn traditionally, scanned into a computer, translated into a 3D figure, animated, morphed into water, a rainbow or sculpted out of microscopic matter created in a laboratory,

*photographed as a geometric configuration in quantum physics, yet still recognisably retain its identity as a Rainbow Serpent in the context of the entire presentation.*³¹

Traditional motifs

Indigenous traditional motifs such as the Wandjinas and Mimis are part of the cultural heritage of certain Indigenous groups. They may not be suitable for mass communication or dissemination. The context of the reproduction is an important consideration. It is necessary to discuss context and intended use and get moral rights clearances from the relevant Indigenous artists. You should also get permission from Indigenous custodians. Each and every intended context should be discussed so that there is an understanding of the envisaged extent of use.

Case study: 2000 Sydney Olympic Games

Images of the Wandjina – an ancestral rain spirit from a specific region in the Kimberley in north-western Australia – were commissioned for inclusion in the opening ceremony of the 2000 Sydney Olympic Games. According to Rhoda Roberts, the written agreement for filming the event included provisions requiring any use of the footage after the event to be cleared by the traditional owners for each and every new context and purpose.³²

Photographs

Media art might involve the digital manipulation of photographs including collage, superimposition, heightened colouring and play with text.³³

According to Jenny Fraser, the use of archival photographs presents questions of ethics and consultation, which need further consideration by Indigenous artists working in media forms.

Jenny Fraser says:

Some artists feel the need to use photographs to create an atmosphere of time and place, knowing that such an act is like treading on

*eggshells, but using it anyway – without seeking approval from the subject's family or acknowledging who the person was or where the image came from. Even some Indigenous artists use images inappropriately – and they probably shouldn't – like images of people that are not from their own particular mob or language group, or people who have passed away. Images are also sometimes used in a new context which is inappropriate. This issue hasn't really been dealt with properly in this country.*³⁴

Some Indigenous artists apply cultural sensitivity by seeking consent from family members to use photographs of family, or by only using Indigenous language group material from their own regions. Other artists feel that unless they can ascertain the origins of archival photographs and gain permission then it may be unwise to reproduce or use such images – particularly where there is little or no information about the individual or community depicted in the photograph.

Brenda L Croft states:

At the very least there should be attempts to consult with experienced people in the same field.

*Cultural sensitivity applies to Indigenous artists as well, and this is along the lines of appropriating symbols and designs that are not from your language group, simply because they 'suggest' Indigenous visual art and culture, e.g. dot paintings or cross-hatching, which come from particular regions in the desert or in Arnhem Land, northern Australia.*³⁵

Some Indigenous artists have developed culturally sensitive practices such as:

- not using old photographs of deceased people in their work
- clearly discussing proposed future uses of photographs and getting written release forms when taking photographs of models

- working in close collaboration with an Indigenous community, giving them joint control of the project
- using photographs only of their own family members and/or language groups.

Commenting on her photography project, Jenny Fraser notes:

*I have recently used old family photographs to document nine stories about the point of contact with my old people. In the process I had lots of discussions (and cups of tea) with different family members in order to ensure that the outcomes would be suitable for all and that we all still maintained collective ownership over the photos. Photos are like gold in most families, especially Indigenous families, because of the rarity. Our family is lucky because my great grandfather had a camera and a little darkroom in Cairns that he used on his return from droving trips out to Borrooloola. So we have the added peace of mind of his copyright.*³⁶

Her advice to artists:

Try to request and obtain permission from the associated mob before making the work or manipulating images of Aboriginal people. This is a respectful way of dealing with a sensitive issue and also may save some time and waiting in suspense later on.

Indigenous imagery

The photographer is generally recognised as the owner of the copyright of a photograph. You must get permission from the photographer (or copyright owner) to reproduce artistic works protected by copyright. Copyright will generally protect photographs that are created by living artists, or created by an artist who passed away less than 70 years ago. See the copyright section of this guide for further information.

Because the artist of the original work has the moral right of integrity in respect of his or her

work, special permission and consent will be needed to alter or adapt it. It is recommended that such consent be sought in writing, after fully explaining to the original artist how his or her work will be adapted or altered.

Certain cultural imagery may not be suitable for adaptation or alteration. For instance, it is considered culturally inappropriate to distort or adapt an artwork that embodies a creation story. This is because part of the cultural value of the artwork relates to the accuracy of the artwork in depicting that particular story.

Although some very old artworks may no longer be in copyright, it is still good practice to consult with Indigenous people for the use of these works. Although such works might be able to be sourced and copied from the internet or accessed from cultural institutions, permission for context and use is culturally appropriate. Attribution is also important.

The artist may require consent for instances where communally owned knowledge and potentially sensitive material is used. It is important to develop strong consultative ties with the owners of such material and to keep them informed of how you intend to use the material. The owners should also be informed of any intended uses by third parties to whom you might license the rights to your works.

Indigenous songs

You should also consider whether a particular song is appropriate for your project. When adding music to a media project, Nancia Guivarra recommends that you choose culturally appropriate music that represents the geographic and cultural content. Discussing the choice of music for radio programming, Nancia Guivarra notes:

You need to be aware of the diversity of Indigenous music and should choose content that is culturally appropriate. For example, checking what the song is about with the artist

*or record label or management or your interviewee and not just selecting the most well-known Aboriginal or Torres Strait Islander music because it sounds good, particularly when working with music in Aboriginal languages. There is plenty of Indigenous music from just about every geographical area. When using music in a radio program, ask 'Is this music relevant to the person, community or place this story is about?' For example, a song by a Torres Strait performer may be more appropriate for a story on the Torres Strait rather than using a didgeridoo track from a central Australian artist.*³⁷

Permission to use copyrighted songs will also be necessary if development of the work involves the reproduction and performance of a song. This includes doing your own version of it, or using an existing recording. For information on Indigenous music and copyright see the music guide in this series.³⁸ The Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) also offer information on their website at <www.apra.com.au>. Many Indigenous musicians may not be members of these copyright societies and it may be necessary to obtain permission from them directly.

For traditional songs, it is a good idea to consult with the performer and the relevant language group, and get permission to use the song in an appropriate context. Do not just assume there is no copyright in a traditional song. There may be copyright on the arrangement, for example, that will require copyright clearance.

Film footage

If you are using film footage that you have not taken yourself, you will need to get permission from the copyright owner to incorporate it into your media work.

For cultural protocol purposes, it is also necessary to consult on the use of old film footage, particularly if any of the Indigenous people depicted are deceased.

Another issue that arises for media artists is the filming of performances. Generally, under the performer's rights of the *Copyright Act*, once a performer gives permission for a recording of his or her work to be used, it can be used in any way that the owner of the recording chooses in the future.

