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# cultures



SONG



Protocols for Producing Indigenous Australian  
Music

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Song Cultures: Protocols for Producing Indigenous Australian Music



An initiative of the Aboriginal and Torres Strait  
Islander Arts Board of the Australia Council



# contents

<b>Introduction</b>	<b>1</b>
Using the <i>Song Cultures</i> guide	2
What are protocols?	2
What is Indigenous music?	3
Special nature of Indigenous music	4
<b>Indigenous heritage</b>	<b>5</b>
Current protection of heritage	6
<b>Principles and protocols</b>	<b>8</b>
Respect	8
Acknowledgment of country	8
Accepting diversity	8
Representation	9
Living cultures	9
Indigenous control	9
Communication, consultation and consent	10
Performing and recording communally owned music	10
Legal and customary law effects	10
Permission to use particular instruments	11
The didgeridoo	11
What about sampling music that is already recorded?	11
Consenting to rearrange or re-mix music	12
Festivals, concerts and events	12
Interpretation, integrity and authenticity	13
Interpretation	13
Integrity	13
Authenticity	13
Secrecy and confidentiality	14
Secret and sacred material	14
Bull-roarer	14
Use of life stories	14
Representation of deceased people	14
Attribution	15
Recording contracts	15
Distribution, promotional material and cover artwork	16
Proper returns	17
Royalties	17
Registration	17
Royalties and Indigenous music	17
Festivals, concerts and events	18
Continuing cultures	18
Recognition and protection	18
Resources	19
Who's Who in the development of musical works	20
<b>Copyright</b>	<b>21</b>
What is copyright?	21
How does copyright protect music?	21
How is music reduced to material form?	21
Who owns copyright?	22
Copyright exceptions	22
How long does copyright last?	22
What rights do copyright owners have?	22
Collaborative works	23
Communal ownership vs. joint ownership	23
Copyright and performers rights	24
Performing a cover version of a song	24
Copyright and recording	24
What is the legal effect of making a sound recording?	24
What is the public domain?	25
What are moral rights?	25
Licensing use of music	26
Assigning copyright vs. licensing	26
New technologies	26
Managing copyright to protect your interests	27
Copyright notice	27
Moral rights notice	28
When is copyright infringed?	28
Fair dealings provisions	28
Crown use of artworks	29
Library copying	29
Further copyright information	29
Copyright collecting societies	29
<b>Follow up</b>	<b>32</b>
Applying the protocols	32
Respect	32
Indigenous control	33
Communication, consultation and consent	33
Interpretation, integrity and authenticity	34
Interpretation	34

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IMPORTANT NOTICE - The information included in this guide is current as at Sydney, May 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.

Integrity	34
Authenticity	34
Secrecy and confidentiality	34
Attribution	35
Proper returns	35
Continuing cultures	35
Recognition and protection	35
Copyright	36
Musical works	36
Sound recordings	37
Copyright infringement	37
<b>References</b>	<b>38</b>
<b>Bibliography</b>	<b>40</b>
<b>Contacts</b>	<b>42</b>
<b>Acknowledgments</b>	<b>45</b>



# introduction

*Indigenous music is a voice that crosses boundaries. It is the true voice of this country because it is linked to the land. It enriches this nation, and shows the nation's true identity.*<sup>1</sup>

David Milroy

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original owners and inhabitants of Australia.

In Indigenous cultures the artist is a custodian of culture, with obligations as well as privileges.

Indigenous people's right to own and control their cultural heritage is known as 'Indigenous cultural and intellectual property rights'. The term is used in *Our Culture: Our Future*<sup>2</sup> to refer to those rights as they are developing within international law. Since 1998, when *Our Culture: Our Future* was first published, the term 'Indigenous heritage rights' has gained more favour in the international arena. In the *Song Cultures* guide we use 'Indigenous heritage' to refer to these rights.

Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people's heritage is a living heritage. An Indigenous person's connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, song, the visual arts and more recently, new media, are ways of 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. *Song Cultures* guides the reader through many of these protocols.

*Song Cultures* is one in a series of five Indigenous protocol guides published by the Australia Council's Aboriginal and Torres Strait Islander Arts Board. The guides reflect the complexity of Indigenous Australian culture, and provide information and advice on respecting Indigenous cultural heritage. Although each of the guides address cultural protocols specific to an Indigenous artform, they are shaped by the same underlying principles – the backbone of the protocols. The five guides in the series are:

- Writing Cultures
- Performing Cultures (Drama/Dance)
- Visual Cultures
- Song Cultures
- New Media Cultures.

The Indigenous protocol guides will have relevance for everyone working in or with the Indigenous arts sector, including:

- Indigenous and non-Indigenous artists
- People working within related fields of Indigenous artform practice
- Federal and state government departments

- Industry agencies and peak organisations
- Galleries, museums and arts centres
- Educational and training institutions
- Indigenous media and targeted mainstream media.

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

We also hope the guides will spark debate and that additional protocols will be developed across ariforms. Your comments and ideas can be forwarded to [atsia@ozco.gov.au](mailto:atsia@ozco.gov.au) or Director

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### Using the *Song Cultures* guide

*Song Cultures* is written as a first point of reference in planning a work with Indigenous music practitioners, or Indigenous cultural material. When you need specific advice on the cultural issues of a particular group, we recommend that you either speak to people in authority, or engage an Indigenous cultural consultant with relevant knowledge and experience.

It is important to read all sections of this publication.

The **Introduction** defines protocols as used in this guide, and looks at the special nature of Indigenous music.

The next section, **Indigenous Heritage**, is an important overview of the issues that inform the development of Indigenous protocols. It looks at the complex web of relationships in Indigenous Australia, and how this might impact on the

planning of a music or song project. It also charts international initiatives for the protection of Indigenous cultural and intellectual property rights.

The key section, **Principles and Protocols**, presents nine principles we have developed to support the protection of Indigenous cultural heritage. There is valuable information on protocols specific to the use of cultural heritage material in the context of music. A number of case studies and commentaries from Indigenous music practitioners identify pitfalls and offer advice.

The **Copyright** section contains general information and advice on the main law in Australia governing the use and reproduction of arts and cultural expression.

**Follow Up** provides a checklist of key points to consider when developing appropriate protocols for a music project. It offers different and more specific information than the preceding sections. We therefore suggest you use the points outlined in **Follow Up** together with the *Principles and Protocols* and *Copyright* sections.

### What are protocols?

Protocols are appropriate ways of using Indigenous music and cultural material, and interacting with Indigenous musicians and Indigenous communities. Protocols 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 note 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 the diversity of urban, rural and remote communities.

While it is not possible to prescribe universal rules for transacting with Indigenous musicians and their communities, there are some fundamental principles within which to conduct respectful work.

The protocols outlined in *Song Cultures* are shaped by nine fundamental principles. The protocols are, by definition, ways of actioning 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 event.

*Song Cultures* identifies many specific protocols which can be applied or adapted by Indigenous musicians, singers, songwriters, record companies, event managers, arts organisations and others working with Indigenous music.

*Song Cultures* 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.

While protocols differ from legal obligations, *Song Cultures* 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 music.

### What is Indigenous music?

Indigenous music is an important part of Indigenous culture.

Music<sup>3</sup> is about expressing cultural belonging. It is part of ceremony, storytelling, celebration, mourning, coming together and telling of the events in Indigenous people's lives, both past and present.<sup>3</sup>

Indigenous music is not easily divided into categories of traditional and contemporary styles, despite common perceptions. In *Song Cultures*, 'traditional' refers to works that have drawn material from a pre-existing cultural base.

Indigenous music refers to

- music and lyrics
- instrumental pieces
- Indigenous rhythms and song cycles

that are created primarily by Indigenous Australian people, or based on the cultural property of Indigenous Australian people.

Indigenous music draws on and embraces the full range of music styles and forms including pop, country and western, disco, opera, rap, techno, and rhythm and blues.

Similarly, Indigenous musicians use a range of instruments including the didgeridoo and clap sticks, but also guitar, drums, piano and saxophone.

In many instances music has developed as part of a collaborative process, created with non-Indigenous people.

## Special nature of Indigenous music

For Indigenous cultures music and song are central to identity, place and belonging, and are an expression of a unique and continuing tradition.

Indigenous music has an important place in the transmission and survival of Indigenous cultures. It has been a primary means of:

- renewing and teaching law and culture
- ceremony
- storytelling
- preserving language
- entertainment
- recording personal stories
- recording stories of common Indigenous Australian experience
- telling Indigenous experience to the wider community
- celebrating
- showcasing and sharing Indigenous experience through collaborative writing, performance recording
- sharing Indigenous experience with audiences in Australia and overseas.

Music is created as a solo or collaborative endeavour. The nature of collaborative work raises many issues for Indigenous performers around the use of cultural property and appropriate production of their work. Some issues of concern include:

- Who has the right to use Indigenous cultural material?
- Who has the right to speak for the owners of Indigenous cultural material?
- What is the proper treatment of Indigenous cultural material such as creation stories, song cycles, rhythms, language and other forms?

New musical styles – including ‘world music’ and the technique of ‘sampling’ Indigenous music, originally recorded by ethnomusicologists and stored in archives or libraries – has caused distress to the Indigenous custodians who were never consulted about this use.<sup>4</sup>

- Is the diversity of Indigenous music respected? In an era of new and emerging artists and styles, many Indigenous musicians want to be recognised for their particular style and talent, rather than being subjected to stereotypes held by others.

