

Protocols for producing Indigenous Australian music

Music

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

IMPORTANT NOTICE

The information included in this guide is current as at September 2007. This document was first published under the title 'Song Cultures' in 2002. This guide provides general advice only. It is not intended to be legal advice. If you have a particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner.

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Introduction

*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.*¹

David Milroy

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

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

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

That is where the Australia Council for the Arts' protocol guides come in. The five guides in the suite spell out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material. They can help people do the right thing. These guides recognise that in Indigenous Australian communities the artist is a custodian of culture, with obligations as well as privileges.

The five guides in the suite are:

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

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

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

The protocol guides endorse Indigenous cultural and intellectual property rights – the rights of Indigenous people to own and control their cultural heritage. These rights are confirmed in the *United Nations Declaration of the Rights of Indigenous Peoples*,² which says Indigenous people have the right to practice and revitalise their cultural traditions and customs. 'This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.'

In *Our culture: our future*³, Terri Janke recommended significant changes to laws, policy and procedures to protect Indigenous cultural knowledge and expression. The Australian Government has yet to make a determination on this matter.

In Australia, Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people have a living heritage. Their connection with the

land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, music, the visual arts, and media arts are 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.

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

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

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

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

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Using this guide

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

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

The introduction defines protocols as used in this guide, and looks at the special characteristics of Australia's Indigenous music.

The next section, Indigenous heritage, gives an overview of the issues that inform the development of Indigenous protocols. It explores the complexity of Indigenous Australia and its potential 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, examines the nine principles that support the protection of Indigenous cultural heritage. It includes valuable information on protocols specific to the use of cultural heritage material in music practice. A number of case studies and commentaries from Indigenous music practitioners identify pitfalls and offer readers valuable advice.

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

The Implementation section summarises some of the key points and provides a checklist for applying protocols to a music project.

There is also a list of contacts and a bibliography to use as starting points for accessing relevant people and information.

What are protocols?

Protocols are appropriate ways of using Indigenous music and cultural material, and interacting with Indigenous musicians and Indigenous communities. They encourage ethical conduct and promote interaction based on good faith and mutual respect. Indigenous protocols arise from value systems and cultural principles developed within and across communities over time.

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

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

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

The protocols outlined in this guide are shaped by nine fundamental principles. The protocols are, by definition, ways of applying these principles. For example, a cultural protocol to implement the underlying principle of respect is to acknowledge the Indigenous custodians of country at the site of each performance or event.

The guide 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.

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

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

These protocols are accepted and used by many Indigenous musicians and organisations and have also been used for several Indigenous music projects.

What is Indigenous music?

Indigenous music is an important part of Indigenous culture.

Music is about expressing cultural belonging. It is part of ceremony, storytelling, celebration, mourning, coming together and telling of events in Indigenous people's lives, both past and present.⁴

Indigenous music is not easily divided into categories of traditional and contemporary styles, despite common perceptions. In this guide, 'traditional' refers to works that have drawn on 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, hip hop, country and western, disco, opera, rap, rhythm and blues, techno and others.

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.

The 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
- commenting on life, society and politics
- 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.⁵

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 asking 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?'⁶

Among important issues raised by the development of Indigenous music and song are the following:

- What can be done to further promote and protect Indigenous people's rights to own and control their Indigenous heritage within the current legal framework?⁷

- How should Indigenous music be properly attributed? For instance, how should performers and owners of traditional songs be recognised?
- What about adaptations of Indigenous music, such as remixing and re-recording?
- How can Indigenous cultural material be respected through all the different aspects of music – from writing, to performance, recording, production and distribution?

This guide offers some suggestions 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*.⁸ Under copyright laws these rights are not always protected and this is why we encourage the use of Indigenous protocols.

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

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

There are many Aboriginal and Torres Strait Islander cultures, not just one. 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, language group affiliations and community, organisational and government structures. A range of authority structures exists across urban, regional and remote communities. It is important to acknowledge the complexity of Indigenous Australia when negotiating the use of Indigenous heritage for a 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.⁹

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 refer to Indigenous people’s cultural heritage.

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

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

For a full list of rights see *Our culture: our future – Report on Australian Indigenous cultural and intellectual property rights*.¹⁰

Current protection of heritage

Australia’s current legal framework provides limited recognition and protection of Indigenous heritage rights. *Our culture: our future* recommended significant changes to legislation, policy and procedures. As yet there has been no formal response to these recommendations from the Australian Government. However, there are proposals to amend the *Copyright Act 1968* (Cth) to recognise Indigenous

communal moral rights. In the absence of laws that protect Indigenous cultural and intellectual property, much of the rights recognition has been done at an industry and practitioner level, through the development of protocols and use of contracts to support the cultural rights of Indigenous people.

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

These rights are given international recognition in the *United Nations Declaration of the Rights of Indigenous Peoples*.¹¹ Article 31 states:

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
2. *In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.*¹²

The *Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights* urges

Indigenous people to 'develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge'.¹³

The *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (1993)*, adopted by the former Aboriginal and Torres Strait Islander Commission's Indigenous Reference Group in 1997,¹⁴ state: 'Artists, writers and performers should refrain from incorporating elements derived from Indigenous heritage into their works without the informed consent of the Indigenous owners.'

In January 2002, the World Intellectual Property Organisation's (WIPO) 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'.¹⁵

Internationally, WIPO has established an intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore to discuss intellectual property issues that arise in the context of:

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

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

(i) The protection of traditional cultural

expressions/expressions of folklore;
Draft objectives and principles¹⁷

(ii) The protection of traditional knowledge;
Draft objectives and principles.¹⁸

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

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

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

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

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights'

for traditional owners of traditional knowledge and expression of culture.²⁰ The prior 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:

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

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

1. Respect

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

Acknowledgment of country

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

When organising an installation, performance or event of local, state or national significance, it is respectful to invite a representative of the traditional owners to attend and give a 'welcome to country' address.

A 'welcome to country' is an address given by an Indigenous custodian of the land, included in the official openings of events. As a matter of cultural protocol, large cultural events should invite an Indigenous custodian or representative of the traditional landowner group to provide a 'welcome to country'. Alternatively, an Indigenous person of prominence or an elder

who has lived in the area and contributed to the Indigenous community may also be asked to acknowledge country if they are not in a position to welcome to country.

It is respectful for others speaking officially to also acknowledge country and custodians at the site of the event. This could be done by the master of ceremonies making an introductory acknowledgement to the traditional owners of the land.²¹

Seek advice from the Indigenous community on the preferred manner of acknowledgement and the relevant groups to be acknowledged. It is important to acknowledge country and custodians at the site of each performance or event. In many instances it may not be appropriate for every performer to acknowledge country and the custodians. It will often be more appropriate for the master of ceremonies, or other spokesperson to acknowledge it on behalf of performers and audience.²² Seek advice from the Indigenous community on the preferred manner of acknowledgement.²³

Museums and Galleries of New South Wales has published a written 'welcome to country' protocol, which is available from their website, <www.mgnsww.org.au>. This is a useful guide to assist artists, and galleries with preparation for launches and events, and is also useful for those organising concerts and performances.

