

# Protecting Copyrights on the Internet: A Cultural Perspective from Indigenous Australia

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**Abstract:** Aboriginal Art has long been exploited in ways that have been detrimental to the artist. The *Australian Copyright Act, 1968 (Cth)* is meant to protect the rights of an artist however; copyrights are awarded to individuals for a finite time which does not reflect the unique needs of Aboriginal Australians. With the on-set of the digital era, coupled with low Indigenous ICT adoption rates leaves Indigenous Australian artists one for most vulnerable groups of people open to exploitation. Interestingly though technology may hold the answer to assisting in the protection of these rights.

## 1. Introduction

Australian Aboriginal art has long been exploited and used in ways that have been detrimental to the artists and their communities. The *Australian Copyright Act, 1968 (Cth)* and the *Australian Copyright Amendment (Digital Agenda) Act, 2000* are meant to protect the rights of an artist. However, the uniqueness of Aboriginal art, and the onset of the digital age leaves Indigenous Australians vulnerable within the current Australian legislative framework.

The motivation for this paper comes from recognition that there is a lack of Indigenous researchers in the area of Information Sciences and that the Indigenous community has to rely on non-Indigenous academics and practitioners to assist in addressing information systems or information technology issues. However, for the non-Indigenous community to understand the complexity of the issues faced by the Indigenous community there must first be an examination of how Indigenous community's needs are different then those of the non-Indigenous community.

This paper covers a number of topics that relate to copyright and art, then examines past successful and unsuccessful court cases to demonstrate the problems faced by the Indigenous community. Firstly, it discusses the *Australian Copyright Act (Cth)* as it applies to artists, and then discusses the uniqueness of Indigenous art and the limitations of the *Copyright Act (Cth)*. It concludes with Internet technology issues and methods to assist in the protection of Indigenous artistic intellectual property from a technology perspective rather than a legalist perspective which other similar research has been based around.

## **2. Definition Of Copyright – Art**

The *Australian Copyright Act, 1968 (Cth)* is a set of statutory rights that an artist automatically receives on the creation of a piece of art. It exists immediately and stays with the artist for their lifetime plus fifty years after their death, providing the work is original and is reduced to material form (*Copyright Act (Cth)*). Therefore, copyright is the right to control an artist's reproduction of his or her "intellectual creation" (Isenberg, 1998).

## **3. What Makes Aboriginal Art Different?**

The *Australian Copyright Act, 1968 (Cth)* considers art as an individual's artistic expression. However, not all art falls into this simple legislative definition as the Act does not address the underlying principles of Australian Aboriginal society (Fitzgerald, 2000). Traditionally, Aboriginal art has been closely related to, among other activities, spirituality practices and territorial groupings (Sutton, 1991). Art is central to Aboriginal life and is considered a way of connecting Aboriginal people living now, with their Spiritual Ancestors. Aboriginal art can be a map, an image, a story or a secret code, of which can describe or represent sacred or secret stories which have been passed down from generation to generation. Paintings often express a clan's ownership or relationship with the land. In instances like these, there are many artists who contribute to one painting. This art is constructed communally and is restricted to those in the community that have the appropriate ritual standing (Sutton, 1988).

Another point of difference in regards to Aboriginal art is the concept of ownership. In the non-Indigenous society, ownership focuses on the individual, whereas in Aboriginal societies, ownership is communal and relevant to the social structure. An area where this has been recognised is Native Title claims where Aboriginal art has been requested by courts to prove the validity of the claim. In these instances the Aboriginal group is expected to demonstrate their rights to the 'ownership' of the land by producing 'relevant' art depicting the area of the claim (Sutton, 1988:117).

## **4. Copyright And The 50 Year Rule**

The *Australian Copyright Act, 1968 (Cth)* states that copyright is held by the owner for their life plus 50 years (*Copyright Act (Cth)*). This rule disadvantages Aboriginal people as the average life expectancy is significantly less than the non-Indigenous community. Australian Aboriginal males' life expectancy is 56 years while for non-Aboriginal Australian males it is 77 years. Australian Aboriginal female's life expectancy is 63 years in contrast to 82 years for non-Aboriginal females (ABS, 2001). Clearly the duration of copyright makes Aboriginal art available to the public domain much sooner than non-Indigenous art. This can lead to the commercial exploitation of sacred Dreamings and cultural material within a short time frame.