Some contemporary Indigenous musicians and composers have complained that record companies, keen to have Indigenous product, are requesting them to perform what are described as ‘tribal style’ or traditional songs.

They say that record companies show little interest in new works based on contemporary Indigenous lifestyles. One record company returned a tape of songs by an Indigenous performer, saying ‘These are great – but could you sing something about how the kookaburra got its laugh?’.<sup>5</sup>

- What can be done to further promote and protect the rights of Indigenous people to own and control their Indigenous heritage within the current legal framework?<sup>6</sup>
- How is Indigenous music properly attributed?
- What about adaptations of Indigenous music, such as remixing and re-recording?

There are many other important issues raised by the development of Indigenous music and song. *Song Cultures* offers some ideas for dealing with these issues.



# Indigenous heritage

Indigenous music 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*.<sup>7</sup>

The music industry can adapt a ‘best practice’ approach by encouraging respect for the cultures of Indigenous Australians. It can do this by acknowledging their innate value, their difference from other cultures, and by respecting Indigenous 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 is not one, but many Aboriginal or Torres Strait Islander cultures. These cultures 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.

An Indigenous person’s connection with Indigenous heritage is expressed in contemporary life through his or her relationship with land, waterways, animals and plants, and his or her relationships with other people.

Aboriginal and Torres Strait Islander people have a well developed and complex web of relationships based on family ties, clan belonging, language group affiliations and community, organisation 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 music project.

Indigenous Australians are concerned that there is no respect for their Indigenous 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.<sup>8</sup>

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

### **Our Culture: Our Future**

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

Heritage comprises all objects, sites and knowledge – the written nature or use 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 and includes objects, knowledge, artistic literary, musical and performance works which may be created now or in the future, and based on that heritage.

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 the culture.

For a full list of rights see *Our Culture: Our Future*<sup>9</sup>

### **Current protection of heritage**

Australia's current legal framework provides limited recognition and protection of these 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. 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 which assert their ownership and associated rights to Indigenous 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.

The Draft Declaration on the Rights of Indigenous Peoples states, in Article 29:

*Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.*<sup>10</sup>

The Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights, in Article 8, urges Indigenous people to 'develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge'.<sup>11</sup>

Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (1993) were adopted by ATSIC's Indigenous Reference Group in 1997.<sup>12</sup> Article 39 states:

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

In January 2002, the World Intellectual Property Organisation's International Forum, *Intellectual Property and Traditional Knowledge: Our Identity, Our Future*, held in Muscat, Oman, adopted a Declaration recognising that 'traditional knowledge plays a vital role in building bridges between civilisations and cultures, in creating wealth and in promoting the human dignity and cultural identity of traditional communities'.<sup>13</sup>


Internationally, the World Intellectual Property Organisation 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.<sup>14</sup>

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.<sup>15</sup> The prior and informed consent of the 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



The principles outlined below are a framework for respecting Indigenous heritage:

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

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.

## 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.

When organising a performance or event, it is respectful to seek the consent of the Indigenous owners of the land.

If consent is given, it is important to acknowledge country and custodians at the site of each festival, concert or public performance. Seek advice from the Indigenous community on the preferred manner of acknowledgment.

### Accepting diversity

Indigenous musicians come from many different backgrounds, learn their art in many different ways, and express their music in many different styles.

It is important that Indigenous cultural expression is celebrated instead of restricted.

Most artists feel the pressure to produce work that will appeal to the commercial market. Indigenous musicians are often under the additional pressure to create music that fits stereotypical ideas.

Indigenous musicians are tired of answering questions about why they don't play the didgeridoo, or why they are not singing in their language, or why they want to compose songs about their feelings and personal experiences.

Indigenous musicians have also confirmed that racism is 'alive and well in the music industry'.<sup>16</sup>

An increase in Indigenous music publishers, managers and promoters who can provide culturally appropriate advice and services will benefit the music industry and Indigenous musicians.<sup>17</sup>

## Representation

Derogatory or outdated perspectives and terminology should be avoided.

### Living cultures

Indigenous cultures are living and evolving entities, not simply historical phenomena.

Indigenous musicians draw upon their pre-existing cultural base in many different ways.

This may include cultural expression based on particular Indigenous experience such as Archie Roach's 'Took the Children Away', Seaman Dan's 'TI Blues' and Marlene Cummins 'Pension Day Blues'. It includes works like 'We Have Survived' by No Fixed Address, calls for political action as in Yolhu Yindi's 'Treaty Now', and comments on ways of life found in the work of the Pigram Brothers.

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

## Indigenous control

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

One significant way is to discuss how Indigenous control over a project will be exercised. This raises the issue of who can represent clans and who can give clearances of 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 stories, geographic locations, rhythms, song cycles and instruments 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 contacts we recommend the following directories.

- *National Directory of Aboriginal and Torres Strait Islander Organisations*. Published for ATSIC and available from Crown Content on (03) 9329 9800 or [www.crowncontent.com](http://www.crowncontent.com)
- *The Black Book Directory 2000 – Indigenous Arts & Media Directory*. Published by Blackfella Films and available from AIATSIS on (02) 6261 4200 or [www.aiatsis.gov.au](http://www.aiatsis.gov.au)

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 relevant Community Councils. For a list of Indigenous authorities consult the *National Directory of Aboriginal and Torres Strait Islander Organisations*.

Some other useful starting points for inquiries include:

- Aboriginal Land Councils
- Aboriginal and Torres Strait Islander Commission
- Torres Strait Regional Authority
- Island Coordinating Council
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- relevant individuals or family members
- elders and custodians of relevant Indigenous clans and groups
- Indigenous language centres
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries
- State and territory government arts departments in NSW, WA, QLD, SA, TAS and NT which have staff dedicated to Indigenous arts programs.

Indigenous people have formed organisations and companies to represent their interests in the music industry. See the *Contacts* section in this guide for further information.

## Communication, consultation and consent

Yothu Yindi describes the importance of this principle as:

*The band's approach to its career is deeply rooted in traditional decision making processes, so all traditional songs that have been performed or released have been done so as a result of substantial consultation with clan leaders and traditional lawmakers.<sup>18</sup>*

Indigenous people should be consulted on the use and representation of their Indigenous heritage, and be informed about the implications of consent.

Consultation should address the communal nature of Indigenous cultural expression.

### Performing and recording communally owned music

When performing or recording communally owned musical works, it is important to seek permission from the relevant community owners of the music.

Observing customary law means finding out who can speak for that music, so the right people are asked for permission to use the music.

For instance, if a musician wanted to use a rhythm or phrase from music belonging to a Torres Strait Island clan or family, it is essential to locate the correct clan or family group from the particular Island owning that song or music.

*If you can't find the correct clan or family to ask permission, that's a good reason not to use the music.<sup>19</sup>*

In order to obtain proper consent it is necessary to:

- provide adequate information
- ask the right people
- consult fully
- be prepared that consent may be withheld.

The right of prior informed consent requires that custodians be given full information about the proposed use of the material. For instance, a songwriter may be composing an ad jingle or writing a score for a play, teaching by performance or writing music for a band to perform and record. If the songwriter hopes for widespread commercial exploitation, he or she should make this clear to the owners of cultural material.

### Legal and customary law effects

The legal and customary law consequences should be considered before recording communally owned music.

There are two issues to consider.

Copyright protection requires the work to have an identifiable author. Some Indigenous material is communally owned, and there is no single identifiable author(s) as such.

Copyright law protects works in 'material form'. In song cultures this generally means the written form or a sound recording. So, once an oral song is written or recorded, copyright in the song may belong to the company or person who wrote or recorded it, not the custodians of the song. Anyone considering participating in the recording of communally owned cultural material is advised to consider the extent of copyright protection, and the requirements of customary law.

Because of these issues, proper communication and consultation means understanding and explaining these issues and all proposed uses of the work. This helps to ensure people are properly informed before giving their consent.

Customary law and cultural protocols should be followed, and consultation should include discussion of proposed uses of the recording and the consequences of wide distribution.

The next case study shows the importance of informing custodians and performers of the proposed uses of a recording. In this case there was no proper consent to commercial exploitation of the music and no royalties were paid to the owners.

#### case study

##### **Recording communally owned music**

**During the 1970s a number of recordings were made of traditional songs from Central Australia for ethnographic purposes. One such recording is now being sold commercially through tourist shops at Sydney's Darling Harbour. The Indigenous performers of the songs complain that they have not received any royalties from the sale of the album. They were under the impression that the song was recorded to preserve the knowledge of the song as part of a language maintenance program. They were not told that the recording would be sold for profit.<sup>20</sup>**

### Permission to use particular instruments

Some Indigenous people feel there should be restrictions on the use of particular instruments in accordance with customary laws or practice.

Use of the bull-roarer, for instance, is subject to ceremonial restrictions: see the *Secrecy and confidentiality* section. Communication, consultation and consent are essential.

### The didgeridoo

There is diversity of opinion among Indigenous musicians on the issue of who can play a didgeridoo. There is a strong belief that in most instances, women are not allowed to play the instrument. Some Indigenous people feel strongly that musicians should refer to the original custodians of the didgeridoo for consent to play the instrument, particularly in view of widespread national and international sale and use of the didgeridoo.