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. It says: '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.' Article 11(f) of the Society's Constitution 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.²⁴

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 about their work. Many 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.

Other Indigenous musicians have also confirmed that racism is 'alive and well in the music industry'.²⁵ An increase in the number of Indigenous music publishers, managers and promoters who can provide culturally appropriate advice and services will benefit the music industry and Indigenous musicians.²⁶

Inappropriate or outdated perspectives and terminology should be avoided.

Representation

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

Alice Haines, Indigenous performer, composer and producer, describes her experience working with Indigenous musicians saying:

*We are developing new Indigenous cultural and musical forms, drawing on many recognised styles including our traditional styles and creating a new and distinct genre of Indigenous music.*²⁷

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

ways. This can also 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's *Pension Day Blues*. It includes works that celebrate and commemorate Indigenous experience, like *We Have Survived* by No Fixed Address; that call for political action, as in Yothu Yindi's *Treaty Now*; and that honour country and people, like *My Land* by the Pigram Brothers or *No More Whispering* by Glenn Skulthorpe. It may also include the use of Indigenous languages, rhythms, instruments and styles. It is important to respect the diversity of cultural expression in Indigenous music, and appreciate its ongoing development through different styles and forms.

2. 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 language groups and who can give clearance of traditionally and collectively owned material.

To consult effectively and gain consent for the 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 individuals with authority to speak for specific Indigenous cultural material.

For initial contacts we recommend the following directories:

- *The Black Book Directory 2005 – Indigenous Arts & Media Directory*, published by Blackfella Films and Australian Film Commission, available online at <www.blackbook.afc.gov.au>.
- *Black Pages* directory – *Black Pages* is Australia's first and only national online Indigenous Business and Community Enterprise Directory, at <www.blackpages.com.au>.
- Australian Institute of Aboriginal and Torres Strait Islander Studies has links to a list of Aboriginal and Torres Strait Islander organisations, at <www.aiatsis.gov.au/library/links/atsi_links>.

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

For information about language use, contact the Federation of Aboriginal and Torres Strait Islander Languages (FATSIL). FATSIL provides a National Indigenous Languages Directory with contacts and profiles for language centres, universities, TAFEs, and other relevant bodies and individuals, listed by location, at <www.fatsil.org/links/nild.htm>.

For music projects relating to the Torres Strait, see Torres Strait Regional Authority, at <www.tsra.gov.au>, for contact information.

Some other useful starting points for inquiries include:

- Aboriginal land councils
- Office of Indigenous Policy Coordination
- Indigenous media associations, including the Australian Indigenous Communications

Authority (AICA) and the Central Aboriginal Australian Media Association (CAAMA Music), and other Indigenous organisations listed in the contacts section of this guide

- 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 language 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 New South Wales, Western Australia, Queensland, South Australia, Tasmania and Northern Territory, 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 of this guide for further information.

Engaging Indigenous contributors

When engaging Indigenous contributors to participate in a project, most organisations use the definition of Aboriginal identity used by the Australian Government as a guide. The Australia Council's Aboriginal and Torres Strait Islander arts board requires a confirmation of Aboriginal/Torres Strait Islander identity to be signed. Applicants must provide confirmation of identity from an organisation registered under the *Aboriginal Councils and Associations Act 1976* or since July 2007, registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, or other relevant legislation, plus a declaration that they are of Aboriginal or Torres Strait Islander descent, identify as such and are accepted as such in the community in which they live.

Management and agency agreements

Good management and a good agent are great assets for songwriters and performers. Musicians will often be required to sign an agreement with a manager or agent. It is important to consider the agreement closely before signing. The Arts Law Centre of Australia provides a music management checklist for musicians to use when considering a management agreement. Legal advice should also be considered before signing.

3. Communication, consultation and consent

Yothu Yindi describes the importance of the principle of communication, consultation and consent as follows:

*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.*²⁸

Indigenous people should be consulted on the use and representation of their Indigenous heritage, and be fully informed about the implications of consent. Consultation should address the communal nature of Indigenous cultural expression.

Case study: Skinnyfish consults

Skinnyfish Music is a Darwin-based company that records, markets and distributes Aboriginal music on CD. It has worked closely with the Nabarlek Band from Manmoyi outstation, western Arnhem Land. The company allows a lot of time to organise broadcasts, performances or videos, so that the band members have enough time to consider

the project themselves, and to consult with family and community members about each stage of the project.²⁹

Doreen Mellor outlines the importance of early consultation:

Consultation with a community or group of people is not simply a formality...Consultation is required as a precursor to consent for it to proceed. It is not appropriate to have decided that the activity is to proceed, or that its structure or format is established before consulting the Indigenous group or person involved. The idea may be a good one from an external point of view. Consultation establishes the internal, cultural perspective and it is important to accept that it is this perspective which should determine the appropriate course of action.

With regard to the process of obtaining consent:

- allow time (perhaps more than one meeting) for communication of a proposal
- allow time for a decision to be made
- remember that the decision will be made on other bases than the ones brought from outside the community – different types of knowledge operating in Indigenous communities may conflict with the requirements of a project
- be prepared to take 'no' for an answer (but don't take it personally)
- respect the views of all factions within a community, and ensure that consent comes from the appropriate quarter for a particular activity or project.³⁰

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 language group or family, it is essential to locate the correct language group or family group from the particular Island owning that song or music. Helen Anu says, 'If you can't find the correct language group or family to ask permission, that's a good reason not to use the music.'³¹

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 or uses of the cultural material. The way in which a song is to be used is important information for custodians. 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 commercial release of the song he or she should make this clear to the owners of cultural material. Also, if a number of different uses are proposed, each use should be discussed. Consent should be sought again if new uses are considered, for example, sale of the work or download from an internet site.

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 or authors.
- Copyright law protects works in 'material form'. In this guide, 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, organisation 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.

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, but no proper consent for commercial exploitation

of the music had been obtained, and no royalties were paid to the owners. Terri Janke has commented:

*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.*³²

In the following case study, the custodians assert their ownership and state that their consent was provided to create the CD. The custodians also clearly state that no further use should be made without their consent.

Case study: Transmitting traditional knowledge

In a booklet accompanying the CD *Jurtbirk love songs from North Western Arnhem Land* is a custodian statement, which informs listeners that permission needs to be sought for any use of the CD or booklet.

*This music CD and booklet contain traditional knowledge of the Iwaidja people. They were created with the consent of the custodians. Dealing with any part of the music CD or the texts of the booklet for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the Iwaidja people and may also breach the Copyright Act 1968.*³³

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.

Opinions differ among Indigenous musicians on the issue of who can play a yidaki or

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 yidaki or didgeridoo for consent to play the instrument, particularly in view of widespread national and international sale and use.

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 yidaki or didgeridoo song cycles belonging to language groups.³⁴

Sampling music that is already recorded

Sampling Indigenous traditional music has caused problems for some Indigenous people, when the creators or custodians are not asked for permission to use their traditional songs. In some instances, the music has been sampled from recordings collected by ethnomusicologists or anthropologists, and held in museums. In these cases, the rights in customary and copyright law may be complex, and require considerable consultation before any use.