Some Indigenous performance artists may not wish to be filmed while performing in public. Consent is necessary and all potential uses of the footage should be discussed prior to filming. Where possible, written release forms should also be used.

Jenny Fraser encourages performers to ask questions such as these:

- How many cameras will be recording the performance?
- Who is the film being made for?
- What are the proposed uses of the footage or stills from the performance?
- Can I view the edited version and consent to the context?
- Who has the rights to control the use of the footage, for example the film maker(s) or the participants, or both? ³⁹

It is possible to ask to limit the rights given to the filmmaker by way of a written agreement (the release), which can include setting agreed terms about the nature and extent of permitted use. Some useful samples of agreements are available from the Arts Law Centre of Australia.

Case study: Filming of the Yeperenye Festival

The grant of rights to the Australian Broadcasting Corporation (ABC) to broadcast the dance ceremonies in the Yeperenye Festival restricted internet use of the footage. Further, to respect the elderly age of many of the Indigenous dancers, the film footage was only to be used by the ABC for one year after the event. After this the film was to be destroyed.⁴⁰

Case study: Dance performance on CD-ROM

An Indigenous choreographer developed original choreography based on the removal of Aboriginal children from their parents.

She had developed the piece sensitively in a culturally appropriate manner, taking into account the content in consultation with others. Although the work was still in progress, she performed part of it publicly at a university concert involving dance students she was tutoring.

At the performance the dance was filmed without her consent. The filmmaker used excerpts from the performance to make a CD on video production at the university. The clip was also put on the internet. The clip contained images from her dance, but the images were cut and interposed with another more violent piece. In the choreographer's opinion, the sensitivity of the original dance piece was severely misrepresented.

The choreographer was able to stop the filmmaker and university from using the dance in that way. She also negotiated payment by raising the issue of copyright and moral rights infringement.⁴¹

Internet publishing

Indigenous people tend to consider that publishing in media technology such as the internet and CD-ROM is different from publishing in books. This stems from the belief that books have a finite number of copies and circulation, which can, to some extent, be monitored. The internet and CD-ROM, on the other hand, are perceived as being much more difficult to monitor. Not only is there a wider audience on the internet, but use of the internet also increases the potential for abuse by others.

Indigenous people are concerned that aspects of Indigenous culture risk being taken out of context through wide dissemination of heritage material on the internet. For example, the practices of caching, linking and framing raise issues concerning the appropriate storage, display and juxtaposition of cultural heritage material on the internet. There is also the sheer ease of copying.

A large range of Indigenous websites and Indigenous cultural material is available on the internet, including:

- library collections of articles
- information on collecting institutions
- artworks and prints
- languages
- photographs
- manuscripts
- oral histories
- recorded interviews
- creation stories
- recordings of Indigenous music.

While many sites are beneficial because they facilitate access to Indigenous people, others may contain inaccurate or sensitive information. Those who seek to publish cultural material online should consider cultural protocols and protection of cultural information.

Some useful measures currently being used include:

- warnings on home pages where photographs of deceased people are displayed
- copyright notices setting out conditions where use and reproduction is permitted, and where permission is required
- notices indicating that cultural material is owned by Indigenous people, and rights should be respected.

For those seeking to use online material in their media art, remember that not all such material is free for use, and copyright permission may be required to reproduce it if it is downloaded. Check the terms published on the website, or contact the website publisher for permission.

The Arts Law Centre of Australia has published a best practice guide to publishing art online. Copies are available from the Arts Law Centre.

Case study: Web permission essential

In July 2000 the International Olympic Museum reproduced the works of three Indigenous artists on its website without seeking their prior permission. Viewers were encouraged to copy the paintings as computer 'wallpaper'. The Olympic Museum was exhibiting the original works as part of its Aboriginal art exhibition in Lausanne, Switzerland. These works had been provided to the museum by private collectors, and there had been no discussion about the display, use and reproduction of the works in this way with the artists. One of the artists, Sam Tjampitjin (deceased) of Warlayirti Artist Aboriginal Corporation at Balgo Community in Western Australia, was appalled when he heard that his sacred painting was treated in this way.⁴²

On behalf of the three artists, the National Indigenous Arts Advocacy Association contacted the Olympic Museum, and the works were taken off the website in December 2000.

The case raised issues of moral rights and copyright. After negotiations with the Olympic Museum, the matter was settled and the artists received an award of money in compensation for the infringement, plus a letter of apology, signed by Juan Antonio Samaranch, acknowledging the infringement of copyright and moral rights and apologising for cultural harm caused. The Olympic Museum also posted an apology in four languages on its website. It asked anyone who might have downloaded the works as wallpaper to delete them from their hard drive.

In responding to this challenge, some internet creators have developed a means of protecting material in the design and presentation of the material online. For example, Jenny Fraser notes that it is a good idea to ensure images for websites are created at a low resolution; if they are downloaded they will print only at a small size, but they will still be large enough on screen to view the overall work. She also recommends watermarks over the images – such as a big © for copyright laid over the top of the image to get the message across.

Brenda L Croft advises artists signing licence agreements to request that their work be reproduced in hard copy (print format) and to check they are not also agreeing to their work being reproduced on the web.⁴³

5. Secrecy and confidentiality

Some Indigenous content may not be suitable for wide dissemination on the grounds of secrecy and confidentiality. It is the responsibility of artists putting together media projects to

discuss any restrictions on use with the relevant Indigenous groups.

Representation of deceased people

In many Indigenous communities the reproduction of names and photographs of deceased people are restricted for public viewing for the period of mourning. Doreen Mellor notes some communities will request that an artwork by a deceased Indigenous artist not be displayed for some time after the death of the artist. They may also require the artist's name not to be used or an image of the artist not to be displayed. The artist's family or community should be consulted so that the appropriate protocols are observed.⁴⁴

The media artist should consider these issues when using sound recordings, films and images of Indigenous people who have passed away. Consultation with relevant family or language group members is recommended. When filming Indigenous people or recording their voices, you should discuss this issue with them, so that they can advise you of their position in relation to this cultural practice.

Case study: Barani website

In developing the Barani⁴⁵ website for the City of Sydney at www.cityofsydney.nsw.gov.au/barani/ CyberDreaming incorporated a gateway entrance protocol to respect the content of the site. The website entrance page states:

Barani contains the history, life stories and images of many Indigenous men and women who have made great contributions to their people and their country. The story of Aboriginal Sydney could not be told without recognising their achievements.

In some Aboriginal communities, seeing the names and photographs of dead people may cause sadness and distress, particularly to relatives of those people.