Seeking permission shows respect for the status of the original instrument owners and respects their right to permit, deny or restrict the way the instrument is used.

Permission should always be sought for playing, performing or recording any didgeridoo song cycles belonging to clan groups.<sup>21</sup>

### What about sampling music that is already recorded?

Sampling Indigenous music from records held in archives and incorporating the music in a new recording has become common. The use of music recorded in the past by ethnomusicologists or anthropologists, and stored in archival institutions, has caused problems for some Indigenous people.

Sampling will generally require a copyright clearance, in the form of a licence for use in a sound recording. Unauthorised use of a substantial part<sup>22</sup> of a sound recording may infringe the rights of the copyright owners under the *Copyright Act 1968*<sup>23</sup>.

Copyright in these old recordings often belongs to the person who made the recording. Or if the recording is more than 50 years old, it may be in the public domain. In that case, the archival institution administers the recording of the music.



Consultation and consent with Indigenous custodians or their descendants is an important part of respectful use of these recordings.

There is a significant flow-on effect from the unauthorised use of Indigenous music for sampling. When recorded music is sampled without the consent of Indigenous owners, there is a breakdown in the other principles.

There is no:

- authority or control over the work
- respect for the integrity or authenticity in the use of the work
- respect for confidentiality or secrecy
- proper return for its use
- proper attribution
- proper transmission of culture
- proper recognition under law.

### case study

#### **Asking permission – and asking the right people.**

In 1992 the album *Deep Forest* was released. The album fused digital samples of Indigenous music from Ghana, the Solomon Islands and African Pygmies with techno-dance rhythms. The band got access to the digital samples from the recordists – ethnomusicologists who had worked with these groups and deposited the recordings in a cultural archive.

Permission was not sought from the groups whose songs were recorded. Some of the Indigenous musicians were not credited for their contribution. The US album cover states that part of the proceeds were donated to the

**Pygmy Fund, a charity that provides support to the Efe people. But according to one observer, the music sampled was not from the Efe people.**

**There is no other evidence of Indigenous musicians being paid for use of their work on the album. Large profits were made with no returns to Indigenous musicians. The music was appropriated without consent or attribution, and potential claims to copyright were ignored. All rights to self-determination were denied by these practices.<sup>24</sup>**

### **Consenting to rearrange or re-mix music**

It is adjustable to carefully consider the possible effects of consenting to the right of a recording company to rearrange or re-mix music. If the musician is unhappy with the result, consent may mean he or she cannot complain that the re-mix or rearrangement is a breach of the musician's moral right of integrity. This is the right not to have the work treated in a derogatory manner. It may also create a new copyright in the adaptation.

### **Festivals, concerts and events**

Festival and event organisers should consult with local communities for advice on cultural protocols during a festival, concert or event. Consultations should be held to discuss involvement of the local community in the event, proper returns for the local community, a welcome to country if appropriate, and meetings between the community and invited guests or performers. Local communities will advise on the cultural protocol for their area.

## Interpretation, integrity and authenticity

Indigenous musicians and their communities should have control over how their cultural heritage is presented. The presentation of a musical work includes its interpretation, integrity and authenticity.

### **Interpretation**

Interpretation refers to how cultural material is interpreted and represented. This includes the perspective given to the cultural heritage material and the language used.

In the past, Indigenous cultural material has been subjected to interpretation by non-Indigenous people. Today, as Indigenous people seek to reassert and re-claim control over their cultural heritage material, Indigenous interpretation of the material is a way of enhancing the cultural significance of the work.

The context of the performance or recording is an important consideration to ensure the music is not used in a disrespectful way.

*It is very important that when Indigenous people are educating others – you have to get it right.<sup>25</sup>*

For instance, an educational performance of song and dance, at a school, should include a good background history of the music and be:

- accurate
- appropriate for children.

Consider interpretation and context in the presentation of musical works:

- Words or phrases from particular languages should not be used just because they are 'language words'.

- Language should only be used where its proper meaning is known and where it is used in the proper context.<sup>26</sup>
- Cultural material should always be used in the appropriate context.
- Observe gender restrictions. For instance, the use of the didgeridoo is generally thought to be restricted to men.
- Check that the musical work does not reinforce negative stereotypes of Indigenous people.
- Check that the musical work does not expose confidential, personal or sensitive material.

### **Integrity**

Integrity refers to the treatment of the original musical work and copies made of it. Under the *Copyright Act 1968*, the moral right of protection for integrity provides a right of protection for individual authors against 'derogatory' treatment of their work.

For example, unauthorised sampling of Indigenous music may alter the original intention or meaning of the work and infringe the author's moral rights.

Maintaining the integrity of a work is important for the authors, but integrity of the work is also very important for the Indigenous communities where the work originates. Unfortunately, there is no legal remedy yet for a community as a whole if a work is subjected to derogatory treatment. But the individual authors can exercise their legal rights.

### **Authenticity**

Authenticity refers to the cultural provenance of a musical work. This can be a complex question. For the purposes of this guide, authenticity may also refer to whether an Indigenous person produced the musical work; and whether it was produced with proper regard to Indigenous customary laws, or cultural obligations associated with the work.

Helen Anu suggests the following guidelines for the proper use of songs:

1. Find out the meaning of the songs.
2. Get a proper translation of the songs.
3. Get the context of the translation right.
4. It is important to ensure that the event or venue at which the song will be performed is appropriate for the song. For instance, a political meeting may not be an appropriate venue for a particular song.

*Performing the song at the wrong place can ridicule the song. The context must be respected.*<sup>27</sup>

## Secrecy and confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality. It is the responsibility of those putting together music projects to discuss any restrictions on use with the relevant Indigenous groups.

### Secret and sacred material

The reproduction of secret and sacred music may be a transgression of Indigenous laws.

'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 clan members (such as men or women or people with certain knowledge).

Most material that is sacred has customary law restrictions on its use. The consultation process should clearly state the proposed use and observe any restrictions according to gender or other customs.

### Bull-roarer

The bull-roarer is used in a very restricted manner by men, and only in ceremony. Although not strictly a musical instrument, the bull-roarer has been incorporated into sound recordings. Musicians working in styles such as 'world music' are advised to exercise extra vigilance when it comes to consultation and consent for any proposed use.

### Use of life stories

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

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

If a composer or lyricist 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 the story in music or song.

### Representation of deceased people

In many Indigenous communities, the reproduction of names and images of deceased Indigenous people is not permitted. If music or cover artwork is to represent a deceased person, surviving family members should be consulted and their wishes observed.

## Attribution

Indigenous people should be attributed for the use of their cultural heritage material in musical works.

Under the moral rights provisions of the Copyright Act, the right of attribution is recognised for individual creators. The production of music – especially a recording – goes through a lot of different stages. It is respectful practice to credit individuals, families, clans 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.

This next case study shows the importance of giving credit to all the people who collaborated on the creation of a song. By attributing all the contributors to the song, copyright is shared among them.

### case study

#### **Yothu Yindi's 'Treaty' – Treaty Mah!**

'The songwriters and copyright owners listed on the sleeve of the recording are Mandawuy Yunupingu, Paul Kelly, Galarrwuy Yunupingu, Milkayngu Munnungurr, Stuart Kellaway, Cal Williams and Gurrmul Yunupingu.'<sup>28</sup>

The song primarily comprises of two parts, the contemporary rock/dance section and the traditional/manakayi section.<sup>29</sup> All of the above songwriters had a hand in the writing of the rock section of the song. The traditional section, I understand, is an Arnhem Land courting song, Djat' pangarri, which would have a number of identifiable traditional owners, including the Yolgnu band.'<sup>30</sup>

### Recording contracts

It is strongly advisable to get independent legal advice before signing a recording contract. The owner of copyright in the recording will be the individual or company who pays for it, unless varied by a term of the contract, so it is important to consider the contract carefully.

There are a number of other terms that musicians may want to negotiate in a contract, such as the length of time of the contract, who is credited on the recording, what the artwork and promotional material will look like, who has creative control and many other issues. In addition to the standard clauses, Indigenous musicians might want to include a clause that incorporates cultural protocols.

Incorporating cultural protocols into recording deals will assist in protecting Indigenous musicians and Indigenous culture.

## hypothetical

### **Attribution at the recording stage**

Imagine an Indigenous performer who is recording his first CD and wishes to record his version of a song written by an Indigenous singer/songwriter he really admires.

He follows all proper protocols, seeking permission and asking her how she would like to be attributed on the CD. He tells the recording company about this process and gives the company the proper form of attribution for the singer/songwriter. But when the CD is produced the singer/songwriter is not credited.

The singer/songwriter is offended and the performer is very upset that all his instructions were not followed through.

Since the introduction of moral rights law in 2000, this mistake not only breaches cultural protocol. It could be the basis for legal action for failing to properly attribute the composer.

Indigenous musicians might consider including cultural protocols in their recording contracts to ensure they are carried through at all stages of production.

## Distribution, promotional material and cover artwork

Songwriters who finance their own sound recording will generally be the copyright owner of the recording.<sup>31</sup> The copyright owner of the recording can authorise the manufacture and distribution of the recording. It is recommended that written contracts are used and that legal advice is obtained before signing any contracts for manufacture, distribution and promotion.