Sampling can also occur using more recent songs and recordings. Some musicians encourage sampling of their new musical works, and may use a Creative Commons licence³⁵ to show others that they can use their work without having to pay for it, on the terms of the licence. This might not be suitable for Indigenous traditional music that may require consideration of each context for which it is used. It is very important to get legal advice before issuing a Creative Commons licence to work available online so you are very clear what you are allowing others to do with your work, and how it might influence your ability to control the work in the future. Start by checking the Creative Commons section in this guide.

Sampling musical works or recordings without the copyright owner's permission may be an infringement of copyright.

If you want to sample a song and sound recording you will generally require a copyright clearance, in the form of a licence for use in a sound recording. Unauthorised use of a substantial part³⁶ of a sound recording may infringe the rights of the copyright owners under the *Copyright Act*.³⁷

Copyright in old recordings often belongs to the person who made the recording. Or if the recording is more than 70 years old, it may be in the public domain. In that case, the archival institution administers the recording of the music.

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

There is a significant flow-on effect from the disrespectful or 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 from 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.³⁸

Consenting to rearrange or remix music

It is important to carefully consider the possible effects of consenting to the right of a recording company to rearrange or re-mix music. Giving consent may mean that the musician cannot do anything if he or she is unhappy with the result.

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.

Ebony Williams, formerly of the Australasian Performing Right Association, explains that festivals can be very important, especially for elders, who are concerned about how to engage young people in culture. For that reason, festival organisers have a strong responsibility to follow protocols.³⁹

4. 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. Helen Anu says, 'It is very important that when Indigenous people are educating others – you have to get it right'.⁴⁰

For instance, an educational performance of song or dance at a school should include a good background history of the music. It should also be accurate and appropriate for children.

Consider interpretation and context in the presentation of musical works, such as:

- Words or phrases from particular languages should not be used just because they are in a different language.

- Language should only be used where its proper meaning is known and where it is used in the proper context.⁴¹
- Cultural material should always be used in the appropriate context.
- Observe gender restrictions – for instance, the use of the yidaki or 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.

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

*You need to be aware of the diversity of Indigenous music and should choose content that is culturally appropriate, for example, checking what the song is about with the artist or record label or management or your interviewee and not just selecting the most well-known Aboriginal or Torres Strait Islander music because it sounds good, particularly when working with music in Aboriginal languages. There is plenty of Indigenous music from just about every geographical area. When using music in a radio program, ask 'Is this music relevant to the person, community or place this story is about?' For example, a song by a Torres Strait performer may be more appropriate for a story on the Torres Strait rather than using a didgeridoo track from a central Australian artist.*⁴²

The way Indigenous music is interpreted can be important for musicians, producers and distributors working with Indigenous music.

Case study: Producing Indigenous music

Alice Haines is an Aboriginal musician and producer. She says that a lot of Indigenous music does not get produced properly because producers don't understand the distinctly Indigenous sounds. Haines says:

*There are new scales and new chords. When you analyse Indigenous music it has different structure and different rhythms to non-Indigenous music. For example the rhythms from North Queensland are very intricate. Indigenous rhythms are like a heartbeat. Unless a producer understands the rhythms they can't produce them properly.*⁴³

Integrity

Integrity refers to the treatment of the original musical work and copies made of it. Under the *Copyright Act*, the moral right of protection for integrity provides a right of protection for individual authors against inappropriate 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 creators, but integrity of the musical work is also very important for the Indigenous communities where the music originates, especially if it includes a traditional song of special significance to the community. Unfortunately, there is no legal remedy yet for a community as a whole if a traditional song is subjected to inappropriate treatment. A legal remedy may be introduced by the Indigenous Communal Moral Rights legislation currently proposed by the Australian Government. (See the section on Indigenous Communal Moral Rights in this guide.) At present, individual creators – lyricists and composers – can exercise their moral right of integrity in their copyright songs.

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:

- Find out the meaning of the songs.
- Get a proper translation of the songs.
- Get the context of the translation right.
- 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.

She notes: 'Performing the song at the wrong place can ridicule the song. The context must be respected'.⁴⁴

For information on Indigenous languages and usage contact the relevant Aboriginal language centre or the Federation of Aboriginal and Torres Strait Islander Languages at <www.fatsil.org>.

5. 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 language group 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.

Use of life stories

If you are planning to depict an identifiable individual or community, ask the individual, community or relatives of the individual for permission, and check whether the details are correct and appropriate.

It is important to avoid disclosing sensitive information. Confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure.

If you are planning to write lyrics 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.

Case study: Jurtbirrk love songs from North Western Arnhem Land

Batchelor Press, an imprint of Batchelor Institute in the Northern Territory, publishes specialised publications, such as Indigenous education resources, cultural

and community history projects, and endangered Indigenous language projects.

Batchelor Press has published a CD called *Jurtbirrk love songs from North Western Arnhem Land*. The CD contains 40 love songs produced by the Jurtbirrk makers. To respect the mourning practices of Indigenous communities, the inside sleeve of the CD contains the following statement:

*Warning: This music CD and booklet contain voices and images of Iwaidja speakers from Minjilang in the Northern Territory of Australia. If someone shown in this booklet or playing or singing on the CD has passed away, hearing their name or voice may cause sadness or distress to some people. Before using this music CD and booklet, advice should be sought from Indigenous Australian Community members regarding the use of these materials in the classroom, community or public forum.*⁴⁵

In some places, although the name and image of the deceased person can be used, writing or singing about people who have passed away will often be a very sensitive issue and great care should be taken to consult with relevant family and community members to ask their consent, and for direction.

6. Attribution and copyright

Indigenous people should be attributed for the use of their cultural heritage material in musical works. It is important to consult on the form of attribution people may want, such as proper wording and spelling of names.

The moral rights provisions of the *Copyright Act* require that individual authors are identified as the creator of the work – the law requires that the lyricist or composer is identified and acknowledged.

As songs and recordings may use material from many different sources, it is respectful practice to credit individuals, families, language groups or communities who contributed to the work at any stage.

What is copyright?

It is important for Indigenous musicians to develop an understanding of copyright so they can negotiate rights to the use of their music. It is also important to keep track of changes to the laws that might affect those rights.

The purpose of copyright is to protect the creator's, or copyright owner's, rights to use or capitalise on their work. The *Copyright Act* was drafted to achieve that aim.

A person's ownership of copyright in music depends on whether the person wrote the words (lyricist), wrote the music (composer), or made a sound recording of the music (the Act calls this person the 'maker').

Copyright is a form of legal protection that provides the copyright owners with the rights to exclusively use and authorise others to use their copyright works and other subject matter. Copyright owners have the right to prevent others from using it without permission. The law refers to the copyright owner's right to control the use of their work, as the right to capitalise on his or her work.

The *Copyright Act* is the main law in Australia that governs the use, production and dissemination of literary, artistic, dramatic and musical works, sound recordings, television broadcasts and films. There are no special laws for the protection of Indigenous cultural and intellectual property.

This section provides general copyright information for Indigenous musicians. For specific legal advice, we recommend consulting a lawyer with specialist knowledge on copyright. The Copyright Council website is also a valuable source of information.

