

# Using intellectual property tools to protect Traditional Cultural Expressions/Traditional Knowledge related issues at Arts Festivals

Presentation to Council for the Festival of Pacific Arts  
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## **1. Introduction**

This paper provides information on intellectual property issues that arise in relation to arts festivals, with a specific focus for traditional cultural expressions (TCEs) and traditional knowledge (TK) related issues. The Festival of Pacific Arts is a celebration of Pacific arts, culture and knowledge. A great wealth of TCEs and TK will be showcased at the Festival including music, dance, drama, photography, craft, visual arts, sculpture, cultural practices including food preparation, canoeing, basket-making and medicinal preparations.

To protect against intellectual property infringement and TCE/TK appropriation, a mix of IP tools such as copyright and trade marks, as well as contracts, and protocols can be useful.

## **2. Film and photography**

Public performances of traditional song, dance and culture can be filmed, recording in sound or photographed. The problem for traditional performers is that they cannot control how that recorded material is used. At the Laura Festival in 2000, the Wik Apalech Dancers were photographed performing, and their image was used without consent, for a CD of Indigenous music not related to them. The image was also put on a postcard. (See the Case study 5, WIPO, *Minding Culture* Studies at following link: <http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>.)

Organisers can control the capturing of performances, art and craft during the Festival by Agreements for visitors attending – so that the rights to photograph, film, record or use in publicity is obtained from the Event organizers and/or the relevant performers.

Using signed performer's releases for authorised filming and recording is necessary. For still photography, some form of written agreement will need to enforce rights of performers. For instance, access to the performance is conditional on the audience not taking photographs.

## **3. Film contracts**

These rights can be granted by the organizers by way of written contract, and terms relating to protecting and safeguarding TK can be inserted. For example, it is a growing practice for Australian Film contracts for Indigenous cultural material to contain cultural heritage rights clauses recognizing rights of TK and TCE owners. See the Australian Film Commission, *A guide to protocols for filmmakers working with Indigenous content and Indigenous communities*, [http://www.afc.gov.au/downloads/indig\\_prot\\_draft.pdf](http://www.afc.gov.au/downloads/indig_prot_draft.pdf).

#### **4. Broadcasting rights**

The rights to communicate the festival to the public includes broadcast via television, radio and internet. Film rights to festivals can also be managed by event organizers – accredited television stations with conditions that allow editing and/or payments. For example, the Special Broadcasting Service has the broadcasting rights for an annual event, *The Deadlys*. The event organizers restrict people from filming the event – tickets state no filming is allowed.

#### **5. Media accreditation and guidelines**

Inviting media to apply to attend the event and also to provide proposals to the Organisers is another way of managing risk. The Council for the Festival of Pacific Arts could then appoint limited media to come to the events, and make their entry conditional on them respecting guidelines or protocols.

Media guidelines and protocols should be drafted and made available to the media, as well as all participants.

The Festival website could be used to disseminate the guidelines and protocols. (<http://pacartsas.com/>) The guidelines could instruct media, and others, about respect appropriate cultural sites, or cultural dances and knowledge. Guidelines for media are another way of informing the media about representations of culture and appropriate ways of behaving and respecting culture at the Festival of Pacific Arts.

Some models for the Council for the Festival of Pacific Arts to explore include:

- Uluru-Kata Tjuta National Park – film and photography guidelines – permits are required to film, record by sound, photograph or do artistic works - <http://www.environment.gov.au/parks/uluru/vis-info/permits-image.html>
- The Dreaming Festival - <http://www.thedreamingfestival.com/> - takes on line applications for media prior to event

#### **6. General authority to make a record**

Yothu Yindi Foundation (YYF), the organizers of the Garma Festival is a cultural festival held in northeast Arnhem land in the Northern Territory, have developed protocols for the conduct of visitors and participants, which they enforce by entry and access contracts. People must apply to attend the festival, and if their attendance is approved they must agree to abide by the protocols. One of the protocols is that those who want to photograph or record at the Festival must sign a ‘General authority to make a record’

agreement. This can be done on line, prior to attending the Festival. The one page agreement sets out the conditions:

- Anyone making a recording must follow the directions of the YYF staff.
- YYF will own copyright and intellectual property rights of Records on behalf of the Traditional Aboriginal Owners. Records is defined as any photographic, film, video or audio recordings, whether permanent or not and the creation of any literary, dramatic, artistic or musical work which embodies an image or sound which was made available to the recorder... at the Festival.
- The person must agree to only use the recording for personal use. No publication of the recording is allowed without the prior permission of the YYF
- The recorder must give high quality copies to the YYF after the Festival.
- The YYF may use the copy for fund raising or publicity purposes provided that YYF give credit to the recorder.
- The recorder shall not use a Record in a matter that detrimental to the Traditional Owners, their rights in land, or their corpus of ritual knowledge, or in a manner inconsistent with Aboriginal law and custom.