### case study

#### **Distribution**

An Indigenous community recorded its songs and approached a record company to distribute its CD. An agreement was signed for distribution only. The record company put a copyright notice on the CD, attributing copyright to the record company. This was a false attribution as copyright belonged to the community. However, a notice of the community's rights was not published on the CD or cover.

The community was paid royalties for the sale of the CDs.

The record company licensed the songs to a recording company in another country. No permission was sought from the community. The songs were included in a compilation album that did not properly attribute the community as the source of the songs. The community successfully took action against the record company for breach of copyright.

The company has since published an unreserved public apology.<sup>32</sup>

Indigenous musicians should be consulted on the cover artwork and distribution of the recording. Artists should be properly attributed for any cover artwork. Similarly, Indigenous musicians should have creative control over material used in the promotion of performances and the recording.

## Proper returns

### Royalties

Royalties are one important form of return for musicians. Copyright owners are entitled to receive royalties for broadcasts (radio, television and the Internet) and public performances of their songs. Collecting societies have been established to monitor use, and collect and distribute fees or royalties owing to songwriters, composers and recording owners who are copyright owners. This system means that copyright owners are not individually trying to chase up their royalty payments.

The Australasian Performing Rights Association (APRA) is a collecting society which distributes performance and broadcast royalties to its composer and songwriter members. The other relevant collecting societies include AMCOS, PPCCA and Screenrights. You will find descriptions of each of these societies at the end of the *Copyright* section.

### Registration

Royalties are available to copyright owners who are registered with the collecting societies. Unless the music copyright owner is registered with APRA, for instance, he or she cannot be paid royalties on the public performance or broadcast of his or her songs – so it is important to join and keep APRA updated on your repertoire.

## Royalties and Indigenous music

There are a number of reasons why Indigenous musicians, songwriters and custodians of music are vulnerable to exclusion from the royalty system.

Some of the reasons are:

- The *Copyright Act 1968* does not adequately protect Indigenous heritage because it does not meet the legal requirements of originality, material form and identifiable author.
- Some past recordings of Indigenous music have resulted in copyright belonging to the person making the recording.
- Past recordings of Indigenous music were made so long ago that the music is now in the public domain and is not protected by copyright.
- Appropriation of Indigenous music has occurred without consent or attribution, therefore owners are not recognised as copyright holders.
- Indigenous people have not known about copyright collecting societies and their functions, and generally, are not members.

This next case study shows how the failure to seek consent of traditional owners and attribute them for their work, denied the owners of royalties from an extremely successful commercial song.

## case study

### The Ami in Taiwan

In 1999, an Ami couple from Taiwan settled their copyright infringement dispute against the band Enigma and Virgin Records America. The couple's performance of a traditional song, 'Jubilant Drinking Song', was appropriated by Enigma in their song 'Return to Innocence', used as the theme song of the 1996 Olympic Games in Atlanta.

The Kuos had not consented to this use and were not credited for their music. The original Kuos version of the music had been recorded and stored by an ethnomusicologist. This recording had been used without consent or attribution in the Enigma song.

The Kuos settlement included:

- a written credit to be given on all future releases of the Enigma song
- a platinum copy of the album on which the song appears
- other confidential terms of settlement.<sup>33</sup>

**Postscript:** Difang Kuos went on to record three albums of Ami music. The first, *Circle of Life*, made it to the top of the World Music Chart in Tokyo. He passed away in March 2002.

license, and a fee to be paid and distributed to the copyright owners. Organisers are asked to collect song sheets from performers, prior to the event, so the royalties can be calculated.<sup>34</sup> This applies even if the event is not producing a profit.

## Continuing cultures

Indigenous people have responsibility to ensure the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

Cultures are dynamic and evolving, and protocols within each group and community will 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 music not envisaged at the initial consultation.

## Recognition and protection

Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights.

*It is important for Indigenous musicians to establish cultural protocols – but they must also know their legal rights with copyright and contracts. Make sure your songs are registered with APRA so that you receive your due income from public performance. When writing songs with another person, have an agreement for sharing royalties.*

Grant Hansen, Songlines Music

The Indigenous musician owns copyright in his or her songs. This means that he or she can control the reproduction and dissemination of his or her music. Such rights are granted under the Copyright Act.

It is important to understand these laws and how cultural material might be protected under them. The *Copyright* section provides some general information.

There are currently no special laws dealing with Indigenous cultural material. 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 culture, including the call for new legislation recognising communal rights to culture. See *Current protection of heritage* in the *Indigenous Heritage* section of this guide.

## Resources

A number of protocol documents have been produced in recent years to meet the needs of particular communities, organisations, industries and situations. The following are selected as useful guides for people working in the music sector.

- Lester Bostock, *The Greater Perspective: Protocol and Guidelines for the production of Film and Television on Aboriginal and Torres Strait Islander Communities*, Special Broadcasting Services, Sydney, 1997.
- *Indigenous Arts Protocol: A Guide*, Indigenous Arts Reference Group, New South Wales Ministry for the Arts, Sydney, 1998.<sup>35</sup>
- Terri Janke, *Doing It Our Way: Contemporary Indigenous Cultural Expression in New South Wales*, Indigenous Arts Reference Group, New South Wales Ministry for the Arts, Sydney, 2002.
- Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, Solicitors, for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1998.
- The Musicological Society of Australia (MSA) has adopted *Guidelines for the Recognition of Indigenous Culture and Custodianship of Country at National MSA Public Events*, including a *Welcome to Country* policy which states in part: 'It is the policy of MSA to recognise the Indigenous custodianship of country where MSA public events are held, and acknowledge the continuing significance of Indigenous culture in Australia.'

The Society recently amended its Constitution so that Article II (f) states: 'The purpose of the MSA shall be, in collaboration with the performers and owners of Indigenous music, to promote and support greater understanding and appreciation of Indigenous music in Australia.'

- *Taking the Time – Museums and Galleries, Cultural Protocols and Communities, A Resource Guide*, Museums Australia Inc. (Qld), 1998.
- *Previous Possessions, New Obligations*, a policy document produced by Museums Australia in 1994 provides a way for museums to approach Indigenous cultures. A plain English version with case studies has been published.
- *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, compiled by Alex Byrne, Alana Garwood, Heather Moorcroft and Alan Barries for the Aboriginal and Torres Strait Islander Library and Information Resources Network.

### **Who's Who in the development of musical works**

**ARIA** - The Australian Record Industry Association represents recording companies in the industry.

**Arranger** - Arrangers may do a number of tasks. Generally, an arranger checks the structure of a song and adds choruses, verses, chord progressions or other changes to enhance or develop the song.<sup>36</sup> An arranger may also adapt a musical work from one musical medium to another – for example, a techno piece from a classical composition.<sup>37</sup> The copyright owner must give permission for such an arrangement. To avoid any confusion about copyright ownership over arrangements it is best to use a written agreement.

**Composer** - Author of the music

**Lyricist** - Author of the lyrics

**Manager** - A manager administers the career of an artist by providing advice and organising the business aspects of their work. The manager charges the musician a fee in the form of a commission. In New South Wales the Entertainment Industry Act regulates managers' commissions and provides for a compulsory licensing system.<sup>38</sup> It is a good idea to get legal advice before entering into a management agreement.

**Music publisher** - The music publisher is the person or company who administers the copyright in the musical work and/or the published edition, on behalf of the composer and songwriter.

The music publisher will arrange licensing, sale, publication and promotion of music, on behalf of the musician, when it is to be used by a recording company, film producer or a publisher of sheet music. Music publishers provide these services for a fee. Legal advice should be sought before signing an agreement.

**Producer** - A producer oversees artistic direction and management of a recording. A producer may be an individual or a company. A producer may or may not provide financial investment. A producer may be paid a fee for services that can include overseeing the hiring of session musicians, arrangers, recording studios, and administrative tasks such as organising copyright clearances from session musicians.

**Sound Engineer** - A sound engineer balances and manipulates the music during the performance and/or recording.



# copyright

It is important for Indigenous musicians to develop an understanding of copyright so they can negotiate rights to their music under licence.

Songwriters and musicians retain copyright in their music for 50 years after their death. Copyright in musical recordings lasts for 50 years after the recording is made. Composers and lyricists can license other people to reproduce their work under an agreement. The agreement will include certain terms such as the fee for use, the purpose of the agreement, the nature of the rights granted and the period of time the agreement will last.

Copyright owners need to think about who will control their copyright after their death. Another issue to consider is who will continue to receive any royalties.

This section provides general copyright information for Indigenous musicians. For specific legal advice we recommend consulting a lawyer.

## What is copyright?

Copyright is a form of legal protection that provides the creator of a work the right to exploit or utilise the work, and prevent others from exploiting it without his or her permission.

The *Copyright Act 1968 (Cth)* is the main law in Australia that governs the use, production and dissemination of literary, artistic, dramatic and musical works. There are no special laws for the protection of Indigenous cultural and intellectual property.

### How does copyright protect music?

The purpose of copyright is to protect the author's rights to exploit their work. The Copyright Act is drafted to achieve that aim.

In general, copyright protects literary, artistic, musical and dramatic works that are reduced to material form. This means a work must be in a permanent and tangible form.<sup>39</sup> Copyright protects the written expression, or in the case of recordings, the recorded form. Copyright protects the *expression* but not the idea.

### How is music reduced to material form?

Music is reduced to material form in a number of ways. Separate copyright exists in each of the following forms:

- written version of the music
- written version of the lyrics
- recording of the song
- published edition of the song, for example, sheet music.