How does copyright protect music?

In general, copyright protects literary, artistic, musical and dramatic works that are 'reduced to material form'. This expression means that a work must be in a permanent and tangible form.⁴⁶ Copyright protects the written expression of words and music, and in the case of recordings, the recorded form of the sounds. Copyright does not protect ideas. Copyright only protects music when it is 'reduced to material form'.

How is music reduced to material form?

Music is reduced to material form in a number of ways. A 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.

Performers have a different set of rights with only limited copyright ownership in certain circumstances.

Issues can arise for Indigenous cultural custodians where Indigenous traditional knowledge, dance, designs and stories are passed on orally. This cultural material is not in material form and is therefore not automatically protected under standard copyright laws.

It is important to consider making arrangements for copyright ownership when oral cultural material is recorded, because generally the maker of the recording is the copyright owner in the recording. This can be altered by agreement. So, for example, a custodian of the cultural material could require an agreement with the maker of the recording, which vests copyright in the recording with the cultural custodian, before any information is provided.

Musicians who use techniques of improvisation should also be aware that copyright does not

protect their music unless it is reduced to material form. This is generally through writing the notes or making a recording of the music.

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.

What kinds of copyright are there?

There are four main kinds of copyright:

- copyright of music
- copyright of words or lyrics
- copyright of sound recordings
- copyright of the performance (this is a new and limited right).

Who owns copyright?

The nature of copyright ownership in music depends on what each person contributes to the work or the sound recording. Copyright in the music is owned by the person or people who compose the music. Copyright in the lyrics belongs to the person or people who write the words. Copyright in a sound recording is owned by the maker of the sound recording.⁴⁷ This is generally the people or recording company who pay for the recording process.

For instance, the music and lyrics of the song *Jewel of the North* were written by Toni Janke. Toni also recorded the song in 2004, trading as Toni Janke Productions. She is the copyright owner of the song's music and lyrics, and the recording.

The copyright in sound recordings of live performances is owned by the makers, and in some instances, the makers and the performers. The makers are generally the people who own the recording equipment, or the people who commission the recording. In some cases, performers, including the conductor will share in ownership of recordings of live performances.

Copyright exceptions

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

- Where a musical work is produced under a contract of employment, copyright will belong to the employer.⁴⁸
- Where a sound recording of a live performance was made, and the performers performed as part of their terms of employment, or pursuant to a contract of employment or apprenticeship, the employer is the maker, and therefore the copyright owner and not the performers.⁴⁹
- Where a work is produced under the direction or control of the Crown, copyright may belong to the Crown.⁵⁰
- Where copyright has been assigned under a written agreement, the agreement may specify who owns copyright. See 'Assigning Copyright Versus Licensing' in this guide.

How long does copyright last?

Copyright protects musical works and literary works during the lifetime of the creator and for 70 years after their death.⁵¹ The composer of a musical work retains copyright for 70 years after his or her death. The lyricist of a song will retain copyright in the words until 70 years after his or her death. After this time has expired, the work is said to be in the public domain. Once a work of recording is in the public domain, the law no longer prevents anyone from accessing, copying or using it.

Copyright in a sound recording generally lasts for 70 years from the date the recording was made.⁵² After this time the sound recording is in the public domain.

Copyright owners need to think about who will control their copyright and receive any royalties that might be payable to their estate after their death.

Another issue relates to controlling traditional songs after the copyright period has expired. Indigenous people want the right to control their cultural songs in perpetuity. The duration of copyright does not reflect the duration of Indigenous people's rights and obligations in relation to their cultural material. 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?

Copyright owners have the exclusive right to authorise use and copying of their musical works. For example, the copyright owner(s) of a musical work has the exclusive right to do any or all of the following:⁵³

- reproduce all or a substantial part of the work in a material form, by writing out the music or the words, or recording the music and words, or including the music and words in a soundtrack
- perform the work in public, including performing it live, playing a sound recording or screening a film which includes the music and words in a non-domestic setting
- communicate the work to the public, for example by transmitting it online, uploading it to a website, emailing digital files of music, or radio and television broadcasting
- make an adaptation of the work which may include new arrangements of the music
- translate the lyrics⁵⁴
- perform in public and communicate the work to the public – known as a performing right.

Music is reproduced in a number of ways including CD, film soundtracks, internet music files and the incidental 'on hold' music recorded for telephone message systems.

The rights to reproduce sound recordings of music in different media are described as:

- mechanical rights – the rights to record a song onto DVD, CD or cassette
- synchronisation rights – the rights to use the music on the soundtrack of a film or video.

Performers' rights

Performers have a different set of rights to composers and lyricists. Performers' rights are, in general, more limited than composers' or lyricists' rights. Each performer's permission must be sought before recording a performance (either by sound or film) and communicating a performance to the public. Performers have other rights in relation to the use of recordings of their performance, including the right to say whether the recording can be used as a soundtrack for a film.

Performances include live performances of:

- a dramatic work⁵⁵
- musical work⁵⁶
- the reading, recitation or delivery of a literary work⁵⁷
- a dance
- a circus act or a variety act or any similar presentation or show
- an expression of folklore.⁵⁸

Performer's rights will often be set out in employment contracts. Industry organisations should be consulted for industry standards for performers. These include the Media, Entertainment and Arts Alliance (MEAA) and the Musicians Union in each state or territory of Australia.

Copyright and performers' rights

Until January 2005, there was no copyright in a performance, but performers could grant or refuse permission to record and broadcast their performances. This was generally done by asking performers to sign a release form which allowed for certain uses of the performance such as making the recording,

broadcasting it or putting it online. Once this release was signed, performers received no further rights in relation to the work or the recording of it unless they were entitled to residuals or royalties as a result of their contract.

Since January 2005, performers have had new rights in sound recordings.⁵⁹ When a sound recording of a live performance is made, the performers⁶⁰ and the person/company who paid for the recording are both regarded as copyright owners in the recording. Unless this situation is altered by a contract the performer will then have a right to make a copy of the sound recording, perform it in public and communicate it to the public.⁶¹

In practice, these new rights may be varied by contracts, so they may not result in large gains for performers. For instance, if a sound recording of a live performance is made, and the performers are employed, the employer is the owner of the copyright unless this is altered by agreement.⁶²

The rights of performers in audio recordings made before January 2005 have now changed. The performer may co-own copyright but they will not have any right to change the way the original copyright owner deals with the audio recording.

Performers who may have a copyright interest in audio recordings of their live performances should register with Australasian Performing Right Association (APRA) and Phonographic Performance Company of Australia (PPCA), which will collect royalties on their behalf.

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.⁶³ 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 the collaboration.

This is a common situation for bands. 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 Indigenous songs and themes have been passed down through many generations. In those cases, it is not possible to say that one or even a number of individuals created the song. And, many songs are owned or held by a group of people – they are owned communally, so it is not possible to identify individual creators. So far, the *Copyright Act* provides only for joint ownership – that is ownership by several individuals. It does not yet provide for group ownership. Therefore, the communal ownership or custodianship of Indigenous heritage, such as language group stories or knowledge, is not recognised by the *Copyright Act*.