Available on line at: <http://www.garma.telstra.com/pdfs/2008/GF08backgroundnotes.doc>

## **7. Live performance and copyright**

Live performances provide an opportunity for bootleggers associated with pirate networks to record, produce and distribute materials illegally. It is important to have signage, and set terms of entry to events that there be no recording or filming without prior consent.

Under copyright laws, performers must consent to the recording and filming of their performances. These rights are called performers rights. We recommend that consent be given in writing with clear terms on the use.

## **8. Live performance and contract law**

Access conditions also allow event organisers to limit the use by which people can make use of recordings and photographs. A good policy which is stated on the website, or made available at the Festival will alert people that you intend to take care for TK/TCE. This is used by many event and concert organizers to protect the performance and a note is put at the ticket sales point, and even on the ticket itself. Some examples:

- No filming, photography or recording devices allowed.
- Flash photography is not permitted within the Museum.
- No photography of any kind is permitted.

## **9. Moral rights**

Creators of works and, filmmakers have moral rights to their works and films. Performers have moral rights in their performances. Moral rights are:

- The right of attribution
- The right against false attribution
- The right of integrity

Procedures for crediting artists and performers should be put in place to allow the connection and attribute creators.

## **10. Attribution for traditional custodians/cultural owners**

The festival should ensure that proper attribution is given to performers, creators of works, the makers of sound recordings and films, but and also traditional custodians of traditional knowledge and traditional cultural expressions. For example, within Australia, clans are often attributed where works incorporate traditional knowledge. The Arts Law Centre recommends that 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 nay part of the images for any purpose that has not been authorized by the custodians is a serious breach of the customary law of the (name) community, and may also breach the Copyright Act 1968 (Cth).

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

## **11. Public performance rights**

Copyright owners have the right to publicly perform their songs in public including festivals. Festival organisers pay a performance licence fee to the public performance collecting agency. In Australia, the Australasia Performer’s Rights Association (APRA) can grant a licence. ([www.apra.com.au](http://www.apra.com.au).) In Fiji, the Fiji Performing Rights Association (FPRA) can grant licences. (<http://www.fpra.com.fj/musicUsers.htm>) For the United States, the relevant agencies are ASCAP (The American Society of Composers, Authors and Publishers) or BMI. Fees are calculated as a percentage of the gross box office receipts and are generally paid after the event, but in some cases an advance payment is required. As part of administering the licence, Festival organizers should have all performers complete a list of the works they perform and return these to the public

performance collecting society after the event. The song lists allow for the society to identify who should receive royalty payments.

In Australia, APRA recognizes that its members own copyright in arrangements of traditional music. The distribution rules in Australia allow a percentage of around 50% to the artist. However, the rules of distribution could be adjusted in the territory.

## **12. Trade marks and branding**

A trade mark is a sign or device used to denote the source of goods and services. Many well known Arts Festivals brand their events with registered trade marks. Registered trade marks and branding give festivals opportunities to gain sponsorship but also allow them to protect the cultural integrity of the Festival in the event that the reputation of the festival is compromised, or content of the festival is used for inappropriate purposes.

WOMAD - the World of Music, Arts and Dance, expressing the central aim of the WOMAD festival – bring together and celebrates many forms of music, arts and dance drawn from countries and cultures all over the world. First held in the UK in 1982, the festivals have involved performance events in over 20 different countries. The conference organizers registered ‘Womad’ as a trade mark in many of the countries where the WOMAD is held. In 1989, the Event organizers registered the UK trade marks and in 1994, the Australian trade marks for WOMAD were registered in classes for festivals, but also recordings, publications and merchandise.

## **13. Merchandising policy promoting authentic arts and craft**

Consumer protection and fair trading law protect artists from misleading and deceptive conduct. There are laws like the Indian Arts and Crafts Act (US) which makes it illegal to display or sell goods ‘in a manner that falsely suggests it is Indian produced.’

Merchandise sold at and during the Festival will include visual arts, craft, books and products are authentic. The Council for the Festival of Pacific Arts should adopt a merchandising policy which promotes best practice for sale of Pacific Arts.

Wider promotion of this policy could be promoted via national tourism and retail agencies, or via government. For example the Code of Practice for retailers and galleries in the City of Melbourne was established by the City of Melbourne local council to promote the sale of authentic Aboriginal art, on fair terms. See <http://www.melbourne.vic.gov.au/rsrc/PDFs/ArtsAndCulture/IndigenousCodeofPractice.pdf>.

See also this guide developed by Arts NT and the Association of the Northern and Kimberley Aboriginal Artists of Australia (ANKAAA) – ‘Purchasing Australian Aboriginal Art: a consumer guide.’ <http://www.aboriginaltourism.com.au/downloads/consumer.pdf>.

Registered trade marks may also assist with promotion authentic products. For instance, the Gab Titui Cultural Centre in the Torres Strait registered a trade mark for its Cultural Centre, and associated classes for products sold at the Centre's shop.