There is no copyright in a performance, although there are some limited rights for performers: see *Copyright and performers rights* in this section.

Issues can arise from Indigenous traditional knowledge, dance, designs and stories that are orally or ephemerally transferred. These are not in material form and are not automatically protected under standard copyright laws.

### Who owns copyright?

In the case of a musical work, copyright belongs to the person or people who created the musical work. This is usually the person or people who wrote the music and lyrics. Copyright in a sound recording is owned by the maker.<sup>40</sup> The maker is the person or company that paid to produce the recording.

For instance, the song 'Hearts Speak Out' was written by Toni Janke in 1992 and recorded by her in 1994. Toni is the copyright owner of the song's music and lyrics as well as the recording.

The copyright in the song and the CD is noted as follows:

- © Words and Music Toni Janke 1992
- © Recording Toni Janke 1994.

### Copyright exceptions

There are some significant exceptions to the general rule of copyright ownership.

- Where the work is produced under a contract of employment, copyright will belong to the employer.<sup>41</sup>
- Where a work is produced under the direction or control of the Crown, copyright may belong to the Crown.<sup>42</sup>
- Where copyright has been assigned under a written agreement, the agreement may specify who owns copyright.

### How long does copyright last?

Copyright protects musical, literary or dramatic works during the lifetime of the author and for 50 years after the death of the composer or lyricist.<sup>43</sup> After this time has expired, the work is said to be in the public domain.

Copyright in a sound recording generally lasts for 50 years from the date of the recording.<sup>44</sup>

Once in the public domain, the law no longer prevents anyone from accessing or exploiting the material.

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

### What rights do copyright owners have?

The copyright owner has the exclusive right to authorise use and copying of their musical works. For example, the copyright owner of a musical work has the exclusive right to do any or all of the following:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public
- make an adaptation of the work which may include new arrangements of the music and translations of the lyrics.<sup>45</sup>

Music is reproduced in a number of ways. Reproductions include CD, radio, film soundtracks, Internet music files and the incidental 'on hold' music recorded for telephone message systems. The rights to use music in different media are described as:

- **mechanical right** – the right to record a song onto DVD, CD or cassette.
- **synchronisation right** – the right to use the music on the soundtrack of a film or video.
- **performing rights**<sup>46</sup> – the rights to perform the music in public (for example, to sing a song at a concert or to play recorded music between sets at a concert) and to otherwise communicate the work to the public (any method of communicating music to the public, including TV, radio, Internet, cable services and other media).<sup>47</sup>

### Collaborative works

In many instances songs are written by a number of people. In this case, copyright ownership may be shared among the creators. There are two common ways where this might occur.

- Where one person has composed the music and another has written the words, copyright in the music will belong to the composer and copyright in the words will belong to the lyricist.
- In situations where two or more individuals have collaborated to create a musical work, and neither person's contribution can be separated from the other, the work is one of 'joint authorship'.

The writer must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions.

Each creator in a work of joint ownership owns copyright in the resulting work.<sup>48</sup> This means that each creator must obtain the consent of the others before exercising any of their rights under copyright. For example, if a composer or lyricist wants to license the rights to record a collaborative musical work, he or she must get the consent of all the other

copyright owners who participated in collaboration. The Australasian Performing Rights Association (APRA) recommends that band members draft a written agreement setting out proportional contributions to musical works. In this way royalties can be distributed accurately, especially in circumstances where the musical work might outlast the life of the band.

Some songs and themes have been passed down through many generations, meaning that an individual creator may not be able to be identified. Indeed, as much Indigenous cultural expression is communally owned, individual creators may not exist. As copyright, through the Copyright Act, belongs to individuals as creators of works, the communal ownership of Indigenous heritage such as clan stories or clan knowledge is not recognised.

Identifying relevant clan or family owners can be a difficult task. Some Indigenous communities have begun compiling registers and databases to keep records of ownership. The Woomera Aboriginal Corporation, for instance, has developed a songs register which is kept at Mornington Island. It assists with cultural clearances but also serves as a teaching tool for passing on knowledge of songs.<sup>49</sup>

### Communal ownership vs. joint ownership

In *Bulun Bulun v R & T Textiles*,<sup>50</sup> the court decided 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 work, and the stories and knowledge within the work, copyright does not recognise the group as the owners.

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

## Copyright and performers rights

There is no copyright in a performance, so performers do not have the same rights as the songwriter, composer or recording company. The performers must give permission for a recording or broadcast, but once permission is given, the recording can be used in any way, except as a film soundtrack. The recording can be used in a film if the performer consents at the time of recording. Performers may be asked to sign release forms when performing at concerts that are being filmed, or where the performance is included in a recording.

### Performing a cover version of a song

One of the exclusive rights of a copyright holder is to perform his or her work in public. APRA and AMCOS act on behalf of music copyright owners to administer this right. They do this by licensing and collecting licence fees from music users and distributing these fees as royalty payments to the copyright owners in the song and sound recording. Venue owners should have a licence with APRA to play music. The venue owner will require musicians to provide song sheets listing the songs played at the venue. The song lists are then given to APRA which distributes royalties to the songwriter, composer or recording owner.

Songwriters and composers are strongly advised to register with APRA so their royalties can be paid.

In addition to the legal requirements, the customary law requirements for performing any traditional music should be observed. As a courtesy, many Indigenous performers ask permission for use of songs, especially songs about personal or community experiences.

Once permission is granted, the next step is to ensure that songwriters or custodians are given proper acknowledgment and credit for their work.

## Copyright and recording

Recording musical works creates a new set of Indigenous cultural obligations because:

- a new copyright is created in the recording
- distribution of the recording creates wide exposure of the work and there are few controls over its use.

Consultation and consent processes should address any cultural restrictions on the music in recorded form.

### What is the legal effect of making a sound recording?

When music is recorded a copyright is created. The owner of copyright in a sound recording is the person or company who pays for the making of the sound recording.<sup>51</sup> The copyright owner will have the rights to:

- copy the sound recording
- play the sound recording in public
- communicate the sound recording to the public using TV, radio, the Internet or telephone system.

Musicians who receive Australia Council grants to record their music are in a strong position to retain copyright ownership in both the underlying work and the recording. It is recommended that contracts be used for recording so all copyright is held by the grant recipient/musician. Clearances should be obtained from session musicians and technicians

who worked on the recording. Copyright clearances must also be obtained from other composers or lyricists whose songs are recorded. If recording communally owned songs, it is recommended that you seek permission from the relevant groups or families.

## What is the public domain?

Once copyright lapses the music is said to be in the *public domain* where the law no longer prevents anyone from accessing and exploiting the music. Indigenous people's right to culture is not limited to the 50 year period, and it may be necessary to get permission to use Indigenous music even though legally, it is in the public domain.

The operation of the Copyright Act creates a number of problems when it comes to protecting Indigenous music.

One example is copyright in Indigenous music recorded by early anthropologists, now stored in archives and libraries. Copyright belongs to the person who made the recording or wrote the notation of the music. In most cases, copyright in recordings by anthropologists and ethnomusicologists belongs to the anthropologist or ethnomusicologist. Copyright in the music does not belong to the traditional owners or performers of the music.

Another problem arises because once copyright expires after 50 years, the work is in the public domain with no copyright protection. Recordings made before 1952 are now in the public domain.

It should not be assumed that all rights to a song have lapsed because one recording of the song is in the public domain. More recent recordings and adaptations of traditional music by Indigenous musicians will be protected by copyright, and reproduction may infringe copyright.

## What are moral rights?

The moral rights provisions of the Copyright Act provide some new ways to challenge derogatory treatment of Indigenous musical works. Moral rights were introduced into the Copyright Act in December 2000. These new laws provide the following rights to musicians:

### 1. *The right to be attributed as author*

The author of a work has the right to be identified as the author where his or her work is reproduced in material form, published, performed, adapted, or communicated to the public.<sup>52</sup> Musicians can require their names to be clearly and prominently identified with their work.<sup>53</sup>

### 2. *The right not to have work falsely attributed to another musician*

Musicians can take action against parties who falsely attribute others as creators of their works.

### 3. *The right of integrity*

An author can bring a legal action if work is treated in a derogatory manner, causing harm to the author's honour or reputation.<sup>54</sup> A musician cannot bring an action against derogatory treatment if he or she agreed to the treatment of the work. For instance, if a musician agrees to a remix of the work and then objects to the remixed version, the original consent may mean that he or she cannot bring an action for infringement of the right of integrity.

Whether or not the work has been treated in a derogatory manner is subject to reasonable defence. For instance, the alleged infringer might argue that the treatment was reasonable in all the circumstances.<sup>55</sup> Prior to making any significant alterations to, or adaptations of a musical work, it is important to get the consent of the copyright owner in writing.

The Australian moral rights laws are new, and their potential to increase copyright protection for Indigenous musicians has not been fully explored.

One important point about moral rights is that they are individuals rights. There is still no legal recognition of communal ownership of Indigenous cultural material. However, individuals who have created a song can bring legal action if they are not properly attributed for their work, if someone else is named as the creator, or if their work is treated in a derogatory manner.