Viewers are then asked if they wish to proceed. They must click on 'I agree' to proceed or 'cancel' to return to the home page. Mark Leavy of CyberDreaming says, 'You have to respect cultural sensitivities. Developing respect for culture within the design of a website is important.'⁴⁶

Secret and sacred material

The reproduction or unauthorised use of secret and sacred images in films, CD-ROMS and/or websites may be a transgression of Indigenous customary law.

'Secret and sacred' refers to information or material that, under customary laws, is:

- made available only to the initiated
- used for a particular purpose
- used at a particular time
- information/material that can only be seen and heard by particular language group members (such as men or women or people with certain knowledge).

Personal privacy

Are you planning to depict an identifiable individual or community? If so, ask the individual, community or relatives of the individual for permission and maintain close consultation throughout the process.

It is important to avoid disclosing sensitive personal information without discussion and consent. Confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure. The public disclosure of personal and private information about a person who has passed away will be very sensitive.

If a media artist uses details about an individual's life experiences, it is advisable to consult with that individual. There may be important cultural formalities to be observed in telling their story.

6. Attribution and copyright

An understanding of legal issues is essential for media artists. Depending on the subject matter and the particular artform, the following areas of law may be relevant:

- patents
- trademark
- breach of confidence (or trade secrets law)
- copyright
- design.

The following is a general summary of copyright law under the *Copyright Act*. For further information about copyright and how it applies to dance, music, film and other media, visit the Australian Copyright Council's website at <www.copyright.org.au>.

What is copyright?

Copyright is a bundle of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings and films, published editions and broadcasts under the *Copyright Act*.

Copyright protects the works of Indigenous artists and creators in the same way it does for other Australians.⁴⁷ There is no need to register copyright in Australia.

Copyright protects:

- artistic works
- literary works
- musical works
- dramatic works
- films, sound recordings
- television and sound broadcasts
- published editions of works.

Requirements of copyright

Copyright will exist in a work as soon as it is created in a material form or as soon as a recording or film is made, provided that certain statutory requirements are met. They are:

- Original work – The new work must not be copied, and the creator must have used the necessary degree of skill, labour and effort to create a new work.
- Material form – A work must be written down or recorded in some fixed form.
- Identifiable author – There must be an author, or authors, for a work to be a copyright work. Generally the author must be identifiable, although there is some protection for anonymous works.

Copyright exceptions

There are some significant exceptions to this general rule of ownership:

- Where the work is produced under a contract of employment, copyright will belong to the employer.⁴⁸
- Where a work is produced under the direction or control of the Crown, copyright may belong to the Crown.⁴⁹
- Where copyright has been commissioned under a written agreement, the agreement may specify who owns copyright.

How long does copyright last?

Before 2006, the duration of copyright in original works was 50 years after the death of the author. From 1 January 2006, the copyright term was extended to 70 years after the death of the author.⁵⁰ If copyright in an original work expired before 1 January 2006, it is in the public domain and may be freely used.

The period for protection of copyright for new copyright material is generally:

- Seventy years from the death of the artist for published artistic, literary, musical and dramatic works.

- Seventy years from the date of creation for unpublished artistic, literary, musical and dramatic works. If it is unpublished before the death of the author, copyright expires 70 years from the date of first publication.
- Seventy years from the date of creation for films and sound recordings.

Copyright protects works for a limited period only and therefore assumes that some forms of Indigenous art and cultural expression are in the public domain and are free for all to use and exploit.

Exceptions to the general rule of copyright include anonymous and pseudonymous works⁵¹ and work commissioned by the government (artworks are only protected for 50 years after publication).⁵² Copyright in unpublished works continues to subsist so long as the work remains unpublished.

Artists should consider who would control their copyright after their death. Family members can benefit from royalties for 70 years after the death of the artist and can also guard copyright in the artist's works.

Indigenous people's right to culture exists in perpetuity. To respect Indigenous cultural heritage, it may be necessary to get permission to use Indigenous stories, designs and themes even though legally, they are in the public domain.

What rights do copyright owners have?

Under the *Copyright Act* specific rights are granted to copyright owners according to the kind of work that has been created. They include the following.

Literary, dramatic or musical works (such as novels, plays or songs)

The creator or copyright owner has the exclusive right to:

- reproduce the work in material form⁵³
- publish the work

- perform the work in public
- broadcast the work⁵⁴
- communicate the work to the public⁵⁵
- make an adaptation of the work.⁵⁶

Artistic works (such as paintings)

The creator or copyright owner has the exclusive right to:

- reproduce the work in material form
- publish the work
- communicate the work to the public.⁵⁷

Sound recordings (such as tapes and CDs)

The creator or copyright owner has the exclusive right to:

- make a copy of the sound recording
- cause the recording to be heard in public
- communicate the work to the public
- enter into a commercial rental arrangement.⁵⁸

Films (such as videos and movies)

The creator or copyright owner has the exclusive right to:

- make a copy of the film
- cause the film to be seen or heard in public
- communicate the work to the public.⁵⁹

Reproduction right

Aside from the new right of communication to the public, the most important right in the digital domain is the reproduction right. This is the right to reproduce a work in material form.⁶⁰

The *Copyright Act* provides that an original work, which is protected by copyright, can be infringed if it is reproduced in the same format or in a different format – for example, where a literary, dramatic or musical work is reproduced as a sound recording or film. Reproduction in a digital form would also include scanning.⁶¹

It is not necessary for a work to be reproduced completely for an infringement of the exclusive

right of reproduction to occur. If a ‘substantial’ part of the material protected by copyright is reproduced without permission from the copyright owner – for example, when extracts of a work are digitally sampled, an infringement of copyright may occur. But this will always be a question of degree. It is not so much the quantity of what is copied or reproduced, but rather the quality of what is taken. In deciding on the issue, the court will consider the circumstances of each particular case.

An infringing work must be shown to have been copied from the copyright work – whether done consciously or unconsciously, directly or indirectly.

Collaborative works

Under the *Copyright Act*, a ‘work of joint ownership’ refers to a work resulting from the collaboration of two or more artists, where each artist’s contribution is equal to the contribution(s) of the other artist(s).⁶²

The artist must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions. The custodians of cultural images are generally not recognised as the legal copyright owners of an Indigenous artwork that depicts language group cultural images.

Each creative contributor to a work of joint authorship owns copyright in the resulting work.⁶³ This means that each artist must obtain the consent of the others before exercising any of their rights under copyright law. For example, if an artist wants to license the rights to reproduce a collaborative work, he or she must get the consent of all the artists who participated in the collaboration.

