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# WHO OWNS COPYRIGHT IN NATIVE TITLE CONNECTION REPORTS?

by Eamon Ritchie and Terri Janke

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## INTRODUCTION

The native title claim process generates a great number of reports that embody Indigenous cultural knowledge. These reports are submitted as evidence, and dealing with them is subject to rules of evidence while the claim is on foot. This article asks the question: after the claim is over, who owns the reports? Who can access, reproduce or publish these culturally significant reports?

Ownership of native title connection reports can be complex, with different parties each making a claim over the same end product. For example, the anthropologist, the author, the Native Title Registered Body ('NTRB') who commissioned it, and the Indigenous person, their descendants and their community who provided the cultural knowledge contained within it, may all seek ownership of these written reports.

In any report there are different types of proprietary interests: there is the interest in the physical copy of the report and the interests in the copyright of the report. The difference can often be confusing but can best be illustrated by an example. If someone buys a book, they are purchasing a right in the physical manifestation of that work; they are not purchasing the intellectual property contained within it. Put simply, they own that particular copy but they do not own the story. In terms of copyright in native title rights, this is further complicated by the fact that the reports contain Indigenous cultural and intellectual property. The anthropologist may have interviewed traditional owners whose knowledge is clan owned, and then incorporated that into the report. This article will highlight the impact of western copyright law on traditional knowledge and offer an alternative framework for intellectual property ('IP') management within a native title framework.

## COPYRIGHT REPORTS ARE LITERARY WORKS

The *Copyright Act 1968* (Cth) ('the Act') provides protection for original literary, dramatic, musical and artistic works.<sup>1</sup> The Act defines a literary work as any work that 'includes a table, or compilation expressed in words, figures or symbols'.<sup>2</sup> A connection report is

protected as a literary work. The Act also protects photographs, maps, all artistic works, audio recordings and films.

## MATERIAL FORM REQUIREMENT

Copyright protection vests the moment a work is produced in material form. 'Material form' is defined as 'any form of storage of the work or adaptation' and includes where the work is written on paper, in a file (for example, on your hard drive) or in a film or audio recording.<sup>3</sup> It is important to note that copyright does not protect the underlying ideas or information. Copyright owners are granted the rights to control the reproduction of the expression of the idea or information.

## AUTHORSHIP

The person who reduces the work to material form is the 'author' of a literary work. As a general rule the author of a work is usually the copyright holder under s 35 of the Act, however an exception is where the author creates a work 'in pursuance to his or her employment by another under a contract of service'.<sup>4</sup> This means in order to determine who owns the copyright it first needs to be determined whether it was written under a contract of service. In most situations this will be easily determined.

Disputes often arise when the author claims to have been engaged as a contractor rather than hired as an employee. This was the argument used by the defendant in *Redrock Holdings Pty Ltd v Hinkley; Hotline Communications Ltd v Hinkley*<sup>5</sup> where Mr Hinkley claimed that he was engaged under a contract for services rather than a contract of service. In order to determine whether the contract was one of employment, the Supreme Court of Victoria looked at the general nature of the relationship and took into account things like the defendant's entitlement to sick and vacation leave and the general role he was engaged to fill. Even where a contract does not specify which type of relationship is being agreed to, the court can still make a determination by looking at the way both parties interact with one another. In this case the court held that Mr Hinkley was engaged as an employee, which gave Redrock Holdings the copyright in the program.

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Employed anthropologists who write connection reports under a contract for services for organisations such as an NTRB will not own the copyright. The NTRB will. Those that write as contractors may own copyright but the NTRB has an implied copyright licence to use the material for the purpose being commissioned. In practice, these issues are most likely to be determined by supply of services agreement. But as illustrated above, the copyright ownership of a report can vary depending on the circumstances of the anthropologist's engagement.