## **5. Copyright - Aboriginal Art**

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From the 1960s people have thought of Aboriginal art as "a kind of artistic 'terra nullius' - "ours for the taking" (House of Aboriginality). Aboriginal art "was perceived as the work of nameless tribesmen (always men) located in the mysterious ahistorical time zone of the 'ethnographic present'. Its designs were seen as a common Australian cultural heritage for anyone to make use of in anyway they saw fit" (Johnson, 1996:14). Aboriginal art was not seen as belonging to or owned by Aboriginal people, but rather there was an anthropological view that museums should be the custodians of the works for preservation and study. Newly created artworks were considered significant as they depicted the Dreamings of over 60,000 years, and ownership could not be assigned to the individual (Gray, n.d.).

The belief of "artistic 'terra nullius'" has led to the exploitation of Aboriginal Art and with the advent of Internet and digital technologies this exploitation has the potential to reach proportions not yet conceived.

### 5.1 A PAST INDIGENOUS COPYRIGHT CASE

One of the first documented breaches of Aboriginal copyright involved the Reserve Bank of Australia during the introduction of decimal currency<sup>1</sup>. The One Dollar note exhibited a bark painting which was originally created by Mr M\*<sup>2</sup>, an Aboriginal man. This reproduction was unauthorised and unacknowledged. The way in which the bark painting came to be used for the One-Dollar note illustrates the colonialistic thinking of Aboriginal art. A Hungarian art collector and anthropologist Karel Kupka had become interested in Mr M\*'s art and purchased a bark painting from Mr M\* titled 'The Hunter'. Kupka donated this work to the Paris Museum of Arts of Africa and Oceania. The artwork depicted one of Mr M\*'s Dreamings, which partly outlined the mourning rites performed upon a clan member's death. Kupka later met with the Secretary of the Reserve Bank and handed the Secretary photos of the bark painting. The photos were given to the currency designers where a depiction of the artwork was then printed on the One-Dollar note (Fitzgerald, 2000). At the time there was an underlying assumption that the artist was dead (which he was not), and therefore the bark painting could be freely reproduced without consideration for Mr M\* or his people (House of Aboriginality). After the copyright breach had come to the attention the Reserve Bank Governor, 'Nugget' Coombs, Mr M\* was offered and accepted the tokenistic compensation of \$1000, a fishing kit and a silver medallion. This successfully kept the case out of court so the issue was not challenged under Act (Fitzgerald, 2000).

### 5.2 A RECENT INDIGENOUS COPYRIGHT CASE

Some would argue that the previous case was simply a reflection of the time; a time where Aboriginal peoples were considered as a lower class than white Australians. Therefore, it would be reasonable to expect that such a mistake would not be repeatable in our modern era.

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<sup>1</sup> Decimal Currency was introduced on 14 February 1966 and was prior to the Indigenous People of Australia being awarded Australian Citizenship in a general referendum in 1967.

<sup>2</sup> The artist has passed away and in accordance with Aboriginal Customary Law his name can not be used.

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Unfortunately, this not the case. During the 2000 Olympics in Australia the International Olympic Committee (IOC) used Aboriginal Art on the Committee's website. Somehow Indigenous artwork, created by Sam Tjampitjan and Richard Tax of the Kukatja people in Western Australia, and an unnamed female artist of the Utopia people in central Australia, found its way on to the IOC's website. Tjampitjan was quite distressed by the appearance of his clan's sacred material on the IOC's website stating that this is "My story, they can't take it, not for anyone, just me...Wrong way". At the time Australian Indigenous lobby groups were in negotiations with a Swiss law firm to take up the case as it was likely to be heard in Sweden where the IOC's Head Office is located. However, Council for the artists believe that the case may never go ahead due to the cost of the legal challenge. And, even if the artists were successful the "copyright heritage laws offer artists little protection against reproduction of their art without permission"(Balmain, 2000:2).

## 6. New Challenges For Communities

Indigenous communities are now facing different challenges to that of the non-Indigenous community. Until recently remote Indigenous communities could be easily marginalised, living in a world of where geography determined their destiny. However, with the introduction of the digital age this restriction is no longer the case. Michael McMahon states that "marginalisation will come from a failure to understand [and] use the opportunities which digital technology offers" (McMahon, n.d). However, Dyson (2003) warns "that computer technology would have a serious impact on traditional communities as they move into new technologies, loading unwanted Western values onto them in a modern form of cultural imperialism".