Media works are often produced in a collaborative arrangement. To avoid any future disagreements the participating artists should discuss issues of copyright and proposed use of the work prior to commencement of the project.

Communal ownership versus joint ownership

In *Bulun Bulun & M* v R & T Textiles*,⁶⁴ the court considered that traditional Indigenous works containing ‘traditional ritual knowledge’, handed down through generations and governed by Aboriginal laws, are not works of joint ownership. Although under Aboriginal laws the entire community may have an interest in the particular artwork, and the designs and knowledge within the work, copyright law does not recognise the group as the owners.

The individual artist is recognised as the copyright owner and may have a special obligation to the language group to deal with the copyright in the art in ways that are consistent with Indigenous law. Depending on the circumstances, this obligation may be enforceable in the courts.

What are moral rights?

Moral rights are separate from the economic rights of copyright owners and may give Indigenous artists avenues to challenge inappropriate treatment of their works. Moral rights laws provide the following rights to authors of works, films and performers:

1. The right to be identified as the creator or performer – The artist has the right to be identified as the artist where his or her work is reproduced in material form, published, performed, adapted or communicated to the public.⁶⁵ Artists can require their names be clearly and prominently identified with their works.⁶⁶ Performers have the right to be named in connection with their performance.
2. The right not to have work or performance falsely attributed to another person – Artists can bring a legal action against parties who falsely attribute their works and performances to others.
3. The right of integrity – Artists can bring a legal action against parties who edit,

alter or treat their works in an inappropriate way, causing harm to the artist’s honour or reputation.⁶⁷ This might include work that is cropped or materially altered or reproduced in poor quality. An artist cannot bring an action against inappropriate treatment if he or she agreed to the alteration or treatment of the work. Whether the work has been treated in an inappropriate way is subject to reasonable defence.⁶⁸ Performers can object to treatment of their performance that demeans their reputations. Before making any significant alterations to, or adaptations of a work or performance, it is important to get the consent of the artist in writing.

Media artists need to ensure they respect the moral rights of any copyright owners whose works they incorporate in their own media works.

Further, there are issues of protecting media artist’s own moral rights in an artform practice where manipulation and alteration is common.

Media art protection

As copyright protects particular categories of creation, such as artistic and literary works, a media work will usually contain a number of works protected by copyright. For example, the following elements of a media work may have separate copyright owners:

- text graphics
- music
- choreography
- video
- animation
- sounds
- photographs
- computer software.

For media art projects, copyright clearances must be obtained from each and every copyright owner of each included component.

There is no separate category in the *Copyright Act* for media art that specifically covers media. Artists seeking to protect a media work have in the past adapted it to one of the categories within the Act such as a cinematograph film, sound recording or a dramatic work.

Different levels of copyright protection will be available to the copyright owner depending on which category the media work falls under.

Reproducing works

A media work may involve clearing rights from a range of copyright owners. It is important to seek prior permission for reproduction by way of a licence from all copyright owners for all intended purposes.

Remember that writers, artists and other creative contributors are entitled to a fee for the reproduction of their works. Note, too, that these artists have the moral rights of integrity, attribution and the right against false attribution. It is a good idea to clear any material alterations with the artists and to carefully check proofs of the work before publication. It is also important to use correct labelling.

When reproducing artworks, we recommend you seek the assistance of a lawyer, or speak to the relevant copyright collecting society.

Accessing archival audio-visual material

Before using archival audio-visual material within media work, you should consider issues of cultural integrity as discussed above. Also note that although the physical material might be available from archives, the copyright owner's consent will also be required before the work can be reproduced. Archives are also beginning to recognise the rights of Indigenous communities and individuals to consent to publication of archival material. For example, the Australian Institute for Aboriginal and Torres Strait Islander Studies' Audiovisual Code of Ethics states that 'copies of material will only be provided for publication purposes if the requestor has consulted with the relevant Indigenous community or individual(s) and has received

written permission to proceed, even in such cases where the copyright owner has approved publication'.⁶⁹

Licensing the use of works

It should not be assumed that traditional Indigenous works are in the public domain. It is necessary to consult with relevant Indigenous people for permission to use their material and if agreed, there should be scope for negotiating with Indigenous people on appropriate royalties for use. Some other points are:

- Written contracts are preferable to oral agreements.
- Indigenous artists, writers and cultural owners should be given the opportunity to consider contracts and to obtain proper legal advice.
- The contract should be explained to Indigenous artists, writers and contributors, and if necessary, a translator should be used to explain the major issues of the contract.
- If the work is to be altered or adapted, artists should be given opportunity to approve, or otherwise reject, the alteration or adaptation of their work.

Assigning copyright versus licensing

Copyright can also be assigned. This means that you can give the copyright in your work to someone else. They become the copyright owner and can authorise others to reproduce your work.

Copyright is usually assigned under written agreement. When copyright in a work has been assigned, the artist relinquishes copyright in his or her work.

Where possible, Indigenous artists should retain the copyright in their works so they can maintain control over reproductions. It is important for Indigenous artists to check agreements and make sure they are not assigning their rights away, instead of licensing use of their work.

It is a good idea to seek legal advice on copyright licensing issues.

What are Indigenous communal moral rights?

Existing moral rights are individual rights only. The communal nature of Indigenous cultural material and the right of an Indigenous language group to protect and guard against issues of misinformed source or integrity are not recognised. In December 2003, the Australian Government drafted proposed amendments to the *Copyright Act* for Indigenous Communal Moral Rights (ICMRs).

The current proposed model introduces ICMRs to exist alongside individual moral rights. It is proposed that the ICMRs will be exercisable independently of the individual author's moral rights. ICMRs will exist in works and films drawn from a traditional base,⁷⁰ if before the first dealing of the work or film, there is a voluntary agreement between the creator of the work or film and the Indigenous community.⁷¹ There must also be acknowledgment of the Indigenous community's association with the work.⁷² Further, all interest holders in the work (i.e., copyright owners) need to have consented to the ICMRs existing in the work or film. ICMRs would exist for the term of the copyright period.

An Indigenous community that has Indigenous communal moral rights to a work may exercise those rights only through an individual who is the authorised representative. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to its decision-making processes.⁷³

The proposed regime incorporates defences, and consents. The ICMR regime is not yet law, and many commentators have criticised the model as being overly complex. Further consultation with Indigenous creators and communities has been recommended.

Attribution of Indigenous people and communities

The Australia Council for the Arts recommends the principle of attributing works to Indigenous people or communities when their cultural heritage material used in media works.

As a media work may use material from many different sources, it is respectful practice to credit individuals, families, language groups or communities who contributed to the work at any stage. It is important to consult on the form of attribution people may want such as proper wording and spelling of names.