### **MORAL RIGHTS**

Moral rights protect the author's right to attribution, the right to not have their work falsely attributed and the right to maintain the integrity of a work.<sup>6</sup> The first two rights are quite simple. The author has the right to receive credit for his or her work and the right for his or her work not be attributed as the work of another person. The right of integrity relates to the right of the author to stop a work from being treated in a derogatory way, such as being modified, altered and used out of context.<sup>7</sup>

Moral rights are for authors, not for organisations or communities. The writer of the report holds these moral rights. These are important rights for anthropologists who build their reputation on the strength of their work and publications; there are no Indigenous communal rights which allow Indigenous communities to argue that the report is used in a way that is derogatory to their reputation, such as, culturally out of context.

### **INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS**

The legal protection of copyright has limitations in recognising the Indigenous cultural knowledge rights. Indigenous Australians have clearly articulated that they assert ownership of their Indigenous Cultural and Intellectual Property ('ICIP'). In 1999, 'Our Culture: Our Future'<sup>8</sup> found that Indigenous people want rights to control and maintain their ICIP.<sup>9</sup> ICIP rights include the right to control use and reproduction; the right of attribution of a community; cultural integrity; and benefit sharing. These rights enable traditional owners to realise self-determination. ICIP rights are not law but are important for the preservation of Indigenous culture. They are recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').

### **UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

The UNDRIP uses different language, but the same content is covered. Article 31 of the UNDRIP states that: 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural

expression.'<sup>10</sup> It is important to note the difference between western and Indigenous culture, especially in regard to intellectual property. Many Indigenous communities throughout the world view their cultural stories as being owned communally. This is contrary to the way in which the Australian legal system views them. There is currently no legal protection of ICIP rights in Australia; however, certain rights may be covered by existing law such as copyright, as discussed above and confidential information.<sup>11</sup>

Copyright has limitations in recognising ICIP rights. For example, Indigenous people may seek to control the dissemination of their creation stories about land and culture. However, there is no copyright in creation stories which are traditionally passed down orally through the generations over many years. This is because Indigenous stories would generally fail to meet the material form requirement of the Act, an individual author may not be identifiable and the copyright period is expired.<sup>12</sup> Case law has, however, recognised that in certain circumstances the copyright owner may owe a fiduciary obligation to the clan group.<sup>13</sup>

There are a number of protocols which advocate recognition of ICIP rights as best practice, but these do not have the force of the law and in some cases can be ignored entirely.<sup>14</sup> It is for these reasons that Indigenous communities may seek to protect their ICIP rights through contract. However, this would only bind the parties to the agreement to respect ICIP rights.

### **FIDUCIARY DUTY TO RESPECT EMBODIED RITUAL KNOWLEDGE IN WORKS**

Even when the copyright holder has been determined, there may still be a number of restrictions governing how the material can be used. These restrictions focus around the publication of secret or sacred Indigenous knowledge. For example in *Bulun Bulun v R & T Textiles*,<sup>15</sup> an artist's clan sought to enforce communal copyright. The Elders of the Ganalbingu people submitted evidence that they were the traditional owners of the Ganalbingu country. As the traditional owners they claimed to have the right to permit and control the distribution and reproduction of traditional artistic works because the work embodies the ritual knowledge of their people.<sup>16</sup> The Federal Court of Australia found that while the clan did not have communal copyright, if the traditional knowledge had been imparted by Elders, the person receiving that knowledge was bound in equity to obey customary law in the use of that knowledge.<sup>17</sup> In that way, the court imposed a fiduciary obligation on the artists and the copyright holder. If the copyright owner had been unable or unwilling to take action, the court would have allowed equitable remedies, which could involve the imposition of a 'constructive trust to strengthen the standing of the [community] to bring proceedings to enforce the copyright.'<sup>18</sup>

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In *Bulun Bulun* the community was not the copyright holder, but the clan was able to control reproduction and publication of certain information by enforcing the fiduciary obligation owned by the artist as copyright owner.<sup>19</sup> This case involved artistic works, but could be applied to literary works, such as connection reports. That is, does an anthropologist and copyright owner owe a fiduciary duty to deal with the copyright in a connection report in accordance with customary laws and obligations they are on notice of?