Many Indigenous people are concerned about the reproduction and use of secret or sacred art for commercial exploitation. They are concerned about the reproduction being carried out without regard to the custodians of that expression, whether that be an individual artist or their community. There are serious consequences when this occurs, ranging from secret material being viewed by those whom have no right to do so, to art being used in a derogatory way or a way in which is culturally offensive (Janke, 1998:19).

## 7. Copyright Amendments

After years of community and industry lobbying, and numerous court cases, in 1997 the Federal Government formally recognised that the *Australian Copyright Act* did not protect the cultural and spiritual rights of Indigenous people. The government amended the *Copyright Act* by introducing the *Copyright Amendment (Digital Agenda) Act, 2000*.

The government also recognised the importance of moral rights to be included in the *Copyright Act*.

Moral rights entitles an artist to have the:

- right to attribution, that is the right to be identified as the artist of a work
- right against false attribution, that is the right to take action against false attribution

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- right of integrity, that is the right to object to derogatory treatment of his/her honour or reputation

The right to attribution offers provisions that allow artists to "identify the nature of the attribution". Terri Janke argues that "This may allow Indigenous authors to acknowledge their clan affiliation and any communal rights the clan may have to the author's work"(Janke, n.d).

The right to integrity covers art if it is used in a derogatory way. This includes "the doing, in relation to the artwork, of anything that results in a material distortion of, the destruction or mutilation of, or material alteration to, the work that is prejudicial to the author's honour or reputation" and/or "an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs" (*Copyright Act 1968 (Cth)*). As with most laws there are exceptions to this. The Act states that no infringement on integrity will be recorded if the treatment of the art was reasonable (Janke, n.d.).

Moral rights are essential to the protection of Aboriginal art but they still do not address specific issues with the uniqueness of Aboriginal art as discussed earlier. Also, as with all copyright, moral rights exist only for the lifetime of the artist plus 50 years.

### 8. Copyright On The Internet

The right to communicate was introduced in the *Copyright Amendment (Digital Agenda) Act, 2000*. It is the right to communicate material in the media of the copyright-holders choice. This includes both material and digital form, including the Internet (*Copyright Amendment (Digital Agenda) Bill, 1999*).

Some critics say that on the Internet "information wants to be free", stating that the Internet is a new "property free zone". This is simply not the case as there are rights that authors possess regardless of the media (Scott, n.d). Copyright exists on the Internet just as it exists on a book or piece of artwork. Therefore, the downloading of information or images is the same as copying them directly from a book. A copyright owner still is required to grant permission to reproduce material from the Internet. This includes printing, uploading to a website, downloading to a hard disk or floppy disk, scanning or caching. This also includes making the material available to the public and communicating the material on the Internet to the public.

An example of where the legislation falls short of addressing 'real life' issues in the digital domain is a website. Currently, it is still unclear whether an entire website is covered by copyright as it could be considered a compilation; however, the components of a website are still protected by copyright. For example, complications to website copyright ownership can arise when there is more than one owner to a website. One person might own the copyright to the photographs and images, while another person might own the copyright to the text, another person might own the copyright to the material compilation, whilst another could own the navigation software. This idea of communal participation or co-authorship draws a striking parallel to the issues of copyright in traditional Australian Aboriginal art.

### 9. International Copyright

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Australian copyright is protected internationally through the *Berne Convention for the Protection of Literary and Artistic Works (1886)*. While this Convention does not specifically impose legislative obligations on signatories to protect Indigenous art, there is some protection offered. Article 15(4) outlines the protection of unpublished works of folklore and provides for the protection of art where the author is unknown. Another protection is Article 7(3) where it provides for a term of protection for anonymous or pseudonymous works that expires 50 years after the work is made available to the public (Janke, 1998:59). Unfortunately the Berne Convention is unable to deal with the complexities of Australian Aboriginal art. Therefore, it is left up to domestic legislation to address the issue.