Attribution of Indigenous sources should also be considered. It has become the practice with many Indigenous artists to also list their language group affiliations after their own names. Indigenous custodians, contributors and relevant Indigenous organisations contributing resources and knowledge are now given a significant credit as collaborators on particular projects.

Case study: Community and technical collaboration

A collaborative project brought together an Indigenous artist, an Indigenous community (whose information was the subject matter) and a non-Indigenous computer programmer. At the end of the project the programmer wanted 'top billing' on promotional material for the work because he had technically put the project together. The artist had to make very clear that it was the Indigenous community who owned the story, and that the artist had directly collaborated with the community. The artist insisted that the order of attribution be headlined with the Indigenous community, followed by the Indigenous artist, and finally the programmer.⁷⁴

Managing copyright to protect your interests

As copyright exists as soon as a work is recorded or created in material form, it is not a legal requirement to register copyright. However, certain precautionary practices can provide good warning to potential infringers and notify them of where to get prior permission to copy.

Given the mixed media nature of media works, a range of copyright materials will often be combined to make the overall work. For instance, a website may include songs, artworks and text. Each component may be owned by a number of copyright owners and licensed for use by the media artist. It is important to include copyright notices for each component, as well as the overall works.

Label all reproductions of the work clearly with the following information:

- title of the work, song or story
- creator
- date created
- copyright owners
- if applicable, cultural group or language group.

When authorising others to reproduce your works make sure you use written agreements and keep records of the rights you have granted. Ask for copies.

Copyright notice

You should also include a copyright notice. A copyright notice provides information about uses that are acceptable and includes details about contacting the copyright owner for consent to use in other material.

Some works use the words 'All Rights Reserved'. This is not necessary in Australia, but if you are publishing in some South American countries that are members of the Buenos Aires Copyright Convention it may be advisable.

If you think that your work will be first published overseas seek advice from a suitable practitioner on appropriate wording.

The following is an example of a copyright notice for a website:

© Aboriginal Web Group, 1999

The following is an example of a copyright notice for an artwork:

© Banduk Marika, 1998

The following is an example of a copyright notice for a song:

'Black Woman' written and performed by Toni Janke.

Recording from the Album *The Brink*, (P) Toni Janke Productions, 2002.

Licensed by: Toni Janke Productions

The following is an example of a notice for language group-owned traditional materials:

Traditional story: Torres Strait Islands

This version: © A. Murray, 2002

This performance is made with the permission of the language group. It may not be reproduced in any form without the permission of the writer and the language group concerned.

The Arts Law Centre of Australia gives advice to artists, writers and filmmakers on legal matters relating to arts practice. It has a website <www.artslaw.com.au>, which publishes useful information sheets on copyright and the arts.

In 2004, the centre established the Indigenous program 'Artists in the Black', which employs an Indigenous legal officer and an Indigenous information officer, and is overseen by an Indigenous reference group, the chair of which is a board member of Arts Law. The 'Artists in the Black' program goals include:

- providing legal service and information to Indigenous artists, arts organisations and communities
- providing informed advocacy work on issues relating to Indigenous cultural and intellectual property.

The Arts Law Centre of Australia recommends the following traditional custodian notice in 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. For enquiries about permitted reproduction of these images contact (community name).

It may also be prudent to include warnings against filming, for example:

WARNING: Any unauthorised recording or broadcasting of this performance is prohibited.

Authorised recordings of performances often carry a warning such as:

WARNING: Copyright subsists in this recording. Any unauthorised sale, rental, hire, broadcasting, public performance or re-recording in any manner whatsoever will constitute an infringement of copyright.

For more information on recommended copyright wording for publications, see *Snooks & Co, Style manual for authors, editors and printers*.⁷⁵

Moral rights notice

If your work is to be distributed in New Zealand and the UK, it is also a good idea to include a notice asserting your moral rights. This could read:

The creator(s) assert their moral rights.

When is copyright infringed?

It is an infringement of copyright to copy or deal with a copyright work without the consent of the copyright owner.

A person will infringe copyright in a musical, dramatic, artistic and literary work if he or she reproduces the work in material form, publishes or communicates the work to the public, without permission from the copyright owner.⁷⁶

For musical, dramatic and artistic works it is also an infringement to adapt the work.

It is an infringement to copy a substantial part of a work. This does not necessarily refer to a large part of the work. The court will look for striking similarities between the original work and the infringing copy, and assess the quality of what was taken.

It is also an infringement of copyright to import copies of a copyright-infringing recording into Australia for sale or hire.

Some exceptions to infringement are when there are fair dealings, when the Crown uses artwork and when libraries and educational institutions copy material.

Fair dealing provisions

The argument of 'fair dealing' can be a defence against allegations of copyright infringement. Copyright in the work is not infringed if it is used:

- in research or private study purposes⁷⁷
- in criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made⁷⁸
- for the purpose of parody or satire⁷⁹
- for the purpose of, or associated with the reporting of news in a newspaper or magazine and a sufficient acknowledgment of the work is made; or for the purpose of, or associated with the reporting of news by means of a communication (including television, radio and the internet) or in a cinematograph film⁸⁰

- in judicial proceedings or of a report of judicial proceedings, or for the purpose of giving professional advice by a legal practitioner.⁸¹

Crown use of artworks

The Crown may use a copyright work without the permission of the copyright owner where the use made is 'for the services of the Crown'. The artist is still entitled to payment for use and the government must contact him or her as soon as possible to negotiate this.

Library copying

Libraries and archives can make copies of copyright works under certain circumstances in accordance with statutory procedures.⁸²

Educational copying

Educational institutions, such as schools and universities, can make multiple copies of print material and can copy television and radio programs for education purposes. They must, however, pay statutory licence fees to the relevant collecting societies. Media artists should be aware of these schemes, as there may be royalties payable in certain circumstances. Contact APRA, Viscopy, CAL and Screenrights where applicable.

The above is general comment only and does not cover all issues relating to infringement. If you think your work has been copied without your consent, we strongly recommend that you consult a lawyer.

Creative Commons caution

Creative Commons is an American organisation that encourages creators to consider using less restrictive copyright.