## Licensing use of music

Copyright is personal property and can be licensed under agreement for a fee. A licence is the grant of a right to use or deal with copyright in a work. You can put limits on the licence, including limitations of time, territory and purpose. For example, you can license the rights to reproduce your music through an airline's inflight audio network for a period of two years. The copyright in the musical work remains with the copyright owner.

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

- Written contracts are preferred to oral agreements.
- Indigenous songwriters and musicians should be given the opportunity to consider contracts and to obtain proper legal advice.
- The contract should be explained to Indigenous songwriters and musicians, and if necessary, a translator be used to explain the major issues of the contract.

- If the work is to be altered or adapted for mass production, songwriters and musicians should be given opportunity to approve or reject the alteration or adaptation of their work.

### Assigning copyright vs. licensing

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

Copyright is usually assigned under written agreement. Once assigned, the musician relinquishes copyright in his or her musical work.

Where possible, Indigenous musicians should retain the copyright in their works so they can maintain control over reproductions.

It is important for Indigenous musicians to check agreements and make sure they are not assigning their rights away instead of alternatively licensing use of their work.

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

## New technologies

The Copyright Act was recently amended by the *Digital Agenda Act 2000*. The amendments introduce a 'right of communication to the public' to cover copyright material in the digital domain.

The right provides that digital transmissions or dealings with copyright material in the digital domain can be controlled by the copyright owner. The right applies to the Internet and other forms of digital media, as well as new forms being developed for the future. Whenever material on a website is downloaded by an Internet user it is an exercise of the 'right of communication to the public'.

The new right of communication to the public also means that collecting societies such as APRA<sup>56</sup> have the right to collect revenue for the use of copyright material in the digital domain. However, many of the MP3 files and other musical works on the Internet are unlicensed and used without permission of the copyright owners. Licensing of the Internet is in its infancy and there are many legal and technological hurdles to be overcome.<sup>57</sup>

While the law provides these rights to musicians and composers, it can be difficult to enforce because of the global nature of the Internet. Technology such as watermarking and encryption now provide some protection – but further developments are necessary before music can be protected from downloading. So while the rights are there, musicians need to be aware of the limits of technology once their musical works are available through the Internet.

## Managing copyright to protect your interests

As copyright exists as soon as a work is created, it is not a legal requirement to register copyright. However, certain precautionary practices can show copyright belongs to you should there ever be a contest or case relating to infringement of your work. Some people believe they need to mail the recording and the written song to themselves before copyright protects their songs. This is not true, although it might be useful for evidence. If there is a competing claim to the song, you can show you own copyright as at the date of the postmark on the unopened envelope enclosing your music. Although a creative idea, this is not necessary. The contest of copyright will involve a range of inquiries including whether or not the first original song is substantially similar to the second alleged song copy.

It is important to keep good records and clearly label reproductions of your songs. It is also a good idea to record the song (it doesn't matter if it's not of a professional broadcast quality), and write down the lyrics as well.

Label all reproductions of the song, tape and CD clearly with the following information:

- title of the song
- songwriters
- performers
- date created
- copyright owners.

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

### Copyright notice

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

Some recordings use the words 'All Rights Reserved'. This is not necessary but if you are publishing in some South American countries it may be advisable. If you think your songs will first be published overseas, seek advice from a suitable practitioner on appropriate wording.

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

All songs written and performed by Terri Janke.  
© Terri Janke, 1999\*.

\*The date of creation or the date the song was first published.



The following is an example of a copyright notice for **collaborations**:

'Circle of Sand'  
Performed by: Terri Janke and Justin Meleo  
Lyrics: © Terri Janke, 1999  
Music: © Justin Meleo, 1999

This song is copyright. Apart from the uses permitted under the Copyright Act 1968, no reproduction of this song is authorised without the consent of the copyright owners.

The following is an example of a copyright notice for a **recording**:

© TJ Records, 1999.

The following is an example of labelling a new recording of a **clan owned traditional song**:

Traditional song: Torres Strait Islands  
This arrangement: © A. Murray, 2002. This recording may not be reproduced in any form without the permission of the performer and the clans concerned.

Sometimes a warning is included:

WARNING: Copyright subsists in this recording. Any unauthorised 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 the *Style Manual for Authors, Editors and Printers*.<sup>58</sup>

### 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, as follows:

The creator(s) assert their moral rights.

## When is copyright infringed?

It is an infringement of copyright to copy a musical work without the consent of the copyright owner.

A person will infringe copyright in a musical work if he or she reproduces the work in material form, publishes, performs the work in public, communicates the work to the public, or makes an adaptation of the work without permission from the copyright owner.<sup>59</sup>

It is also an infringement to copy a substantial part of a musical work. A 'substantial' part of a work does not necessarily refer to a large part of the work. The court will look for striking similarities between the original song 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:

### Fair dealings provisions

Copyright in the work is not infringed if it is used for:

- research or private study purposes<sup>60</sup>
- criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made<sup>61</sup>
- 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 broadcasting or in a cinematograph film<sup>62</sup>
- judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.<sup>63</sup>

### Crown use of artworks

The Crown may use a copyright work without 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.<sup>64</sup>

## Further copyright information

For further information on copyright laws see the following websites:

- Australian Copyright Council  
[www.copyright.org.au](http://www.copyright.org.au)
- Arts Law Centre of Australia  
[www.artslaw.com.au](http://www.artslaw.com.au)

### 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 administer copyright. These collecting societies manage the rights of its members for an administrative fee or a share of the royalties. Some of them such as CAL and Screenrights have a legislative basis for collecting royalties. Others are voluntary organisations which artists are required to join. Details follow on the most relevant collecting societies for musicians.

### APRA – Performing rights for composers

The Australasian Performing Rights Association (APRA) administers the performing rights in the music of composers, songwriters and publishers in Australia and New Zealand. These are the rights of performance in public and communication to the public.

The rights of performance in public occur mostly when music is played on radio, television, in music venues and other venues that play music (including incidental music), and businesses (including online businesses) which use music.

The right of communication to the public includes any method of communicating music to the public including television, radio, Internet, cable services and other media.

APRA also manages the reproduction rights' licensing business of the Australasian Mechanical Copyright Owners Society (AMCOS).

For more information about APRA visit its website [www.apra.com.au](http://www.apra.com.au)

### **AMCOS – Mechanical rights**

The Australian Mechanical Copyright Owners Society (AMCOS) administers a broad range of reproduction licensing schemes for musical works.

AMCOS can administer the mechanical rights (the right to record a sound onto record, CD or cassette) and the synchronisation right (the right to use your music on a video or film soundtrack).

AMCOS can administer the right to reproduce written music, for example the original notation or lyrics for a song. The rights are assigned to a music publisher and anyone who then wishes to copy the work must seek permission of the music publisher and pay royalties for that use. Exceptions include educational purposes.

When music is used in a film or television program, composers should ensure the producer makes a cue sheet listing the music on the soundtrack. This list should then be submitted to APRA for royalty payment.

APRA and AMCOS license people and companies who want to use music, and then distribute the license fees to members.

For more information on AMCOS visit its website [www.apra.com.au](http://www.apra.com.au)

### **PPCA - Copyright in sound recordings**

The PPCA is the Phonographic Performance Company of Australia.

The PPCA grants licenses on behalf of record companies and recording artists to venues such as hotels, shops, restaurants, and radio and TV stations which play recorded music or music videos. It also licenses online users of sound recordings.

PPCA members are the owners of copyright in sound recordings. They are mainly record companies.

For more information on the PPCA visit its website [www.pcca.com.au](http://www.pcca.com.au)

### **CAL – Copyright Agency Limited**

The Copyright Agency Limited (CAL) is an Australian statutory collecting agency whose role is to provide a bridge between creators and users of copyright material.

CAL collects and distributes fees on behalf of authors, journalists, visual artists, photographers and publishers, operating as a non-exclusive agent to license the copying of works to the general community.

CAL administers licences for the copying 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 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 [www.copyright.com.au](http://www.copyright.com.au)

### **Screenrights**

Screenrights is a copyright collecting society for screenwriters, producers, distributors, music copyright owners, copyright owners in artistic works and sound recordings, and other rights holders in film and television.

Screenrights manages rights on behalf of copyright owners in film and television, licensing the use of their work in circumstances where it is difficult or impossible to do so on an individual basis.

Screenrights also administers the educational copying license. This allows educational institutions to copy from radio and television, provided they pay a fee to copyright owners. Screenrights monitors copying, collects money and distributes this income to the copyright owners.

In addition, Screenrights collects royalties being held by other societies administering rights in their territories. All money collected is distributed to the copyright owners after deduction of administrative overheads.

For more information on Screenrights visit its website [www.screen.org](http://www.screen.org)

Screenrights has also established a website for educators at [www.enhancetv.com.au](http://www.enhancetv.com.au). Enhancetv lets teachers know about upcoming programs relevant to their curriculum and provides teaching resources for using television and radio in educational contexts.



# follow up

## Applying the protocols

*Protocols are about people's value systems and their cultural beliefs.<sup>65</sup>*

The protocols in this guide are flexible. You can use them to develop protocols for your music project, program or practice, and language group, region, clan or community.

It is important to read all the preceding sections of *Song Cultures* before applying the protocols.

**Follow up** can then be the main point of reference when returning to the guide at a later date, or in the planning stage of a music project or program.

**Follow up** provides a checklist of key points to consider when developing appropriate protocols for a music project, or in your own music practice. It offers different and more specific information than the preceding sections. We therefore suggest you use the points outlined here together with the *Principles and Protocols* and *Copyright* sections.