In the *Bulun Bulun* case, knowledge was given to another member of the same community, however the principle can still be applied in other relationships. Sally McCausland considered that filmmakers who film Indigenous people and culture and who own the copyright in films may owe a fiduciary duty to the subject Indigenous communities. Her article, 'Protecting Communal Interests in Indigenous Artworks after the *Bulun Bulun*,'<sup>20</sup> outlines that in situations where a filmmaker is made aware of the Indigenous interests in the ritual knowledge to be filmed, a fiduciary obligation will arise for the filmmaker.<sup>21</sup> To alert viewers of the film of the continuing interest of the Indigenous community, Sally McCausland suggests the use of a 'custodian's interest notice' which can be placed on the copyright material to provide notice of the communities' interest.<sup>22</sup>

The anthropologist is arguably in the same relationship with Indigenous communities. The nature of native title research for connection reports essentially puts the anthropologist on notice that customary law obligations control reproduction of the traditional ritual knowledge. The anthropologist should then know that by writing about connection to the land they will be covering culturally owned material and would be bound in equity to only use the information for the case at hand. Any future uses should be consulted about and consent should be obtained.

## ETHICS AND PROTOCOLS

Even though legal rights to copyright may give rights to reproduce connection reports, there are still ethical obligations that need to be taken into account when future reproduction of connection reports are proposed.

The Australian Anthropological Society's ('AAS') code of ethics requires consultation with community groups outlining the project and proposed uses of cultural material.<sup>23</sup> However, there is very little mention in regards to intellectual property. Section 3.7 of the code of ethics outlines that, where possible, anthropologists should give their research collaborators co-researcher status, but acknowledges that there may be legal or contractual obligations that prevent this. It has been suggested by Sarah Holcombe that

Indigenous knowledge holders were in the past essentially reduced to 'informants' without acknowledgement of their ownership of knowledge and contribution to research work.<sup>24</sup>

There are a number of organisations in Australia which have released protocols and guidelines on dealing with ICIP rights in research and writing. The Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') produced the premier guidelines for Indigenous research, *Guidelines for Ethical Research in Australian Indigenous Studies* ('GERAIS'),<sup>25</sup> which state that: '[r]esearch projects should be conducted in accordance with the principle of Indigenous peoples' rights to maintain, control, protect and develop their intangible heritage, including their cultural heritage, traditional knowledge, traditional cultural expressions and intellectual property.'<sup>26</sup>

AIATSIS also released a set of guidelines for the ethical publishing of Indigenous material, which contains similar provisions relating to IP as GERAIS.<sup>27</sup> In addition to this, the UNDRIP art 31 could also act as a guide when dealing with Indigenous Australian communities.

## CONCLUSION

Copyright provides the legal ownership of the intangible expression of the research included in native title connection reports. To ascertain who owns the copyright, one must make enquiries as to the chain of title as follows: who was the author; were they employed or under contract; and was there a funding agreement that had terms relating to the ownership of copyright? There may also be fiduciary duties owed to the clans whose ritual knowledge is embodied in the literary works that restrict how an author or copyright owner can deal with the report. This makes it difficult to outline hard and fast rules about copyright and future uses of connection reports.

The rights of Indigenous Australians to control the dissemination and publication of reports that incorporate their cultural knowledge are not legally recognised under copyright law. However, this is an area of law that is developing internationally. The World Intellectual Property Organisation's Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has produced draft articles<sup>28</sup> on traditional cultural expression and traditional knowledge protection. These articles, while not finalised in the international arena, serve as a guide in demonstrating how best to approach this issue in Australia. The *Draft Articles for the Protection of Traditional Cultural Expression* propose rights for beneficiaries to 'prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions' and 'acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this

turns out to be impossible.<sup>29</sup> There have also been a number of reports suggesting practical changes to help better protect ICIP rights and cultural material.<sup>30</sup>

Despite the lack of copyright recognition of Indigenous communal rights to their knowledge, anthropologists and organisations should set up best practice procedures for dealing with reports after the claim. Indigenous rights to culture should also be considered when future uses of connection reports are proposed. Article 31 of UNDRIP should guide anthropologists, and other bodies, to respect traditional knowledge, traditional cultural expression and cultural heritage. Prior informed consent should be followed when considering archiving, publishing and making available to the public connection reports after the claim.