*Creative Commons aspires to cultivate a commons in which people can feel free to re-use not only ideas, but also words, images, and music without asking permission – because permission has already been granted to everyone.*⁸³

Creative Commons has developed a series of licences that creators can use for sharing their works. This might be useful for some people, but it can mean giving up your rights to control or benefit financially from your work. A number of Australian arts advocacy organisations have raised serious concerns about the licences, particularly that they may not effectively limit commercial or derivative uses.⁸⁴

The Creative Commons licence use states 'CC – some rights reserved' rather than the copyright © symbol used for standard copyright. Some Creative Commons music licences allow for file sharing, downloading and performance of the entire work. Others allow commercial uses and allow the music to be used for sampling. In general all Creative Commons licences require that the author or persons granting the licence be attributed.⁸⁵

Creative Commons licences may not require you to give up your copyright. However by signing a Creative Commons licence you may allow such wide use of your music that you lose a lot of control over the way your work is used. This could also cause serious problems if you later want to enter into a recording or publishing agreement, because you no longer have control of the rights a recording company may need.

It is very important to take some time to think about whether a Creative Commons licence suits you, and it is a good idea to get legal advice. Creative Commons provides this advice:

Creative Commons licences are non-revocable. This means that you cannot stop someone, who has obtained your work under a Creative Commons licence, from using the work according to that licence. You can stop distributing your work under a Creative Commons licence at any time you wish; but this will not withdraw any copies of your work that already exist under a Creative Commons licence from circulation, be they verbatim copies, copies included in collective works and/or adaptations of

*your work. So you need to think carefully when choosing a Creative Commons licence to make sure that you are happy for people to be using your work consistent with the terms of the licence, even if you later stop distributing your work.*⁸⁶

Hypothetical case study: Free website download

Hanna wants to promote her art, and is encouraged to put her art on a website which allows people to view and use the art, using a Creative Commons licence that will allow anyone to download the work for free, and to make commercial uses.

Hanna finds that someone has downloaded her art from the website, altered the art and used it in on a poster.

Hanna is very unhappy as the cultural message in her story has been distorted. Hanna can remove her art from the website, but she cannot stop the uses that have already happened. She may be able to take legal action for breach of her moral rights, but there is no guarantee of success.

Further copyright information

For information on copyright laws visit the websites of the following organisations:

- Australian Copyright Council at www.copyright.org.au
- Arts Law Centre of Australia at www.artslaw.com.au
- Viscopy www.viscopy.com.au

7. Proper returns and royalties

Given that there may be many different components in a media work, resolving ways in which benefits can be shared among all contributors is a challenge.

Some media artists have developed methods of benefit-sharing which allow large scale projects to be undertaken – for instance, exchanging technical information for free copies of the product for members of the contributing cultural groups.

Brenda L Croft says, 'Artists should also receive licence or royalty payments for any commercial product generated by the collaboration.'⁸⁷ This should apply to all creative contributors. When applying for funding, these fees should be incorporated in the project budget.

Media projects can constitute a range of outcomes, and the artform is flexible to allow sharing of benefits by way of copies, as well as focused outcomes as the following case study illustrates.

Case study: Media and research

Jason De Santolo, Indigenous lawyer and media artist is coordinator of the Jumbunna Enhanced Research Media Project (JERMP), a pilot project that uses media and creative research practice to appropriately enhance research and project outcomes for Indigenous people. This approach actively uses the new technology itself to produce benefits for Indigenous people. JERMP is placed at the Jumbunna Indigenous House of Learning Research Unit where the research charter is focused on developing Indigenous research-driven legal and policy advice and interventions. One example is a 15-minute documentary⁸⁸ created as a strategic response to the encroaching practical reconciliation policies of the national government in Australia.⁸⁹

Jason De Santolo explains:

A media collaboration was devised as a way to reflect on the 'documentary' experience and its interventionist outcomes. This Creative Cut aimed to inspire political and cultural action, recognising that our rights do indeed have natural and powerful rhythms. It reached out from a collective vision – through a collaboration that speaks globally and in a strategic language of rights evoking movement along a fluid line of engagement.⁹⁰

Copyright collecting societies

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. Several collecting societies have been established in Australia to manage and administer the copyright of its members for a fee, or share of the royalties. Some of them, such as the Copyright Agency Limited (CAL) and Screenrights, have a legislative basis for collecting royalties. Others are voluntary organisations which artists are required to join.

CAL, Australasian Performing Right Association, Screenrights and Viscopy are the most relevant collecting societies for media artists.

Copyright Agency Limited

CAL is an Australasian copyright management organisation that provides a bridge between creators and users of copyright material.

CAL is the non-exclusive copyright agent for authors, journalists, visual artists, photographers and publishers to license the copying and communication of works to the general community.

CAL manages licences for the copying and digital communication of print material by educational institutions, government agencies, corporations, associations, places of worship and other organisations.

Authors must register to receive monies directly from CAL. If not registered, the monies may go to the publisher who is then responsible for passing on the author's share under terms of the publishing contract. For more information on CAL, visit its website at <www.copyright.com.au>.

Australasian Performing Right Association/Australian Mechanical Copyright Owners Society

The Australasian Performing Right Association (APRA) collects and distributes licence fees for the public performance and communication (including broadcast) of its members' musical works. Public performances of music include music used in pubs, clubs, fitness centres, shops, cinemas, festivals, whether performed live, on CDs or played on the radio or television. Communication of music covers music used for music on hold, music accessed over the internet or used by television or radio broadcasters. The Australasian Mechanical Copyright Owners Society (AMCOS) collects and distributes 'mechanical' royalties for the reproduction of its members' musical works for many different purposes. These include the manufacture of CDs, music videos and DVDs, the sale of mobile phone ringtones and digital downloads, the use of production music and the making of radio and television programs. Since 1997, APRA has managed the day-to-day operations of the AMCOS business.

For more information about APRA|AMCOS, visit <www.apra.com.au>.

Screenrights

Screenrights collects royalties from schools, TAFEs and universities when they copy from television. It distributes this money on a non-profit basis to the producers, screenwriters, distributors, copyright owners of music and artistic works and other rights holders in the copied programs.

To help filmmakers market their programs to educational institutions and to assist teachers in getting the most out of their copying licence, Screenrights set up <www.enhancetv.com.au>. This site gives educators free resources for using television in the classroom, as well as a weekly email guide to television highlights.

Screenrights also administers provisions in the Copyright Act that allow pay-television operators to retransmit to air broadcasts as part of their service provided they pay royalties to the underlying copyright owners. Copyright owners in television can register titles with Screenrights to collect these royalties. They can also make their registration global, appointing Screenrights International to collect any royalties being held for them by other similar societies in Europe, Canada and the United States. This enables filmmakers to maximise their returns and minimise their costs.

For more information on Screenrights, visit <www.screen.org>.

Viscopy

Viscopy is the copyright collecting society for visual artists in Australia and New Zealand. Established in 1995, Viscopy is the main point of contact for those wishing to clear copyright for the reproduction of artistic works.

Viscopy has about 2000 Australian artist members, half of whom are Indigenous artists or representatives of artists' estates.