Identifying relevant language group 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 that is kept at Mornington Island. It assists with cultural clearances, but also serves as a teaching tool for passing on knowledge of songs.⁶⁴

Communal ownership versus joint ownership

In *Bulun Bulun & M* v R & T Textiles*⁶⁵, 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 law 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 language group 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.

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.

Recording contracts

Before signing a recording contract, it is strongly advisable for Indigenous musicians to get independent legal advice. 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 and who has creative control. In addition to the standard clauses, Indigenous musicians might want to include a clause that incorporates cultural protocols.⁶⁶

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

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.⁶⁷ 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 television, 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. Legal advice should be sought about copyright that may vest in performers when a live performance is recorded.

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.

Hypothetical case: 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 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 the Moral Rights Amendments to the *Copyright Act* in 2000, this mistake not only breaches cultural protocol, it could also be the basis for legal action against the owner of the copyright for failing to properly attribute the work to 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.⁶⁸ 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.

Indigenous musicians should be consulted on the cover artwork and distribution of the recording. It is also important to talk about and agree on appropriate promotional material before it is used. All photographers and visual artists should be properly attributed for any cover artwork, or promotional material. Also, if you want to crop or alter a photograph or artwork, it will often be essential to get the consent of the photographer or artist to avoid infringing their right of integrity.

Case study: Community rights and royalties

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.⁶⁹

Lapse of copyright and 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, copying and exploiting the music. Indigenous people's right to culture is not limited to the 70-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 copyright only lasts for a set period of time. This can vary according to the type of material and who created it. In general, copyright in a musical work lasts for 70 years after the death of the author.⁷⁰ Copyright in a sound recording generally lasts for 70 years after the recording was made.⁷¹ Once copyright expires, the work is in the public domain with no copyright protection.

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?

Moral rights are separate from the economic rights of copyright owners and may give Indigenous musicians avenues to challenge inappropriate treatment of Indigenous musical works. Moral rights laws provide the following rights to authors of musical works and performers

1. The right to be attributed as author or performer

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.⁷² Songwriters can require their names to be clearly and prominently identified with their work.⁷³ Performers have the right to be named in connection with their performance.

2. The right not to have work or performance falsely attributed to another musician

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

3. The right of integrity

A song writer can bring a legal action if a song is treated in an inappropriate manner, causing harm to the song writer's honour or reputation.⁷⁴ However, an action for inappropriate treatment will not be available if the song writer 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 the work has been treated in an inappropriate manner is subject to reasonable defence. For instance, the alleged infringer might argue that the treatment was reasonable in all the circumstances.⁷⁵ Performers can object to treatment of their performance that demeans their reputations.

Before 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 potential for moral rights 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 an inappropriate manner.

In general, moral rights last for the period of copyright.⁷⁶ The moral right will exist for as long

as the copyright exists. For example, the moral right in the lyrics of a song will last for the author's life plus 70 years. One exception to this rule is the moral right of integrity in a film.⁷⁷

Indigenous communal moral rights

Existing moral rights are individual rights only. If the literary work is treated in an inappropriate way, only the individual author would have a remedy under moral rights. However, an Indigenous community, which is the source of cultural material incorporated in a literary work, does not have any moral rights under the *Copyright Act* even though under customary laws, the language group or its representative may be responsible for safeguarding the cultural integrity of the story embodied in the work. The moral rights framework under the *Copyright Act* also excludes Indigenous persons with authority other than the author (creator) from legally exercising moral rights over works embodying traditional ritual knowledge.⁷⁸

In December 2003, the Australian Government drafted proposed amendments to the *Copyright Act 1968* for Indigenous Communal Moral Rights. The Exposure Draft proposes the introduction of Indigenous communal moral rights for copyright works and films.

*These Indigenous communal moral rights will exist alongside individual moral rights, and will be exercisable independently of the individual author's moral rights. It also exists separately to the copyright in the relevant material.*⁷⁹
Ian McDonald

The Indigenous communal moral rights would exist in a work for the duration of the copyright period.

For there to be Indigenous communal moral rights in a copyright work, the following requirements must be met before the first dealing of the work.

- **Drawn from traditional base**

The work must be drawn from the ‘particular body of traditions, observances, customs and beliefs held in common by the Indigenous community’. A community is defined loosely and can include an individual, family, language or community group.

- **Voluntary agreement that communal moral rights exist**

A voluntary agreement must be entered into between the creator of the work and the Indigenous community.

- **Notice of association must be given to third parties**

There must be acknowledgement of the Indigenous community’s association with the work.⁸⁰

- **Consent from interest holders**

Interest holders in the work (i.e., copyright owner/s) need to have consented to the Indigenous communal moral rights in the work.

An Indigenous community that has Indigenous communal moral rights to a work may exercise those rights only through an individual who is the authorised representative. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to its decision-making processes.⁸¹

The proposed regime incorporates defences and consents. However, it has been criticised as being overly legalistic and complex. The operation of the proposed law will be limited if the rights arise only where there is a voluntary agreement. This does not counter the situations where Indigenous knowledge and stories are used without consent, as these stories can be still be appropriated by third parties, who may not agree that there are Indigenous communal moral rights to the new copyright work. Those who do not engage with Indigenous communities, and plunder their stories from

archives for instance, will not be liable for infringing these rights under these provisions.

While these proposals are not yet law, these guidelines recommend that the principles of integrity and attribution should be extended wherever possible to all uses of Indigenous cultural and intellectual property, and where appropriate, the rights of the community will also need to be discussed.

Attribution of Indigenous sources should always be considered. Some practices in the industry include:

- Indigenous artists listing their language group affiliations after their own names
- Giving significant credit as a collaborator on the project to Indigenous custodians, contributors and relevant Indigenous organisations which have contributed resources and knowledge.

Case study: Jurtbirrk love songs from North Western Arnhem Land

Jurtbirrk is a collection of works by a number of composers and performers recorded during 2003–2004. The CD sleeve includes a list of the composers and performers who, in this case, are the copyright owners. It also includes a Custodian Statement that states that the CD contains the traditional knowledge of the Iwaidja people, and that the CD was created with their consent.⁸²

The production of music – especially a recording – goes through a lot of different stages. It is respectful practice to credit individuals, families, language groups or communities who contributed to the work at any stage. Some bands acknowledge and thank the people and organisations that have contributed to their work, while separately asserting the copyright in their works.

Case study: Local Knowledge – Blackfellas

On the sleeve of their CD *Blackfellas*, Local Knowledge writes: ‘Local Knowledge pay respect to all the elders across our land and all the mob for supporting us.’

They include family, extended family, organisations and particular individuals in organisations. They say: ‘This is for all people across our land stand up and represent your culture, be proud of who you are... Copyright Local Knowledge 2005.’

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 in-flight audio network for a period of two years. The copyright in the musical work remains with the copyright owner.

It is a good idea to have a written agreement that includes 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. It is very important to read, understand and consider any written agreement before deciding whether you agree to the terms and signing the agreement. It is always a good idea to get legal advice on any agreement to ensure a full understanding of all the terms before signing.