## **14. Protocols**

Protocols are also a good way to invoke the good will of participants to respect TCE/TK, and if combined with contracts can be legally binding, as the example of the Garma Festival shows. Protocols can cover principles such as:

- Respect
- Indigenous control
- Communication, consultation and consent
- Interpretation, integrity and authenticity
- Secrecy and confidentiality
- Attribution
- Proper returns (payment)
- Continuing cultures
- Recognition and protection.

The Aboriginal and Torres Strait Islander Arts Board of the Australia Council has produced a series of Protocols guide that cover TCE/TK issues, as well as copyright.

[http://www.australiacouncil.gov.au/data/assets/pdf\\_file/0007/19744/Performing\\_arts\\_protocol\\_guide.pdf](http://www.australiacouncil.gov.au/data/assets/pdf_file/0007/19744/Performing_arts_protocol_guide.pdf)

Other event organisers have published their protocols to inform participant behaviour at Festivals. An example of a protocol for taking photography:

'Please exercise courtesy and sensitivity when taking photographs – seek the permission of the subjects if taking close-ups, or photographs of small groups, particularly in the women's programs and men's programs cultural and health sessions.'

## **15. Traditional knowledge protection**

For protecting against the misuse of traditional knowledge, performers and participants should be aware that there is no international legal regime that protects traditional knowledge rights. Participants should ensure that traditional knowledge is suitable for public performance and dissemination at the Festival.

Notices included within the Festival published protocols and guidebooks will also put the audience on notice that any traditional knowledge should not be used, adapted or commercialized without the prior informed consent of the relevant traditional custodians. Here is an example of a notice used in a published book on Indigenous plant knowledge:

## **Traditional knowledge notice**

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

### *Optional paragraph to allow researchers a limited licence if appropriate*

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

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

## **16. Choice of law**

The 2008 Festival of Pacific Arts is in American Samoa. Hence, US law will apply. The examples discussed above reflect the Australian legal and policy framework, and are for illustrative purposes only. It may be possible to adapt them for application to the Festival, however, advice from a US legal adviser is recommended.

## **17. Summary**

Festival organizers can use a range of IP tools to protect intellectual property at the Festival. IP tools such as copyright, performers rights, trade marks used in association with contracts, protocols, guidelines, notices (accreditation, access conditions etc).

<b>PARTICIPANTS</b>	<b>POTENTIAL STRATEGIES</b>
Copyright for original works - songs, dance, literature, visual art	Copyright notices with name and date.
Performer's rights	Performers' rights control recordings of performances. No commercial filming/recording. Provide Festival organizers rights to record for publicity.
Rights of public performance	Musicians and performers to join Public performance association to collect licence fees. Arrangements of traditional music to be recognized.
Moral right of attribution - creators of works/makers of sound recordings and films	Notices for creators/makers of sound recordings and films.
Moral right of integrity for creators of works.	Notice.
Traditional cultural expression and TK recognition.	Traditional knowledge check - make sure prior to performances and publication that knowledge is suitable for public performance and dissemination  Traditional knowledge and traditional custodian notices used.
<b>FESTIVAL ORGANISERS</b>	<b>POTENTIAL STRATEGIES</b>
Access is conditional on respecting TK/TCE.	Contractual rights enforced by publishing on website, point of sale, and on the back of ticket.
Rights of public performance	Public performance rights licence
Traditional cultural expression and TK recognition.	Protocols for TK/TCE published on website, visitor guides, media info kits, and conditions of entry on website, point of sale and on tickets.
Accredit media at events	Solicit applications via website - once media is selected have them sign a media agreement.
Accredit photographer	Solicit applications via website for accredited photographer - once selected, the photographer agrees to be bound by terms of contract.
Accredited broadcasters	Council can select broadcasters for events and make film/recording conditional on respecting protocols. Broadcaster must get performer's releases from participants to film and record their performances.
Restrict photography, film, recordings	FOPA policy for no commercial photography, recording or filming - enforced by entry conditions, warnings published on website and event guides, ticketing and media campaign.
Commercial photography of specific participants	Media guidelines advising people they must enter into agreements with relevant participants and become an accredited recorder.
Publicity film/recording of event.	Seek limited licence to photograph and film, or record participants to use for publicity of the Festival only, using a performer's release form
TK/TCE attribution	Traditional custodians' notice & TK notices published on visitors guide, website etc.
Promote authenticity	Trade marks registered for FOPA.
Promote authenticity	Merchandising policy for products sold at FOPA & brand authenticity.
<b>VISITORS</b>	<b>POTENTIAL STRATEGIES</b>
No photography, film, recordings	Invitation to attend events is conditional on following protocols and that there be no commercial photography or filming, or sound recording- terms via ticket, visa entry, and published on website, point of sale.
Personal photography is limited	Photography/film/recording restricted to personal use. No publishing on the internet including You-Tube. No use for non-commercial purposes unless prior informed consent on terms to be negotiated.
Repatriate of copies of recordings for cultural maintenance purposes.	The recorder could be asked to give copies to the Festival archive.