The following principles are a framework for respecting Indigenous heritage:

- Respect
- Indigenous control
- Communication, consultation and consent
- Interpretation, integrity and authenticity

- Secrecy and confidentiality
- Attribution
- Proper returns
- Continuing cultures
- Recognition and protection

## Respect

People working in the music industry 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 groups where projects are located.
- Indigenous music is produced by Aboriginal and Torres Strait Islander people.
- Indigenous cultures are living cultures.
- Indigenous culture is diverse. Culture varies from Indigenous country to country and from clan to clan.
- Indigenous cultural expression is diverse.
- Indigenous people have the right to be represented by Indigenous people of their choice and in a manner they approve.
- The cultural contribution to a performance by Indigenous people should be valued, acknowledged and remunerated.

- Local cultural protocols and protocols associated with a work should always be respected and observed.
- Indigenous worldviews, lifestyles and customary laws should be respected in contemporary artistic and cultural life.

## Indigenous control

Indigenous people have the right to determine how their cultural property will be used.

- Indigenous people have the right to own and control their heritage, including Indigenous body painting, stories, songs, dances and other forms of cultural expression.
- Identify appropriate Indigenous information and authority structures.
- Discuss your ideas for development of music projects with the relevant people in Indigenous music companies and associations, and Indigenous media organisations.
- The current practice of the Australia Council requires all Indigenous participants to provide a letter of support confirming their Aboriginal or Torres Strait Islander identity from an incorporated Indigenous organisation.
- When engaging Indigenous contributors to participate in a project the Aboriginal and Torres Strait Islander Commission (ATSIC) definition of Aboriginal identity can be used as a guide.
- Keep appropriate and relevant Indigenous people informed and advised, and where possible, provide regular updates.

## Communication, consultation and consent

When performing, recording, publishing or otherwise dealing with Indigenous songs and music, consider the following:

- Has the consent of relevant Indigenous people been obtained? This should include the consent of composers, songwriters (including next of kin if deceased) and custodians of the music.

- It is very important that the Indigenous custodians have all the relevant information prior to considering consent. This might include:
  - proposed use, particularly if it involves adaptation and alteration.
  - whether you intend to perform or record the work, what instruments you intend using, and who will be performing or recording the work.
  - proposed digital or broadcast media: is the work going to be broadcast, or communicated to the public through the Internet?
- Has sufficient time been allowed for consultation?
- Is the particular song or music acceptable for wider use and recording? If unsure, discuss with Indigenous people, composers and songwriters.
- Have you advised the elders or people of authority of the perceived risks and benefits from the wider use and reproduction of their songs?
- Seek advice on the correct cultural context for the material. Ask about any restrictions on the material and the instrument, and establish the exact meaning of any words in language if unsure.
- If you are writing lyrics about an individual or community, advise the relevant people, family or community. Seek their permission as you may be touching on sensitive issues, such as mentioning the names of people who are deceased.
- Have the community and performers been consulted on any cultural considerations to be taken into account for the festival or concert?
- If recording communally owned songs and music, advise Indigenous custodians and other people in authority, and seek permission for recording.
- Recording companies and collecting societies should not assume that Indigenous music is in the public domain.
- It is necessary to consult with relevant Indigenous people for permission to distribute recordings. If agreed, recording companies and collecting societies should negotiate with Indigenous people on appropriate royalties for use.

- Indigenous musicians should consider any cultural obligations before negotiating a recording contract, or entering into agreements relating to the publication and dissemination of the music. For example website publication may expose the songs to greater appropriation.
- Is consultation seen as an ongoing process for the life of the musical work or recording?

- It is important to exercise care when permitting a re-mix or rearrangement of a work. A new copyright might also be created in the adaptation. If the owner is unhappy with the result, there may be no legal remedy because of the consent.

### Authenticity

- Are you using instruments and music with respect for gender and cultural restrictions?
- Do you have a translation of the work you are using? Are you using language in the correct context?

### Secrecy and confidentiality

- The right of Indigenous people to keep secret and sacred their cultural knowledge should be respected.
- Sacred and secret material refers to information that is restricted under customary law.
- Indigenous people have the right to maintain confidentiality about their personal and cultural affairs.
- Does the music expose confidential or sensitive material?
- Be aware that the inclusion of personal material may be sensitive. If it is objected to by the family or clan representatives – leave it out.
- If mentioning deceased people, seek permission from the family or clan representatives. Discuss issues of interpretation and authenticity.
- It is a good idea to speak to elders and/or other Indigenous people in authority to identify sensitivities, sacred material or religious issues relevant to the music.

## Interpretation, integrity and authenticity

### Interpretation

Be responsible for your representations of Indigenous cultures.

- Does your composition, performance and recording empower Indigenous people?
- Does your music expose confidential, sensitive or personal material?
- Does it reinforce negative stereotypes?

### Integrity

- Is there any adaptation which needs to be discussed with relevant traditional custodians from Indigenous country to country and from clan to clan?
- Have you discussed this and obtained consent?
- Will the individual or community who is the subject of the work get an opportunity to hear the work prior to public release. Have their suggestions been incorporated?
- Is the material suitable for the intended audience?
- When selecting illustrations or photos for the cover or promotional material, consult with the musician and other Indigenous people to check the cultural appropriateness of the image.

## Attribution

- Be sure to attribute the musical work to all Indigenous custodians, composers, lyricists and session musicians who contributed to the work at any stage.
- Ask for correct wording of how the person or community wishes to be attributed with ownership of the musical work.
- The composers, musicians and custodians should be attributed at all stages, including use of the copyright notice and attribution of a clan group.

## Proper returns

- Have fees or other benefits been negotiated with the musicians, composers, songwriters and custodians?
- Is the cultural value of the work recognised in financial returns?
- Have Indigenous cultural advisors been acknowledged and properly remunerated for their contribution?
- Has the issue of copyright ownership been discussed upfront?
- Has registration with APRA, AMCOS and PPCA been completed?
- Are all other rights holders acknowledged in that registration?
- Proper credit and appropriate acknowledgment includes copyright and royalties for the use of Indigenous cultural material.
- Check whether benefits other than royalties are sought by Indigenous people.
- Are the relevant Indigenous people sharing in the benefits from any commercialisation of their cultural material?

## Continuing cultures

- Indigenous cultures are dynamic and evolving, and the protocols within each group and community will also change.
- Consultation is therefore an ongoing process.
- Have you given thought to ways of maintaining relationships for future consultation?
- Have future uses of the music that were not contemplated at the initial consultation been considered?
- Have cultural protocols been considered and included in any future plans for the musical work, including licence agreements?
- Indigenous people have a responsibility to ensure that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

## Recognition and protection

- Has copyright protection for a work been sought?
- Have the owners of copyright in a work been identified?
- Written releases and contracts are the best way of ensuring that rights are cleared for proposed and intended uses. The Arts Law Centre of Australia has draft agreements available for members. It is a good idea to seek independent legal advice on written releases and contracts.

## Copyright

Copyright protects specific categories of material. The material 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. In the case of music this will normally mean that the author has composed the work, or adapted or arranged the musical work.

To be 'reduced to material form' means that the musical work must have been written or recorded.

When reproducing musical works or sound recordings it is necessary to get copyright clearance from the copyright owners.

### Musical works

- Composers, lyricists and arrangers are referred to as 'authors' in a copyright context.
- The copyright owner is generally the author of the musical work. There are exceptions to this rule, including an author who is an employee under a contract of service.
- Authors do not need to register for copyright protection.
- Copyright in a musical work lasts for 50 years after the death of the author.
- The copyright owner of a musical work has the exclusive right to:
  - reproduce the work in a material form
  - publish the work
  - perform the work in public
  - communicate the work to the public
  - make an adaptation of the work
  - do any of the above in relation to an adapted work.

- When any of these rights are exercised the copyright owner is generally entitled to a license fee or royalties for the use of their work.
- It is strongly recommended to use written agreements when licensing musical works for commercial purposes.
- The author has moral rights to his or her work. This includes the right of integrity and attribution.
- The Indigenous author who incorporates traditional ritual knowledge in his or her musical work has a special obligation to the clan when exercising copyright in the work.
- In collaborative works, copyright may be shared with the collaborating authors. If all band members collaborate to write a song, the members will generally be the joint authors.
- Styles of music are not protected by copyright. It is the *expression* of the style, that is, the actual song or instrumental piece that is protected.
- Public performance of a work can include any performance that is not domestic or private, even if no fee is charged. So anyone intending to perform a work that is protected by copyright should seek advice to ensure they are not infringing copyright. Check the *Contacts* section in this guide for copyright advice referrals.
- Under the educational statutory licensing schemes authors may be entitled to royalties for use of their music and sound recordings in formal teaching and learning situations. The relevant collecting agencies, APRA, AMCOS and PPCA, collect and distribute these royalties to members.