## **10. Who Is Most At Risk?**

By and large the majority of “traditional” Aboriginal art is sourced or produced in the more remote parts of Australia, more commonly known as the outback. Aboriginal peoples living in these regions of Australia suffer a basic understanding of their rights which among other things is due to very low literacy and education rates (see Kral and Schwab 2003). The issue of vulnerability in the digital domain is exacerbated by very low Information Communication Technology adoption rates in these areas. While Australia has a Digital Data Service Obligation (DDSO) which, on request, provides a 64kb per second Internet access point to all Australian citizens wherever they reside or carryout their business (ACA), computer use by Aboriginal people currently stands at 18% nationally which is contrasted by non-Indigenous computer use of 44%; Internet use nationally for Aboriginal peoples is 16% and 39% for non-Indigenous Australians. There is a huge disparity in ICT and Internet adoption rates by Aboriginal and non-Indigenous people in Australian communities but this divide grows significantly with the remoteness of the community. In remote Aboriginal communities 3% have a computer at home with 38% of remote non-Indigenous people having a computer at home. An unbelievable 1% of Aboriginal people in remote Australian have Internet access at home with 23% of remote non-Indigenous people having Internet access at home. The reasons for these low ICT adoption rates is the subject of my PhD studies where I am examining the “Adoption and Effective Uses of ICTs in Australian Aboriginal Communities” (ABS 2001).

Therefore, it is reasonable to deduce that as a consequence of low ICT adoption rates coupled with low education and literacy rates combined with the socio-economic position of Aboriginal people clearly prevents the monitoring of copyright breaches on the Internet and a general lack of access and understanding of and to the complex legal framework which is meant to protect their rights.

## **11. How Can Technology Help?**

While there is no way to prevent an image being taken from the Internet there are ways that we can inform people viewing an image that copyright is held on the images.

One very basic and simple way to demonstrate copyright on a website is to use the © symbol. Some websites try to solve the copyright problem by overlaying their web address onto their images to show the origin of the image. This means the user of the image can check

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the copyright restrictions and/or contact the copyright owner. Other websites make use of web technologies such as JavaScript. With the use of JavaScript, when a user right-clicks on a webpage or image, a message box will appear that lets the user know that the image or webpage is protected by copyright.

One commercial tool that is currently having some success in identifying copyright ownership is digimarc, that is, digital watermarks. Digital watermarks are used to ensure authenticity and quality. Digital watermarks are "fingerprints" that allow copyright owners to identify their work on the Internet. The combination of digital watermarks and new Internet digimarc scanning technologies, allows a copyright owner to track the use of their images on the Internet (Isenberg, n.d.).

More recently research has focused on developing XML based rights mark up language, or XrML. This language has been specifically developed as a form of protection of copyright on the Internet. It can specify the conditions of use of the copyrighted material, and the fees associated for using it. It also provides secure "entity authentication" and at the same time provide the copyrighted material with the further protection of cipher technology. It is more than likely that this will become the industry standard for the protection of copyrighted material on the Internet (Hunter, n.d.).

### 12. The Way Forward

Why is copyright on Australian Aboriginal art such a concern? There is quite clearly a divide of laws. Aboriginal people are in a weaker bargaining position than non-Indigenous Australians. The deep concerns in the Aboriginal community regarding copyright issues have reached the point to where some Aboriginal artists now refuse to paint (Janke, 1998:41).

It is widely recognised that copyright laws need, once again to be amended and that Indigenous people need to be a part of this process. Michael McMahon suggests that Indigenous Communities would "need to articulate clearly their needs and demands for a better system of intellectual property protection of alternative arrangements which will protect their cultures in a fast changing technological environment" (McMahon, n.d.)

### 13. Conclusion

The majority of the Australian Aboriginal copyright cases that have gone to court have come from the reproduction of Aboriginal art from books or photographs. With the introduction of the electronic age the reproduction of Aboriginal art will only become easier.

There is no doubt that the *Copyright Amendment (Digital Agenda) Act, 2000* has addressed and amended many issues that were not covered previously in the *Copyright Act, 1968 (Cth)*. However, it still fails to address the issues of communal ownership and copyright in the digital domain.

Some argue that copyright will survive the new digital era, and protection for artist's rights will survive as it has in the past. On the other hand some argue that the sheer nature of the Internet's open architecture and the ensuing digital era will eliminate copyright enforcement altogether.

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It is quite obvious the potential ease of which Aboriginal art can be exploited in the digital domain. But, rather than restricting the use of Aboriginal art on the Internet, there needs to be much wider recognition through the Government, Industry bodies and the general population that copyright exists just as much on the Internet as it does for any other copyrightable products. This will go a long way to ensure that possible infringers know that Aboriginal art is protected by copyright in the digital domain.

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