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, 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. There should be scope for negotiating with them on appropriate royalties for use.

Assigning copyright versus 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 assignments must be in writing. Once copyright is assigned, the musician has no copyright interest in his or her musical work.

Where possible, Indigenous musicians should keep 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 forever instead of licensing specific use of their work for a limited time.

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

Creative Commons caution

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

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

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

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

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

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

Creative Commons licences are non-revocable. This means that you cannot stop someone, who has obtained your work under a Creative Commons licence, from using the work according to that licence. You can stop distributing your work under a Creative Commons licence at any time you wish; but this will not withdraw any copies of

*your work that already exist under a Creative Commons licence from circulation, be they verbatim copies, copies included in collective works and/or adaptations of your work. So you need to think carefully when choosing a Creative Commons licence to make sure that you are happy for people to be using your work consistent with the terms of the licence, even if you later stop distributing your work.*⁸⁶

Hypothetical case study: Free website download

Hanna has written and recorded a song that includes some verses in her language. She wants to distribute it on a friend's website because she is hoping for the widest distribution of her music. Her friend encourages her to make the whole song available on the site and sign a Creative Commons licence that will allow anyone to download the music for free, to use the work for sampling and to make commercial uses of the music. Hanna finds that someone has downloaded her song from the website, and used it in their new music. Hanna is very unhappy with the way the verses in language have been used. She also feels that her original song has been ripped off.

Hanna can remove her song from the website, but she cannot stop the uses that have already happened. She may be able to take legal action for breach of her moral rights, but there is no guarantee of success.

A year later Hanna is negotiating a recording contract, but she is unable to include this song in the deal because she has given up so many aspects of her copyright that the recording company won't include it in the deal.

Resolving disputes

If you have a legal dispute, it might be suitable for mediation rather than litigation. The Arts Law Centre of Australia has a panel of mediators who may be able to help with mediating your dispute. Contact the Arts Law Centre of Australia for more information (see the list of contacts in this guide).

If you have a dispute with APRA, for example, over the terms of a licence, it has developed a process called an Expert Determination. The process involves a panel of former judges who will hear both sides and make a decision. Contact APRA for more details of this service.

Using music in a film or video

Many Indigenous organisations make educational videos and DVDs. It is very important to properly license music and sound recordings used in a film or video. This will require obtaining a licence to use the music or sound recording and paying any necessary fees to use the music or sound recording. A licence may be required from the composer, lyricist, maker of the sound recording and performers with a copyright interest. Using music and sound recordings in a film or video without clearing these rights, may result in copyright infringement. It is best to get legal advice before using music or sound recordings as a soundtrack on a video or DVD.

Copyright of music on the internet

The *Copyright Act* was 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 allows for the copyright owner to control digital transmissions or dealings with copyright material in the digital domain. 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'.

This means that the copyright owner's permission is required before sound recordings are placed on the internet, and made available for download. The new right of communication to the public also means that collecting societies, such as APRA,⁸⁷ have the right to collect revenue for the use of copyright material in the digital domain.

Using the internet to increase distribution

There are two ways to distribute music on the internet. The first way is by selling CDs on the internet. CDs are sold by mail order, and a percentage of the sale price is retained by the distributing company.

The other way is digital download. This means that entire songs can be downloaded from the internet. Making music available on the internet certainly increases exposure and distribution options for music. It can also increase the risk of copyright infringement and reduce control over cultural material.

Online music stores generally require musicians or recording labels to sign an agreement that allows them to provide music over the internet on certain terms. In both cases most distributors will require part of a song to be available for promotional purposes.

Some companies use technology called Technological Protection Measures (TPM) to limit the way music can be used. The Attorney-General's department describes TPMs as 'technical locks copyright owners use to stop their copyright material from being copied or accessed (e.g. passwords, encryption software and access codes). TPMs are used by copyright owners to support business models for distributing materials such as films and music online and self-protect against increased piracy.'⁸⁸

Processes that utilise all the mechanisms available such as TPMs, copyright licensing and copyright societies are called Digital Rights

Management (DRM). TPMs and DRMs include technological security measures, which prevent unauthorised use of the music. They work in many different ways. For example, they may encode the digital music, which is available on the internet to limit the number of times it can be burned to a CD, or copied to portable players. Other mechanisms encode 'the terms and conditions under which works can be used, embedding them in the file and allowing use of the material only when the conditions are met. Typically, the embedded information includes Rights Management Information (RMI) about the object such as author, title, copyright and links to a key required to unscramble the information.'⁸⁹

Downloading music from the internet also often requires particular software and portable players to operate the downloaded music.

It is important to check the terms and conditions of use before agreeing to place music on the internet for download. It is also important to check the terms and conditions of use before downloading music.

Technical measures are useful ways to exercise some control of music, but do not guarantee that copyright will not be infringed. So while the rights exist, musicians need to be aware of the limits of technology once their musical works are available through the internet.

The development of technological measures and the laws that will govern them have undergone rapid progress and are regularly changing. While the law provides rights to musicians, it can be difficult to enforce because of the global nature of the internet. It is advisable to seek industry and legal advice before signing contracts or allowing music to be downloaded from the internet.

Managing copyright to protect your interests

As copyright exists as soon as a work is created, it is not a legal requirement in Australia

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 does not matter if it is 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 in Australia, but if you are publishing in some South American countries that are members of the

Buenos Aires Copyright Convention it may be advisable. If you think 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:

Island way (Reprise/Kapa Roa'ia Se Laloga)

Album: Seaman Dan, *Island Way*

Performed by: Seaman Dan

Words: © Seaman Dan & Karl Neuenfeldt

Music: © Ernest Ahwang

Hot Music/control

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

2006 Steady Steady Music. All rights reserved. Unauthorised public performance, broadcasting, leasing and copying of this disc is prohibited.

The following is an example of labelling a new recording of a language group-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 language group 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*.⁹⁰

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.⁹¹

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 described below.

Fair dealing provisions

Copyright in the work is not infringed if a copy is made or it is performed and it is used for:

- research or private study purposes⁹²
- criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made⁹³
- for the purpose of parody or satire⁹⁴
- the purpose of, or associated with the reporting of news in a newspaper or magazine and a sufficient acknowledgement of the work is made; or for the purpose of, or associated with the reporting of news by

means of a communication (including television, radio and the internet) or in a cinematograph film⁹⁵

- judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.⁹⁶

Signing away your copyright

Do not sign away or assign your copyright unless you have taken legal advice from a qualified legal practitioner.

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.⁹⁷

Further copyright information

For further information on copyright laws see the following websites:

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

7. Proper returns and royalties

Royalties are a vital form of income for musicians. Copyright owners are entitled to receive royalties as payment for radio broadcasts and television and internet use of their music as well as public performances of their songs.

Yet 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 Screenrights, have a legislative basis for collecting royalties.

Others are voluntary organisations which artists are required to join.

The collecting societies 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.

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.

Copyright collecting societies

These are the main associations involved in licensing and collecting royalties.