### Sound recordings

- The copyright owner of a sound recording is the maker of the sound recording. The maker is generally the individual or recording company who pays the costs of recording. However, this can be varied under written agreement.
- Copyright in a sound recording lasts for 50 years after the date on which the sound recording was made.
- The copyright owner of a sound recording has the exclusive right to:
  - (i) make a copy of the sound recording
  - (ii) cause the recording to be heard in public
  - (iii) communicate the recording to the public
- When any of these rights are exercised, the copyright owner is generally entitled to a license fee or royalties for the use of their work.
- Recipients of Australia Council grants are encouraged to seek legal advice on written contracts for recording.
- Recording companies should provide written agreements for musicians. Indigenous musicians should be given the opportunity to consider contracts and obtain proper legal advice.
- Has APRA been contacted to ensure royalties are paid on work performed?
- Have performers signed clearance forms if their work is to be recorded at a festival or concert?

### Copyright infringement

- A person will infringe copyright in a work if he or she reproduces the work in material form, publishes the work, performs the work in public, communicates the work to the public, or makes an adaptation of the work without the permission of copyright owner.
- Statutory exceptions to copyright infringement include the purposes of criticism or review, and incidental filming.



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<sup>1</sup> David Milroy, consultation interview, 11 October 2001.

<sup>2</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, written and published under commission by the Australian Institute of Aboriginal Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1999.

<sup>3</sup> *Song Cultures* uses the terms 'music' and 'songs' interchangeably.

<sup>4</sup> Many ethnomusicologists now seek to make agreements that vest copyright in the Indigenous owners. Linda Barwick, consultation interview, 14 June 2001.

<sup>5</sup> Terri Janke, 'Deep Forest and the Commercial Exploitation of Indigenous Music', *Music Forum: Journal of the Music Council of Australia*, vol. 3, no. 6, Aug/Sept 1997, page 27.

<sup>6</sup> Terri Janke, *Our Culture: Our Future*.

<sup>7</sup> Terri Janke, *Our Culture: Our Future*.

<sup>8</sup> Terri Janke, *Our Culture: Our Future*, page 3.

<sup>9</sup> Terri Janke, *Our Culture: Our Future*.

<sup>10</sup> *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 46th session, Draft Declaration on the Rights of Indigenous Peoples, United Nations Documents, E/CN.4/1995/2 and E/CN.4/Sub.2/1994/56.

<sup>11</sup> The Mataatua Declaration was developed at the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, 12–18 June 1993, at Vhakatane, Aotearoa, New Zealand. A full text of the Declaration is cited in Terri Janke, *Our Culture: Our Future*, pages 306–310.

<sup>12</sup> Erica Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples*, United Nations Document E/CN.4/Sub.2/1995/26. The full text, as adopted and elaborated on by ATSIIC's Indigenous Reference Group, is cited in Terri Janke, *Our Culture: Our Future*, pages 273–277. See also Erica Irene Daes, *Study of the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, United Nations Economic and Social Council, Geneva, 1993.

<sup>13</sup> See the World Intellectual Property Organisation's website, <http://www.wipo.int/globalissues>, for further information.

<sup>14</sup> See the World Intellectual Property Organisation's website, <http://www.wipo.int/globalissues>, for further information.

<sup>15</sup> Section 6, *Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, South Pacific Community, Noumea, 2002.

<sup>16</sup> Ade Kukoyi (Daki Budtcha), consultation interview, 1 October 2001.

<sup>17</sup> See the *Contacts* section in this guide.

<sup>18</sup> Yothu Yindi, 'Our Homeland', <http://www.yothuyindi.com/ourhome.html>

<sup>19</sup> Helen Anu, consultation interview, 14 August 2001, Sydney.

<sup>20</sup> Terri Janke, 'Deep Forest and the Commercial Exploitation of Indigenous Music', *Music Forum: Journal of the Music Council of Australia*, vol. 3 no. 6, August–September, 1997.

<sup>21</sup> This issue was identified as a concern by a number of musicians and industry participants.

<sup>22</sup> Section 14, *Copyright Act 1968 (Cth)*.

<sup>23</sup> Michael Easton, 'Music Sampling', *Art + Law*, no. 3, September 2000. Available from the Arts Law Centre of Australia website, [http://artslaw.com.au/reference/003music\\_sampling/](http://artslaw.com.au/reference/003music_sampling/)

<sup>24</sup> Terri Janke, 'Deep Forest and the Commercial Exploitation of Indigenous Music', *Music Forum: Journal of the Music Council of Australia*, vol. 3 no. 6, August–September, 1997.

<sup>25</sup> Helen Anu, consultation interview, 14 August 2001, Sydney.

<sup>26</sup> Helen Anu, consultation interview, 14 August 2001, Sydney.

<sup>27</sup> Helen Anu, consultation interview, 14 August 2001, Sydney.

<sup>28</sup> The original release included accreditation to Peter Garrett who, the author believes, relinquished his share to members of Yothu Yindi. Martin Hardie, *Treaty Mah! But Who Owns the Copyright?*, unpublished paper in possession of the author, Darwin, 1996, page 10.

<sup>29</sup> The author states that subsequent remixes have blurred this distinction. Martin Hardie, *Treaty Mah! But Who Owns the Copyright?*, unpublished paper in possession of the author, Darwin, 1996, page 10.

<sup>30</sup> Martin Hardie, *Treaty Mah! But Who Owns the Copyright?*, unpublished paper in possession of the author, Darwin, 1996.

<sup>31</sup> This includes finance through grants from the Australia Council for the Arts.

<sup>32</sup> Peter Cleary, consultation interview, 11 September 2001.

<sup>33</sup> Nancia Guivarra, 'Singing the Unsong', *Music Forum: Journal of the Music Council of Australia*, vol. 6, no. 5, June 2000, pages 18–19.

<sup>34</sup> See Australasian Performing Rights Association, 'Event Licenses', at <http://www.apra.com.au>

<sup>35</sup> NSW Ministry for the Arts, *Guidelines 2001–2002*, Sydney, 2000, pages 103–104.

<sup>36</sup> Milroy, David, consultation interview, 11 October 2001.

<sup>37</sup> Stanforth Rickelson, *The Law of Intellectual Property*, Law Book Company, Sydney, 2001.

<sup>38</sup> See Arts Law Centre of Australia, 'Music Management Checklist', at <http://www.artslaw.com.au/documents/artpluslaw/music/>

<sup>39</sup> Sections 31(1)(a)(i) and (b)(i), *Copyright Act 1968 (Cth)*.

<sup>40</sup> Section 22(3)(b), *Copyright Act 1968 (Cth)*.

<sup>41</sup> Section 35(6) of the *Copyright Act 1968 (Cth)* states that where the work is 'made in by the author in pursuance of the terms of his or her employment by another person under contract of service or apprenticeship, that the other person is the owner of any copyright subsisting in the work'.

<sup>42</sup> Section 176(1), *Copyright Act 1968 (Cth)*.

<sup>43</sup> Section 33, *Copyright Act 1968 (Cth)*.

<sup>44</sup> Section 93, *Copyright Act 1968 (Cth)*.

<sup>45</sup> Section 31, *Copyright Act 1968 (Cth)*.

<sup>46</sup> These are different to the rights of performers who do not own copyright in the work or sound recording. For performers rights see *Copyright and performers rights* in the *Copyright* section of this guide.

<sup>47</sup> See Australian Copyright Council, Information Sheet G12, 'Music and Copyright', page 2.

<sup>48</sup> Section 35, *Copyright Act 1968 (Cth)*.

<sup>49</sup> Peter Cleary, consultation interview, 11 September 2001.

<sup>50</sup> *Bulun Bulun & M\* v R & T Textiles Pty Ltd (1998)*, 41 Intellectual Property Reports 513. The M\* refers to a deceased person and that is how the cultural protocol advises speaking of him.

<sup>51</sup> Section 97, *Copyright Act 1968 (Cth)*.

<sup>52</sup> Section 194(1), *Copyright Act 1968 (Cth)*.

<sup>53</sup> Section 194AA, *Copyright Act 1968 (Cth)*.

<sup>54</sup> 195AJ, 195AK and 195 AL, *Copyright Act 1968 (Cth)*.

<sup>55</sup> Section 195AS, *Copyright Act 1968 (Cth)*.

<sup>56</sup> See the Australasian Performing Rights Association website, <http://www.apra.com.au>, for further information.

<sup>57</sup> Scot Morris, Director of International Relations, APRA, correspondence dated 30 November 2001.

<sup>58</sup> *Style Manual for Authors, Editors and Printers*, 6th edn, Commonwealth of Australia, Canberra, 2002, page 413.

<sup>59</sup> Section 36, *Copyright Act 1968 (Cth)*.

<sup>60</sup> Section 65, *Copyright Act 1986 (Cth)*.

<sup>61</sup> Section 41, *Copyright Act 1968 (Cth)*.

<sup>62</sup> Section 42, *Copyright Act 1968 (Cth)*.

<sup>63</sup> Section 43, *Copyright Act 1968 (Cth)*.

<sup>64</sup> Section 49, *Copyright Act 1968 (Cth)*.

<sup>65</sup> Doreen Mellor, telephone consultation, 31 May 2002.



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# contacts

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### Australian Copyright Council

PO Box 1986  
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Tel: (02) 9318 1788  
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Email: cpright@copyright.org.au  
Web: www.copyright.org.au

### Indigenous Cultural and Intellectual Property website

Web: www.icip.lawnet.com.au

## Copyright collecting societies

### Australian Mechanical Copyright Owners Society – AMCOS

Locked Bag 3665  
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Tel: (02) 9935 7900  
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Email: amcos@amcos.com.au  
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### Australasian Performing Rights Association – APRA

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**Music industry  
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