This can be done by following AIATSIS's *Guidelines for Ethical Research in Australian Indigenous Studies* in developing and following protocols that protect and respect the rights of Indigenous peoples. Given the importance of traditional knowledge and cultural expression in maintaining a connection to country, it is imperative that we adopt methods of practice that give effect to the UNDRIP's art 31 rights. In the absence of law, practitioners and organisations should follow or develop frameworks that use existing intellectual property rights, protocols, ethics and contracts to enable access to these important reports for the continuation of cultures to the next generations.

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1 *Copyright Act 1968* (Cth) s 32.

2 *Ibid* s 10.

3 *Ibid* ss 10, 22(2).

4 *Ibid* s 35(6).

5 *Redrock Holdings Pty Ltd v Hinkley; Hotline Communications Ltd v Hinkley* (2001) 50 IPR 565.

6 *Ibid*.

7 *Copyright Act 1968* (Cth) ss 193, 195AC, 195AI.

8 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, (1999); the OCOF report was commissioned by the Aboriginal and Torres Strait Islander

Commission (ATSIC) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

- 9 Indigenous Cultural and Intellectual Property was the term then used in the 1995 draft of the *United Nations Declaration on the Rights of Indigenous Peoples*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991). Although the language in the final draft now refers to 'traditional knowledge, traditional cultural expression and heritage', Australian protocols and policies refer to ICIP due to the work in *Our Culture, Our Future*.
- 10 *United Nations Declaration on the Rights of Indigenous Peoples*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).
- 11 *Foster & Ors v Mountford and Rigby Ltd* (1976) 14 ALR 71.
- 12 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, (1999) 9.
- 13 *Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] FCA 1082.
- 14 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (2012) AIATSIS <<http://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf>>; Australia Council, *Protocols for Producing Indigenous Australian Writing* (September 2007) <[http://www.australiacouncil.gov.au/symphony/extension/richtext\\_redactor/getfile/?name=fc8a5cc73467cb405e8943ae14975da7.pdf](http://www.australiacouncil.gov.au/symphony/extension/richtext_redactor/getfile/?name=fc8a5cc73467cb405e8943ae14975da7.pdf)>.
- 15 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.
- 16 *Ibid*.
- 17 *Ibid*.
- 18 *Ibid* 20.
- 19 *Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] FCA 1082, 19.
- 20 Sally McCausland, 'Protecting Communal Interests in Indigenous Artworks after the Bulun Bulun Case' (1999) 4(22) *Indigenous Law Bulletin* 4.
- 21 *Ibid*.
- 22 *Ibid*.
- 23 Australian Anthropological Society, *Code of Ethics* (2012) <[http://www.aas.asn.au/wp-content/uploads/2013/05/AAS\\_Code\\_of\\_Ethics-20121.pdf](http://www.aas.asn.au/wp-content/uploads/2013/05/AAS_Code_of_Ethics-20121.pdf)> 2[3].
- 24 Sarah Holcombe, 2010, 'The Arrogance of Ethnography: Managing Anthropological Research Knowledge', *Australian Aboriginal Studies*, vol 2, pp 22–32, 24.
- 25 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 14.
- 26 *Ibid* 3.
- 27 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for the Ethical Publishing of Aboriginal and Torres Strait Islander Authors and Research from those Communities* (2015) <<http://aiatsis.gov.au/sites/default/files/docs/asp/ethical-publishing-guidelines.pdf>>.
- 28 World Intellectual Property Organisation, *The Protection of Traditional Knowledge: Draft Articles* (2014) World Intellectual Property Organisation <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_22/wipo\\_grtkf\\_ic\\_22\\_ref\\_facilitators\\_text.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_ref_facilitators_text.pdf)>.
- 29 *Ibid* 2 [3].
- 30 Please see Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*; Terri Janke, *Minding Culture*, World Intellectual Property Organisation 2003; Terri Janke and National Congress of Australian First Peoples, *The Call for a National Indigenous Cultural Authority*, National Congress of Australian First Peoples, position paper on National Indigenous Cultural Authority, 2013.