Australasian Performing Right Association (APRA)/ Australasian Mechanical Copyright Owners’ Society (AMCOS)

APRA collects and distributes licence fees for the public performance and communication (including broadcast) of its members’ musical works. Public performances of music include music used in pubs, clubs, fitness centres, shops, cinemas, festivals, whether performed live, on CDs or played on the radio or television. Communication of music covers music used for music on hold, music accessed over the internet or used by television or radio broadcasters.

AMCOS collects and distributes ‘mechanical’ royalties for the reproduction of its members’ musical works for many different purposes. These include the manufacture of CDs, music videos and DVDs, the sale of mobile phone ringtones and digital downloads, the use of production music and the making of radio and television programs. Since 1997, APRA has managed the day-to-day operations of the AMCOS business.

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

Phonographic Performance Company of Australia Limited (PPCA)

PPCA is a non-profit company whose members are sound recording copyright owners. These are mainly record companies, but performers may also be joint owners of copyright in recordings. Performers on sound recordings should check their recording contracts to see whether they are joint copyright owners.

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

It collects royalties from broadcasters and businesses publicly playing recorded music. The money is distributed to the copyright holders and Australian recording artists registered with PPCA. For more information on the PPCA visit <www.pcca.com.au>.

Copyright Agency Limited (CAL)

CAL is an Australian statutory collecting agency that acts as 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 payment directly from CAL. If the copyright owner is not registered with CAL, payment may be made to the publisher, who is then responsible for passing on the author’s share in terms of the publishing contract. For more information on CAL visit <www.copyright.com.au>.

Screenrights

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

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

Screenrights also administers provisions in the *Copyright Act* that allow pay television operators to re-transmit broadcasts as part of their service, provided they pay royalties to the underlying copyright owners. Copyright owners in television can register titles with Screenrights to collect these royalties, and they can also make their registration global, appointing Screenrights International to collect any royalties being held for them by similar societies in Europe, Canada and the United States. This enables filmmakers to maximise their returns and minimise their costs. More information about Screenrights can be found at <www.screenrights.com.au>.

Other major associations involved in licensing are listed below.

Australian Record Industry Association (ARIA)

ARIA represents recording companies in the industry. It has more than 100 member companies ranging from large companies with international affiliations to small boutique labels run by a handful of people. ARIA provides licences on behalf of ARIA members to individuals and organisations wishing to make legitimate reproductions of sound recordings for some specific limited purposes – such as commercial

background music suppliers. The royalties generated from ARIA licences are collected and then distributed to copyright owners, usually the record companies. It plays a role in protecting copyright and the fight against music piracy.⁹⁸ More information about ARIA can be found at <www.aria.com.au>.

Australasian Music Publishing Association (AMPAL)

AMPAL operates as a trade association representing music publishers in Australia and New Zealand. AMPAL does not grant licences for the use of music. It collects statistical information about the economic value of music publishing, provides a forum for music publishers to discuss matters relating to the industry, provides information to government, the education sector and the general public about the role of music publishers and the copyrights in music that they administer. It also provides training to those working with music publishers.⁹⁹

Indigenous music and royalty exclusion

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

- The *Copyright Act* 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.

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

Case study: The Ami in Taiwan

In 1999, the Kuos, an Ami couple from Taiwan settled their copyright infringement dispute against the band Enigma and Virgin Records America. The couple's performance of the traditional *Jubilant Drinking Song*, was appropriated by Enigma in their song *Return to Innocence*, which was 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.¹⁰⁰

Difang Kuos subsequently recorded 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.

Festivals, concerts and events

When organising a concert or other event, it is important to contact APRA, which will arrange for the songwriters to be paid royalties for the performance of their work. If tickets are sold to the concert, APRA will arrange a concert

promoter's licence, 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.¹⁰¹ This applies even if the event is not producing a profit. If sound recordings, CDs or cassette recordings will be played, it is also important to get a licence from PPCA.

8. Continuing cultures

Indigenous people are responsible for ensuring the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

Skinnyfish Music reports that the West Arnhem local band Nabarlek is strongly supported by its elders, because Nabarlek's music presents its songs in a rock and roll style that offers a new way of bringing the culture to young people.¹⁰²

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.

Indigenous musicians are developing new and innovative styles, which have their origins in the core of Indigenous tradition.

Case study Women's Business Project

Singer, songwriter and producer Alice Haines is working with well-known Western Australian Indigenous women Lorrae Coffin, Lois Olney, Naomi Pigram, Doreen Pensio, Charmaine Bennell, Gina Williams and Bev Webb on a compilation CD. They are creating new styles within an Indigenous framework.

They say:

Musically we are breaking new grounds and have discovered parts of ourselves we never knew existed. By having an Indigenous producer we now only have to answer to ourselves and not be confined to Westernised music standards.

This process has worked wonderfully in the studio and, through surrendering to our own ears and hearts, we have stumbled into music genre never heard before. On an analytical level we break standard music rules straight through the middle and by doing this have created our own. This sound is sometimes ancient in vibe, yet funky and hip with a fresh edge to contemporary music. Aboriginal blues is alive and well and Aboriginal jazz is well on its way.¹⁰³

9. 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 Music¹⁰⁴

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. See the attribution and copyright section of this guide for further 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.

Who's who in the development of musical works

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.¹⁰⁵ An arranger may also adapt a musical work from one musical medium to another – for example, an electronic arrangement from a classical composition. 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.¹⁰⁶

Composer – Author of the music.

Copyright owner, maker and author – The person wrote the words (lyricist), the music (composer) or made a sound recording 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.¹⁰⁷ 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.

Implementation

Protocols are about people's value systems and their cultural beliefs
D Mello¹⁰⁸

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

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

1. 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.
- Acknowledgement 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 language groups.
- Indigenous cultural expression is diverse.
- Indigenous people have the right to be represented by people of their choice and in a manner which 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 world views, lifestyles and customary laws should be respected in contemporary artistic and cultural life.

2. Indigenous control

Indigenous people have the right to determine how their cultural property will be used. They have the right to own and control their heritage; including Indigenous body painting, stories, songs, dances and other forms of cultural expression. When working with Indigenous people:

- Try to identify appropriate Indigenous information and authority structures with whom you can consult about particular projects.
- 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, most organisations use the Australian Government's definition of Aboriginal or Torres Strait Islander identity as a guide.
- Keep appropriate and relevant Indigenous people informed and advised, and where possible, provide regular updates.
- Care should be taken when considering a Creative Commons licence as it can limit a musician or community's rights to require consent before future uses.
- Consider getting legal advice before entering into management or agent agreements.

3. Communication, consultation and consent

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

- Ask consent of relevant Indigenous people, including composers, songwriters (or next of kin if deceased) and custodians of the music.
- Supply Indigenous custodians with all the relevant information before considering consent. This information might include:
 - The proposed uses, particularly if these involve 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: for example, is the work going to be broadcast, or communicated to the public through the internet?
- Allow sufficient time for consultation.
- Find out if the particular song or music is acceptable for wider use and recording. If unsure, discuss with Indigenous people, composers and songwriters.
- Advise 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.
- Consult the community and performers about any cultural considerations that need 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.
- Consult and get permission from relevant Indigenous people to distribute recordings. If agreed, recording companies and collecting societies should negotiate with Indigenous people on appropriate royalties for use.
- Provide notices to users of CDs, publications or recordings that the community requires that it should be consulted for permission before any future uses are made. This notice should be in a place where users can easily see it.
- Consent and acknowledgement should be considered before playing the yidaki or didgeridoo.
- Care should be taken when considering a Creative Commons licence, as it can limit a musician or community's rights to require consent before future uses.
- Sampling Indigenous music without the permission of the copyright holder and the traditional owner, can breach customary law and copyright law.
- 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.
- Consultation should be seen as ongoing for the life of the musical work or recording.