Viscopy negotiates copyright-related transactions between the artist and the user for reproductions of artistic work in advertising, publications, newspapers and electronic media, such as television, cinema, the internet and CD-ROM. Viscopy handles associated contracts, negotiations, legal requirements and the distribution of royalties.

There is no membership fee to join Viscopy. However, an administrative charge applies

to clearances. Payments are then made to artists half yearly.

For more information on Viscopy, visit <www.viscopy.com.au>.

8. Continuing cultures

Cultures are dynamic and evolving, and the protocols within each group and community also change.

Consultation is an ongoing process, and thought should be given to ways of maintaining relationships for future consultation.

This might include consultation, at a later date, for further uses of the work not envisaged at the initial consultation.

The media artist will also need to consider how his or her work might be made available to the relevant communities in the future. Some artists have dealt with this issue by donating collections to Indigenous cultural centres or depositing material at the Australian Institute of Aboriginal and Torres Strait Islander Studies and/or the National Film and Sound Archive. Before depositing material, research and discuss the deposit terms with participants and communities.

9. Recognition and protection

The Indigenous artist owns the copyright in his or her media work and can control its reproduction and dissemination. Such rights are granted under the *Copyright Act*.

It is important for Indigenous media artists to be informed about copyright and other laws in order to protect their cultural interests. The copyright section in this guide provides some general information.

Special consideration needs to be given to where the work incorporates Indigenous cultural heritage. There are currently no special laws dealing with Indigenous cultural heritage ownership and reproduction rights.

The *Copyright Act* has been criticised for not recognising the communal ownership of heritage material and the continuing right of heritage custodians to control the use of this material.

The increasing level of non-Indigenous appropriation of Indigenous cultural material has compelled Indigenous people to seek greater protection of Indigenous arts, including the call for new legislation recognising communal rights to culture.

Indigenous artists should be aware that while information gained from an interview is the cultural and intellectual property of the artist, the copyright in the resulting article, book, thesis, television or radio program remains with the author (or publisher or producer). The artist can negotiate with the writer, publisher or filmmaker for a proper credit and a share in any money made from the exploitation of the book, or film, for example. The terms of the arrangement can be incorporated in a written agreement.

Implementation

*Protocols are about people's value systems and their cultural beliefs.*⁹¹

Doreen Mellor

The protocols in this guide are flexible. You can use them to further develop protocols for your media art project, program or practice, and particular language group, region or community. This section tells you how to implement the protocols.

It provides a checklist of practical points to consider when using the protocols for a media art project, or in your own practice. It summarises the preceding sections and also offers some different and more specific information.

1. Respect

The rights of Indigenous people to own and control their cultures should be respected.

Diversity of Indigenous cultures should be acknowledged and encouraged. Indigenous worldviews, lifestyles and customary laws should be respected in contemporary artistic and cultural life.

Those working in Indigenous media art are encouraged to respect that:

- Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.
- Acknowledgment should be given to the Indigenous custodians of the country in a manner preferred by the custodians.
- Indigenous cultures are living cultures.
- The diversity of Indigenous cultures should be acknowledged and encouraged. Culture varies from Indigenous country to country and from language groups.
- Local community protocols and protocols associated with a specific work should always be respected and observed.
- Inappropriate or outdated perspectives and terminology should be avoided.

2. Indigenous control

Indigenous people have the right to self-determination in their arts and cultural affairs. They have the right to own and control their heritage, including Indigenous body painting, stories, songs, dances, images, traditional knowledge and other forms of cultural expression.

How can you tell whether someone is accepted as an Indigenous person? The Australia Council for the Arts currently requires all Indigenous participants to provide a letter of support confirming their Aboriginal or Torres Strait Islander identity from an incorporated Indigenous organisation. As a guide, you can use the Australian Government's definition of Indigenous identity, which is that the person is of Indigenous descent, identifies as Indigenous and is accepted as Indigenous by the Indigenous community.

Among steps media artists need to take are the following:

- Identify appropriate information and authority bodies.
- Discuss ideas for development of media works and projects with relevant people in Indigenous media organisations and Indigenous arts centres.
- Keep appropriate and relevant Indigenous people informed and advised, and where possible, provide regular updates.

3. Communication, consultation and consent

Indigenous people should be consulted on the use and representation of their cultural and heritage material. Communication and consultation is an ongoing process and takes time, so prepare to be flexible. Do not expect a reply to a question in a day or week. Each community will need time to consider and consult.

- Negotiate with Indigenous organisations, family members, and individuals relevant to the project. Remember they have the right to choose their own representative.
- Media artists need to get the consent of the relevant Indigenous people. This should include the consent of writers, storytellers, artists (including next of kin if the copyright owner is deceased) and the custodians of traditional knowledge.
- Consider how the proposed work might impact on or portray Indigenous people.
- Consider the risks and benefits of incorporating Indigenous creation stories. Discuss the intended use widely with relevant individuals, families, language groups and people in authority.
- Find out if the particular cultural expression is suitable for public use or if it is subject to restrictions. If unsure, discuss with Indigenous custodians.

- Advise the elders or people in authority of the perceived risks and benefits from the wider dissemination of their cultural material.
- Discuss who should own copyright in the resulting work, for example the community, the writer, an organisation, or a combination? The following factors may be taken into account:
 - nature of the commission
 - skill, labour and effort of the writer
 - nature of the subject matter
 - whether it is a collaboration
 - fee for engagement, whether royalty-based or a flat fee.
- Ensure that consultation addresses the communal nature of Indigenous cultural expression.
- Make opportunities for the relevant Indigenous people to view and comment on proposals and prototypes of the project. Show the community or individual the work prior to public release, and allocate time to incorporate their suggestions.
- Whether you are proposing to record cultural information or wish to license the developed work, prior informed consent must be sought for all uses.
- If you plan to license the work to other companies, ensure that consultation for ongoing use is built into any agreements.
- When focusing on an identifiable individual or community, ask for permission to do so. Consult closely and get consent throughout the process.
- Consider the possibility that you might not get consent.
- If you intend using archival audio-visual material in your work, discuss this with the relevant Indigenous people and obtain consent.

4. Interpretation, integrity and authenticity

Indigenous people should have control over how their material is presented. This means consulting them about art works, which will impact on the integrity, and authenticity of their cultural heritage material.

Seek advice on the correct cultural context for the material, particularly for heritage material. Ask about any restrictions on the material and the exact meaning of any language words if unsure.