4. Interpretation, integrity and authenticity

Be responsible for your representations of Indigenous cultures. The following are some questions that need to be answered.

- Does your composition, performance and recording empower Indigenous people?
- Does your music expose confidential, sensitive or personal material?
- Does it reinforce negative stereotypes?
- Is there any adaptation which needs to be discussed with relevant traditional custodians?
- 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?
- Have you consulted with the musician and other Indigenous people to check the cultural appropriateness of the image when selecting illustrations or photos for the cover or promotional material?
- Have you exercised care when permitting a remix 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.
- Have you checked the status of the work under the proposed Indigenous Communal Moral Rights regime?¹⁰⁹
- Are you using instruments and music in a manner that respects gender and cultural restrictions?
- Do you have a translation of the work you are using? Are you using language in the correct context?
- Have you checked the Federation of Aboriginal and Torres Strait Islander Languages (FATSIL) Protocol and Agreements?

5. 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.
- Ensure the music does not expose confidential or sensitive material.
- Be aware that the inclusion of personal material may be sensitive. If family or language group representatives objected then leave it out.
- If mentioning deceased people, seek permission from the family or language group representatives. Discuss issues of interpretation and authenticity.
- Put a warning notice on your CD, publication or other recording if it contains recordings or images of deceased people.
- 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.

6. Attribution and 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.

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 work of composers, musicians and custodians should be attributed at all stages, from consultation to distribution, including use of the copyright notice and attribution of a language group.

Copyright

- Seek copyright protection for all works.
- Identify all the owners of copyright in a work.
- Discuss the issue of copyright ownership with Indigenous representatives upfront.
- Indigenous creators who incorporate traditional ritual knowledge into their musical work have a special obligation to the language group when exercising copyright in the work.
- In collaborative works, copyright may be shared with the collaborating authors. If all band members collaborate in writing a song, the members will generally be the joint authors.
- Anyone intending to perform a work that is protected by copyright should seek advice to ensure they are not infringing copyright.
- 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.

- The copyright owner of a sound recording is generally the individual or recording company which pays the costs of recording. However, this can be varied under written agreement.
- Recipients of Australia Council grants should seek legal advice on the copyright issues relating to their recording projects. Where possible, written contracts should be used.
- Recording companies should provide written agreements for musicians. Indigenous musicians should be given the opportunity to consider contracts and obtain proper legal advice.
- Ask performers to sign clearance forms if their work is to be recorded at a festival or concert.
- Statutory exceptions to copyright infringement include the purposes of criticism or review, and incidental filming.

7. Proper returns and royalties

- Copyright owners are generally entitled to a licence fee or royalties for the use of their work. Make sure you are registered with associations like APRA, AMCOS and PPCA so that you benefit from royalties.
- Check that all other rights holders are acknowledged in that registration.
- Experts recommend that you use written agreements when licensing musical works for commercial purposes.
- When using Indigenous material, negotiate fees or other benefits with the musicians, composers, songwriters and custodians.
- Ensure that the cultural value of the work is recognised in financial returns.
- Acknowledge and properly remunerate Indigenous cultural advisors for their contribution.

- Proper credit and appropriate acknowledgement may include a copyright notice and payment of royalties for the use of Indigenous cultural material.
- Find out whether benefits other than royalties are sought by Indigenous people.
- Try to make sure that relevant Indigenous people share in the benefits from any commercialisation of their cultural material.
- If you are a performer on an audio recording, check whether you might have a copyright interest in the recording and registered for any royalties.

8. 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.

- Be aware that Indigenous people have a responsibility to ensure that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.
- Think of ways of maintaining relationships for future consultation.
- Consider future uses of the music that were not contemplated at the initial consultation.
- Incorporate cultural protocols in any future plans for the musical work, including licence agreements.
- 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.

9. Recognition and Protection

Australian laws and policies should be developed and implemented to respect and protect the rights of Indigenous people and communities to their cultural heritage.

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Contacts

ARTS POLICY AND FUNDING

Australia Council for the Arts – Aboriginal and Torres Strait Islander arts board

PO Box 788
Strawberry Hills NSW 2012
Tel: (02) 9215 9065
Toll free: 1800 226 912
Fax: (02) 9215 9061
Email: atsia@australiacouncil.gov.au
Web: www.australiacouncil.gov.au

STATE AND TERRITORY ARTS BODIES

Arts NT (Darwin and the Top End)

GPO Box 1774
Darwin NT 0801
Tel: (08) 8999 8981
Fax: (08) 8999 8949
Toll Free: 1800 678 237
Email: arts.office@nt.gov.au
Web: www.nt.gov.au

Arts NT (Central Australia and the Barkly)

PO Box 3521
Alice Springs NT 0871
Tel: (08) 8951 1190
Fax: (08) 8951 1161
Email: arts.office@nt.gov.au
Web: www.nt.gov.au

Arts Queensland

GPO Box 1436
Brisbane QLD 4001
Tel: (07) 3224 4896
Toll free: 1800 175 531
Fax: (07) 3224 4077
Email: reception@arts.qld.gov.au
Web: www.arts.qld.gov.au

Arts Queensland – Regional Office

PO Box 5300
Cairns Qld 4870
Tel: (07) 4048 1411
Fax: (07) 4048 1410
Email: fnqqa@arts.qld.gov.au
Web: www.arts.qld.gov.au

Arts SA

GPO Box 2308
Adelaide SA 5001
Tel: (08) 8463 5444
Fax: (08) 8463 5420
Email: artssa@saugov.sa.gov.au
Web: www.arts.sa.gov.au

Arts Tasmania (Hobart Office)

GPO Box 771
Hobart TAS 7001
Tel: (03) 6233 7308
Toll free: 1800 247 308
Fax: (03) 6233 5555
Email: arts.tasmania@arts.tas.gov.au
Web: www.arts.tas.gov.au

Arts Tasmania (Launceston Office)

PO Box 1186
Launceston TAS 7250
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Arts Victoria

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Web: www.arts.vic.gov.au

Department of Culture and the Arts

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The Gunnery
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Email: artslaw@artslaw.com.au
Web: www.artslaw.com.au

Australian Copyright Council

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Web: www.copyright.org.au

Viscopy

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Australasian Performing Right Association

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Copyright Agency Limited

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INDIGENOUS MUSIC ORGANISATIONS

**Central Australian Aboriginal
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Songlines Music Aboriginal Corporation

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**Federation of Aboriginal and
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MUSIC INDUSTRY ORGANISATIONS

Australian Record Industry Association

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Music Council of Australia

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