These are some of the questions you need to ask before creating a media work which uses Indigenous sources:

- Does it empower Indigenous people?
- Does it depict or expose confidential, personal and/or sensitive material?
- Does it reinforce negative stereotypes?
- Does it adapt or alter the cultural heritage material in any way? If so, have you discussed this and gained consent?
- Will the individual or community who is the subject of the work get an opportunity to see the work?
- Have their suggestions been incorporated before public dissemination?
- Are there restrictions on performance such as where, when, and by whom?
- Are you using heritage material, such as imagery, music and language, with regard to gender, language group affiliations and cultural restrictions?

5. Secrecy and confidentiality

The right of Indigenous people to keep secret and sacred their cultural knowledge should be respected. Indigenous people have the right to maintain confidentiality concerning aspects of their personal and cultural affairs.

When planning a media artwork consider whether it exposes secret/sacred, confidential or sensitive material.

- Secret and sacred objects are important to Indigenous religious practices. It may be a transgression of Indigenous law to reproduce these images. For instance, some cultural information may only be learned or viewed by men or women, or only after initiation.
- Speak to elders and/or other Indigenous people in authority to identify any sensitive, sacred or religious issues that might prevent depicting the image, story or event.
- Be aware that the inclusion of personal material may be a sensitive issue. If individuals, family or language group representatives object – leave it out.
- Many Indigenous communities have restrictions on making public the name and photograph of a deceased person. Before depicting deceased people, seek permission from family or language group representatives.
- Discuss issues of interpretation, integrity and authenticity.
- If adapting traditional knowledge content or communally owned material, it is a good idea to explain the adaptation you propose and give people time to comment.

6. Attribution and copyright

Copyright protects:

- artistic works
- literary works
- musical works
- dramatic works
- films, sound recordings
- television and sound broadcasts
- published editions of works.

The works must be original and must be reduced to material form. To be original, for the purpose of copyright protection, the author or authors must have applied sufficient skill, labour and judgment to create the work.

The owners of copyright works have the exclusive right to, among other things, reproduce the work in a material form, publish the work and communicate the work to the public.

Attribution

Indigenous people should be given proper credit and appropriate acknowledgment, including copyright and royalties, for their role in the development and use of their cultural material.

- Acknowledge Indigenous contributors, writers, creators, communities and custodians who contribute to the work in any important way.
- Ask for correct wording of how the person or community wishes to be attributed with ownership or contribution.
- Ensure that proper acknowledgment is given to the writer and the source community, or other relevant Indigenous people.

Copyright

- Creators do not need to register for copyright protection.
- Copyright lasts for 70 years from the death of the creator for artistic, literary, musical and dramatic works. Films and sound recordings are protected for 70 years from when they are made.
- A person will infringe copyright in a copyright work, film or sound recording if he or she reproduces it in material form, publishes it or communicates the work to the public, without the permission of copyright owner.
- In collaborative works, copyright may be shared with the collaborating artists.
- The Indigenous artist who incorporates traditional ritual knowledge in his or her artwork has a special obligation to the language group when exercising the copyright in the artwork.

- When reproducing copyright material it is necessary to get copyright clearance from the artist.
- Media artists are encouraged to use written agreements when licensing artworks for commercial purposes.
- The artist has the moral rights to his or her artwork, and performers have moral rights over their performances. This includes the right of integrity, the right of attribution and the right against false attribution.
- There are statutory licensing schemes that allow copying of certain copyright material under certain circumstances. The relevant collecting agencies including APRA, Viscopy, CAL and Screenrights collect and distribute royalties to their members.

7. Proper returns and royalties

Indigenous people have the right to be paid for their contribution and for the use of their cultural heritage material. They have the right to control commercial exploitation of their cultural and intellectual property.

- Copyright owners are generally entitled to a licence fee or royalties for the use of their work. Media artists should register with collecting societies, such as Viscopy, CAL, APRA and Screenrights, to ensure they are paid their share of royalties.
- Check that all other rights holders are acknowledged in that registration.
- Have an upfront discussion of the issue of copyright ownership of Indigenous material.
- Negotiate fees and other benefits with the contributors and traditional custodians.
- Ensure relevant Indigenous people share in the benefits from any commercialisation of their cultural material.
- Recognise the cultural value of the work. The cultural contribution of Indigenous people to media art should be valued, acknowledged and remunerated.

- Indigenous cultural advisers should be acknowledged and properly remunerated for their contribution.
- Incorporate any such fees in the project budget when applying for funding.

8. Continuing cultures

Indigenous cultures are dynamic and evolving, and the protocols within each group and community will also change. Consultation is an ongoing process.

- Be aware that Indigenous people have a responsibility to ensure that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.
- Think of ways of maintaining relationships for future consultation.
- Consider future uses of the artwork that were not contemplated at the initial consultation.
- Consider cultural protocols and try to include these in any future licence agreements for use of the work.

9. Recognition and protection

Indigenous people have the right to protection of their cultural and intellectual property. Australian laws and policies should be developed and implemented to respect and protect Indigenous rights to cultural and intellectual property.

Media artists should:

- Get written releases and contracts, as this is the best way of ensuring that rights are cleared for proposed and intended use. It is a good idea to seek independent advice on written releases and contracts. The Arts Law Centre of Australia has sample agreements available for members.
- Discuss copyright issues.
- Propose ways of identifying cultural sources of information.

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- 60 The right to reproduce an artistic work in material form is an exclusive right pursuant to Section 31(1)(b) of the *Copyright Act 1968* (Cth).
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Acknowledgments

Terri Janke and Company would like to acknowledge the input and guidance of Jenny Fraser in developing the protocol guides and for acting as peer reviewer for the second edition in 2006.

Terri Janke of Terri Janke and Company undertook the edit of the 2007 guide.

We thank Helen Zilko whose contribution as editor assisted in creating the original suite of five protocol guides in 2002.

We acknowledge the contribution of the following people:

- Samantha Joseph, (former) solicitor, Arts Law Centre of Australia
- Libby Feez, Australian Broadcasting Corporation's Message Stick
- Dr Anita Heiss, author, Curringa Communications.
- Mark Leavy, CyberDreaming
- Anastasia Charles, Terri Janke and Company
- Sonia Cooper, Terri Janke and Company
- Brenda L Croft, National Australian Gallery
- Doreen Mellor, National Library of Australia
- Samara Mitchell, Ngapartji Media Centre, Adelaide
- Robynne Quiggin, Vincent-Quiggin Consulting
- Brook Andrew, media artist
- Helen Anu, performer
- Jason Davidson, media artist
- Jason de Santolo, media artist
- Pauline Lampton, dancer and choreographer
- Rhoda Roberts, festival director
- Vynette Wright, media artist
- Past and present members and staff of the Australia Council's Aboriginal and Torres Strait Islander arts board and Inter-arts office.